Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 662

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 663

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 664

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL., APPELLANTS

vs.

THE UNITED STATES OF AMERICA

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

FILED FEBRUARY 1, 1944.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action No. 54

UNITED STATES OF AMERICA, Plaintiff

v.

CRESCENT AMUSEMENT COMPANY, INC., LYRIC AMUSEMENT COMPANY, INC., New Strand Company, Cumberland Amusement Company, Strand Enterprise Corporation, Rockwood Amusements, Inc., Cherokee Amusement Company, Inc., Kentucky Amusement, Inc., Muscle Shoals Theatres, Inc., Anthony Sudekum, R. E. Baulch, Kermit C. Stengel, Louis Rosenbaum, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Vitagraph, Inc., Twentieth Century-Fox Film Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., United Artists Corporation, and Columbia Pictures Corporation, Defendants

COMPLAINT—Filed August 11, 1939

The United States of America by Horace Frierson, United States Attorney for the Middle District of Tennessee, acting under the direction of Frank Murphy, Attorney General, brings this proceeding in which equitable relief is sought [fol. 3-2] under Section 4 of the Act of Congress of July 2, 1890 (26 Stat. 209), entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," hereinafter referred to as the Sherman Act, against the above named defendants, which are more fully described as follows:

Description of Defendants

1. Crescent Amusement Company, Inc., hereinafter referred to as Crescent, is a corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business in Nashville, Tennessee. It operates one or more motion-picture theaters in each of the towns of Brownsville, Clarksville, Cleveland, Columbia,

Dyersburg, Greenville, Lebanon, Maryville, Morristown, Murfreesboro, Paris, Springfield, Union City, Madisonville and Nashville, in the State of Tennessee. It also operates one or more theaters in each of the towns of Bowling Green, Earlington, and Hopkinsville, in the State of Kentucky, and Alabama City, Decatur, and Gadsden, in the State of Alabama.

2. Lyric Amusement Company, Inc., hereinafter referred to as Lyric, is a corporation organized and existing under the laws of Alabama, with its principal office in Nashville, Tennessee. It operates one or more theaters in the town of Huntsville, Alabama.

[fol. 3-3] 3. New Strand Company, hereinafter referred to as Strand, is a corporation organized and existing under the laws of Virginia, with its principal office in Nashville, Tennessee. It operates one or more theaters in the town of Kingsport, Tennessee.

4. Cumberland Amusement Company, hereinafter referred to as Cumberland, is a corporation organized and existing under the laws of Tennessee, having its principal office at Tullahoma, Tennessee. It operates one or more theaters in the towns of Tullahoma, Dayton, Rogersville, Crossville, Winchester, McMinnville, Sparta, South Pittsburg, Pulaski, Fayetteville, and Franklin, in the State of Tennessee.

5. Strand Enterprise Corporation, hereinafter referred to as Enterprise, is a corporation organized and existing under the laws of Tennessee, with its principal office at Ridgely, Tennessee. It operates one or more theaters in each of the towns of Ridgely, Ripley, Trenton, Tiptonville, and Philadelphia, in the State of Tennessee; Parkins, Marked Tree, Earl, and LePanto, in the State of Arkansas; Kosciusko, Lexington, Louisville, Morehead, Itla Bena, and Durant, in the State of Mississippi, and Clinton in the State of Kentucky.

6. Rockwood Amusements Inc., hereinafter referred to as Rockwood, is a corporation organized and existing under the laws of Tennessee. It operates one or more theaters in each of the towns of Rockwood, Tracy City, Coal Creek, Manchester, and Huntingdon, in the State of Tennessee, and [fol. 3-4] in Guthrie, Kentucky.

7. Cherokee Amusement Company, Inc., hereinafter referred to as Cherokee, is a corporation organized and exist-

ing under the laws of Tennessee, with its principal office at Erwin, Tennessee. It operates one or more theaters in each of the towns of Erwin, Sweetwater, Lenoir City, La Follette, and Oneida, in the State of Tennessee.

8. Kentucky Amusement, Inc., is a corporation organized under the laws of the State of Tennessee, with its principal office in Elizabethtown, Kentucky. It operates a theater in the town of Elizabethtown, Kentucky.

9. Muscle Shoals Theaters, Inc., hereinafter referred to as Muscle Shoals, is a corporation organized and existing under the laws of Alabama. It operates one or more theaters in each of the towns of Athens, Florence, Tuscumbia, and Sheffield, in the State of Alabama.

10. Anthony Sudekum is President and a director of Crescent, Lyric, Strand, Cumberland, Enterprise, and Muscle Shoals. He resides at Nashville, Tennessee.

11. R. E. Baulch is Secretary and a Director of Crescent, Lyric, Strand, Enterprise, and is a Director of Cumberland. He resides at Nashville, Tennessee.

12. Kermit C. Stengel is President and a Director of Cherokee and Kentucky Amusement and an officer and director of Muscle Shoals.

[fol. 3-5] 13. Louis Rosenbaum is Vice-President and a Director of Muscle Shoals and resides in Florence, Alabama.

14. The nine defendants, Crescent, Lyric, Strand, Cumberland, Enterprise, Rockwood, Cherokee, Kentucky Amusement, and Muscle Shoals are hereinafter referred to as the defendant exhibitors. The towns in which they operate are hereinafter collectively referred to as Crescent Towns.

15. Defendants Lyric, Strand, Cumberland, Enterprise, Rockwood, Cherokee, Kentucky Amusement, and Muscle Shoals are either affiliated with or controlled by Crescent or by the officers and directors of Crescent, and are operated under the control and direction of defendant Sudekum.

16. Paramount Pictures, Inc., hereinafter referred to as Paramount, is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 1501 Broadway, in the City of New York, New York.

17. Paramount Film Distributing Corporation, hereinafter referred to as Paramount Film, a wholly owned subsidiary of Paramount, is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 1501 Broadway, in the City of New York, New York.

18. Loew's, Incorporated, hereinafter referred to as Loew's, is a corporation organized and existing under the [fol. 3-6] laws of the State of New York and has its principal place of business at 1540 Broadway in the City of New York, New York.

19. Radio-Keith-Orpheum Corporation, hereinafter referred to as RKO, is a corporation organized and existing under the laws of the State of Maryland, and has its principal place of business at 1270 Sixth Avenue, in the City of New York, New York.

20. Warner Bros. Pictures, Inc., hereinafter referred to as Warner Bros., is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 321 West 44th Street, New York, New York.

21. Vitagraph, Inc., hereinafter referred to as Vitagraph, a wholly owned subsidiary of Warner Bros., is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 321 West 44th Street, New York, New York.

22. Twentieth Century-Fox Film Corporation, hereinafter referred to as Fox; is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 444 West 56th Street, in the City of New York, New York.

23. Universal Pictures Company, Inc., hereinafter referred to as Universal, is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 1250 Sixth Avenue, in the City [fol. 3-7] of New York, New York.

24. Universal Film Exchanges, Inc., hereinafter referred to as Universal Film, a subsidiary of Universal, is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 1250 Sixth Avenue, in the City of New York, New York.

25. United Artists Corporation, hereinafter referred to as United Artists, is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 729 Seventh Avenue, in the City of New York, New York.

26. Columbia Pictures Corporation, hereinafter referred to as Columbia, is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 729 Seventh Avenue, in the City of New York, New York.

27. The defendants Paramount, Paramount Film, Loew's RKO, Warner Bros., Vitagraph, Fox, Universal, Universal Film, United Artists, and Columbia are engaged, either directly or through subsidiary or associated companies, in the business of distributing motion-picture films in interstate commerce throughout the United States, including the states of Alabama, Kentucky, Tennessee, Arkansas, and Mississippi. They are hereinafter referred to as the defendant distributors.

[fol. 3-8] Definition of Terms [1]

28. First-run exhibition in a town is the initial exhibition of a motion picture in that town with first-run clearance.

29. Second-run exhibition in a town is the exhibition of a motion picture with second-run clearance, which has been previously shown in the same town.

30. A first-run theater is a motion-picture theater which customarily exhibits first-class pictures on first run.

31. A second-run theater is a motion-picture theater which customarily exhibits first-class pictures on second run.

32. Feature pictures are motion pictures five or more reels in length.

33. Clearance is protection against competition granted to an exhibitor, by agreement with a distributor, which limits the terms on which the distributor may license films to other competing exhibitors.

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[1] These definitions apply only to the use of these terms in this complaint.

34. First-run clearance is the protection customarily given to a first-run theater by a distributor of feature pictures against competition resulting from the subsequent exhibition of its feature pictures at other theaters in the same town. Said protection generally takes the form of an agreement by the distributor covering a period of one year or more, during which it agrees not to license its feature pic- [fol. 3-9] tures for exhibition at other theaters in the same town until a specified period has elapsed after the conclusion of their exhibition in the first-run theater and further agrees not to license said pictures to said other theaters unless said other theaters maintain a specified minimum admission price.

35. Second-run clearance is the protection given a second-run theater by a distributor of feature pictures against competition resulting from the exhibition of its feature pictures at other theaters in the same town subsequent to the second run. Said protection generally takes the form of an agreement similar to that described in the preceding paragraph.

Description of Business Involved

36. The defendant distributors have collectively released during each of the past five years more than ninety percent of the first-class pictures exhibited in Crescent towns.

37. First-class pictures generally have the highest production cost, are made with the aid of the best acting, directing, writing, and technical talent, and possess the greatest box-office value to an exhibitor. They also receive the maximum advertising expenditure by the distributors and their prior exhibition in metropolitan centers serves to further advertise and make them attractive to the patrons of [fol. 3-10] motion-picture theaters in the Crescent towns.

38. The defendant distributors have collectively released during each of the past five years more than seventy-five percent of all feature pictures exhibited in the Crescent towns.

39. The feature pictures released by the defendant distributors have constituted the principal entertainment furnished by any exhibitor in said towns during each of the said past five years.

40. In order successfully to operate a first-run theater in any of the Crescent towns an exhibitor must be able to exhibit on first run each year a substantial number of the feature pictures released by three or more of the defendant distributors each year.

41. In order successfully to operate a second-run theater in any of the Crescent towns an exhibitor must be able to exhibit on second run each year a substantial number of the feature pictures released by three or more of the defendant distributors each year.

42. In order successfully to operate any motion picture theater in any of said Crescent towns an exhibitor must be able to exhibit on some run a substantial number of first-class pictures released by three or more of the defendant distributors each year.

43. The defendant exhibitors have been able to take over the operation of numerous theaters and keep other theaters [fol. 3-11] closed in said Crescent towns during the past five years by virtue of the control exercised by them over the licensing of feature pictures for exhibition in said towns as hereinafter alleged.

44. The prints of feature pictures released by defendant distributors which are used by exhibitors, including the defendant exhibitors, in Alabama, Kentucky, Tennessee, Mississippi, and Arkansas are manufactured entirely in other states; each print is used successively by numerous exhibitors and moves continuously across state lines in the course of such use.

Violations Alleged

45. For the past five years the defendant exhibitors have continuously combined with each other and with each of the defendant distributors unreasonably to restrain interstate trade and commerce in motion-picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures and the operation of motion-picture theaters in the Crescent towns and in other towns in Tennessee, Alabama, Kentucky, Arkansas, and Mississippi in violation of Sections 1 and 2 of the Sherman Act, in the following manner:

46. Said exhibitors have refrained from competing with each other in the acquisition and operation of motion-pic-

ture theaters in said towns pursuant to express or implied agreements to allocate said territory between them.

[fol. 3-12] 47. During each of the past five years said exhibitors have collectively contracted with each of the defendant distributors for all of the feature pictures annually required for exhibition at all of the theaters operated by them in said towns, in advance of the production and distribution of such feature pictures and before such feature pictures or any of them have been offered to any other exhibitor in the said towns, with the purpose and effect of controlling and monopolizing the supply of feature pictures available for exhibition in said towns.

48. By said contracts said exhibitors have combined with each other to compel each of the defendant distributors to grant to all of them in all of said towns the following exclusive privileges during the time they have operated theaters in said towns.

(a) The exclusive privilege of selecting from the feature pictures released by said distributors such feature pictures as said exhibitors deemed suitable for exhibition in said towns, as and when prints thereof became available, before said pictures were released to any other exhibitors in said towns.

(b) The exclusive privilege of receiving clearance on said feature pictures over competing theaters in said towns.

49. The foregoing exclusive privileges have enabled the defendant exhibitors unreasonably to restrain, suppress, [fol. 3-13] and eliminate the competition offered by other theater operators in said Crescent towns by—

(a) Preventing them from obtaining enough first-class pictures for exhibition to operate their theaters successfully.

(b) Forcing them to exhibit feature pictures previously exhibited or rejected by the defendant exhibitors and to maintain admission prices for such pictures higher than those warranted by the quality of the entertainment they were thus able to offer.

(c) Preventing them from showing any feature pictures released by the defendant distributors with first-run clearance in any of said towns.

(d) Preventing them from exhibiting any feature pictures released by the defendant distributors with second-run clearance in any of said towns where any of the defendant exhibitors operate one or more second-run theaters.

50. For the past five years all of the defendant distributors have combined with each other and with each of the defendant exhibitors unreasonably to restrain interstate trade and commerce in motion-picture films and to monopolize and attempt to monopolize the exhibition of motion pictures and the operation of motion-picture theaters in the Crescent towns in violation of Sections 1 and 2 of the Sherman Act in the following manner:

51. During each of the past five years said distributors have followed the policy of contracting with the defendant [fol. 3-14] exhibitors for all of the feature pictures which said exhibitors required for exhibition in said towns, in advance of the production and distribution of such feature pictures and before such feature pictures or any of them have been offered to any other exhibitor in said towns, with the purpose and effect of permitting each of the defendant exhibitors to control and monopolize the supply of feature pictures available for exhibition in said towns.

52. By said contracts said distributors have granted to each of the said exhibitors in the respective towns in which they operate theaters the exclusive privilege of selecting from the feature pictures released by said distributors such feature pictures as said exhibitors deemed suitable for exhibition in said towns as and when prints thereof became available, before said pictures were released to any other exhibitors in said towns.

53. Each of the defendant distributors has imposed the foregoing restraints upon competing exhibitors at the instance and request of the defendant exhibitors and pursuant to agreements made with them, with full knowledge of the action taken by all the other said defendant distributors, and with full knowledge of the effect of such action upon the competitors of defendant exhibitors.

54. By reason of the control by defendant exhibitors of the most desirable motion pictures as hereinbefore set forth, defendant exhibitors have been able practically to

[fol. 3-15] eliminate the competition of independent exhibitors in the Crescent towns. Independent exhibitors have been induced to sell their theaters to defendant exhibitors under the threat, express or implied, that if they refused to sell, defendant exhibitors would open competing theaters in the same town and prevent the independent exhibitor from procuring desirable pictures. In a number of instances, independent exhibitors attempting to compete with defendant exhibitors have found it impossible to procure sufficient pictures to keep their theaters in operation. In addition defendant exhibitors have lowered their prices, given away large sums of money as prizes and operated some of their theaters at a loss with the purpose and effect of driving their competitors out of business and giving defendant exhibitors a monopoly in the exhibition of motion pictures in the area in which they operate. By the use of such tactics defendant exhibitors have forced a large number of independent exhibitors in the states of Tennessee, Kentucky, Alabama, Mississippi, and Arkansas out of the motion-picture business and, unless restrained and enjoined by this court, will continue to do so in the future until they have complete control of the motion picture exhibition business in the area in which they operate.

55. The defendant exhibitors are what is commonly referred to in the motion-picture industry as a circuit of theaters. As a result of the acquisition and operation of [fol. 3-16] numerous theaters as hereinbefore alleged, the said exhibitors have obtained what is commonly referred to in the motion-picture industry as circuit-buying power. Said circuit-buying power is now so great that its use in the manner set forth herein in and of itself constitutes a violation of the Sherman Act.

Relief Prayed

Wherefore, plaintiff prays:

1. That the combinations in restraint of interstate trade and commerce, together with the attempts to monopolize and the monopolization of the same, hereinbefore described, be declared illegal and violative of the Sherman Act.

2. That the defendants herein, and each of them, and each and all of their respective officers and directors, and each and all of their respective agents, servants, and em-

ployees, and all persons acting or claiming to act on behalf of the defendants, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the attempts at monopolization, the monopolies and all restraints of said interstate trade and commerce in motion pictures described herein, and from entering into and carrying out, directly or indirectly, expressly or impliedly, any monopolies or restraints of interstate trade and commerce similar to those alleged herein to be illegal.

[fol. 3-17] 3. That the defendant exhibitors herein, and any two or more of them, and each and all of their respective officers and directors, and each and all of their respective servants, agents, and employees, and all persons acting or claiming to act on behalf of said defendants or any of them be perpetually enjoined and restrained from jointly or collectively negotiating any contracts for the licensing of feature pictures with any of the defendant distributors or their successors in interest.

4. That the defendant distributors herein, and each and all of their respective officers and directors, and each and all of their respective servants, agents, and employees, and all persons acting or claiming to act on behalf of said defendants or any of them, be perpetually enjoined and restrained from licensing features pictures for exhibition on any run at any theater in any of the Crescent towns, except upon a local competitive basis whereby all theaters operating in each of said towns will have an equal opportunity to license pictures for that area without regard to whether these theaters or any of them form or constitute a part of a circuit of theaters.

5. That the defendant exhibitors, and each of them, be dissolved and that their respective properties be rearranged under several separate and independent corporations in such a manner as to terminate effectively the aforesaid [fol. 3-18] monopolistic control in the licensing and exhibition of motion pictures and prevent further violations of the Sherman Antitrust Act, and that said exhibitor defendants, their officers, directors, agents, and representatives be required to make such divestiture and conveyances of their stockholdings and properties as shall be necessary in order to accomplish such dissolution.

6. That the Court appoint such receivers and trustees as may be necessary and appropriate to effectuate a dissolution of the said exhibitor defendants, and each of them, and of the aforesaid monopoly in the licensing and exhibition of motion pictures.

7. That the defendant exhibitors and each of them be enjoined and restrained from acquiring any additional theaters or financial interests therein, except where they shall establish to the satisfaction of this Court that such acquisitions will not unreasonably restrain competition or create or tend to create a monopoly in the licensing of feature pictures for first-run or second-run exhibition or in the operation of first-run or second-run theaters in any of the towns in which they operate theaters.

8. That the plaintiff shall have such other and further relief as the Court shall deem just.

[fol. 3-19] 9. That the plaintiff recover its costs and disbursements.

Horace Frierson, United States Attorney for the Middle District of Tennessee, Solicitor for Plaintiff. O. W. Hughes, Assistant U. S. Attorney. Frank Murphy, Attorney General. Thurman Arnold, Assistant Attorney General. Wendell Berge, Holmes Baldridge, Paul Williams, Robert E. Sher, Special Assistants to the Attorney General.

[fol. 4] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF ANTHONY STUMPO, R. E. BAULCH, KERMIT C. STENGEL AND THE CRESCENT AMUSEMENT COMANY, ET AL., REFERRED TO AS EXHIBITORS IN THE COMPLAINT—Filed September 6, 1940

The defendants herein, The Crescent Amusement Company, (Erroneously sued as Crescent Amusement Company, Inc.), Lyric Amusement Company, Inc., Nu-Strand Corporation, (erroneously sued as New Strand Company), Cum-

berland Amusement Company, Strand Enterprises, Inc., (erroneously sued as Strand Enterprise Corporation), Rockwood Amusements, Inc., Cherokee Amusements, Inc., (erroneously sued as Cherokee Amusement Company, Inc.), Kentucky Amusement Co., Inc., (erroneously sued as Kentucky Amusement, Inc.), Anthony Sudekum, R. E. Baulch and Kermit C. Stengel, having united in this answer for the convenience of the Court, for answer to the complaint, say:

1. Defendants admit Section 1 of the complaint is true, except that the correct corporate name is The Crescent Amusement Company.

2. Defendants admit Section 2 of the complaint is true.

3. Defendants admit Section 3 of the complaint is true except that the correct corporate name is Nu-Strand Corporation.

4. Defendants admit Section 4 of the complaint is true except that the principal office of the Cumberland Amuse- [fol. 5] ment Company is in McMinnville, Tennessee, instead of Tullahoma, Tennessee, and except that the Cumberland Amusement Company does not operate a theater in Rogersville, Tennessee, and did not at the time of the filing of this complaint.

5. Defendants admit Section 5 of the complaint is true except that the proper corporate name is Strand Enterprises, Inc., and the principal office of the corporation is at Memphis, Tennessee and not Ridgely, Tennessee.

6. Defendants admit Section 6 of the complaint is true.

7. Defendants admit Section 7 of the complaint is true except that the proper corporate name is Cherokee Amusements, Inc.

8. Defendants admit Section 8 of the complaint is true except that the proper corporate name is Kentucky Amusement Co., Inc., and it is a Kentucky corporation and not a Tennessee corporation.

9. Defendants deny that there is any such corporation as the Muscle Shoals Theaters, Inc. They admit there is a partnership operating under the name of Muscle Shoals Theaters which does operate one or more theaters in the towns mentioned in Section 9 of the complaint.

10. Defendants admit that Section 10 of the complaint is true except that Anthony Sudekum is not President of or a Director in Strand Enterprises, Inc. or Muscle Shoals.

11. Defendants admit that Section 11 of the complaint is true.

12. Defendants deny Section 12 of the complaint except they admit that Kermit C. Stengel is a Director and Vice-President of Cherokee, and is a Director and Secretary-Treasurer of Kentucky Amusements.

13. Defendants deny Section 13 of the complaint except they admit that Louis Rosenbaum does reside in Florence, Alabama.

14. Defendants admit Section 14 of the complaint is true for the purposes of this suit.

15. Defendants deny Section 15 of the complaint except [fol. 6] they admit that defendant, Crescent, owns 50% of the voting stock of defendants, Lyric, Nu-Strand, Cumberland and Strand Enterprises; that defendant, Stengel, owns more than 50% of the voting stock of defendant, Rockwood, and less than the majority of the voting stock of defendant, Cherokee, and 50% of the voting stock of defendant, Kentucky.

16-26. Defendants are without knowledge or information sufficient to form a belief as to the truth of any of the averments in Sections 16-26, both inclusive, of the complaint.

27. Defendants admit Section 27 of the complaint is true except that they are without knowledge or information sufficient to form a belief as to the truth of the averment that the distributor defendants named therein distribute motion picture films "throughout the United States."

28-35. Defendants accept the definition of terms set out in Sections 28-35, both inclusive, of the complaint for the purposes of this suit except that they deny the averment in Section 34 that the protection of first-run clearance generally takes the form of an agreement by the distributor whereby the distributor agrees not to license its feature pictures to other theaters in the same town "unless said other theaters maintain a specified minimum admission price," and except that they deny the averments in Section 35 of the complaint that second-run clearance protection "gener-

ally takes the form of an agreement similar to that described in the preceding paragraph."

36. Defendants deny Section 36 of the complaint except they admit that a majority of the first-class pictures (as defined in Section 37 of the complaint) which were exhibited in Crescent towns in the past five years were released by the defendant distributors.

37. Defendants deny Section 37 of the complaint except they admit that in some instances first-class pictures have the highest production cost, are made with the aid of the best acting, directing, writing and technical talent, and possess the greatest box-office value to an exhibitor, but they deny that this is so in every instance; and admit that [fol. 7] first-class pictures sometimes receive the maximum advertising expenditure by the distributors and that their prior exhibition in metropolitan centers serves to further advertise and make them attractive to the patrons of motion-picture theaters in the Crescent towns, but this is not always true.

38. Defendants deny Section 38 of the complaint except they admit that a majority of all feature pictures exhibited in the Crescent towns during each of the past five years have been released by the defendant distributors.

39. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in Section 39 of the complaint.

40-43. Defendants deny Sections 40-43, both inclusive, of the complaint.

44. Defendants admit Section 44 of the complaint except that the allegation in this Section that each print "moves continuously across state lines in the course of such use" is denied.

45-46. Defendants deny Sections 45-46, both inclusive, of the complaint.

47. Defendants deny Section 47 of the complaint except they admit it is customary for all exhibitors in the motion picture industry to purchase feature pictures in advance of the production and distribution of same.

48-50. Defendants deny Sections 48-50, both inclusive, of the complaint.

51-52. Defendants deny Sections 51-52, both inclusive, of the complaint except they admit that during each of the past five years said distributors have followed the policy of "block booking" with exhibitors, which means that they release their feature pictures only in blocks in advance of production and distribution, with the privilege on the part of the exhibitor of rejecting a small percentage thereof.

[fol. 8] 53-54. Defendants deny Sections 53-54, both inclusive, of the complaint.

55. Defendants deny Section 55 of the complaint except they admit that each one of them operates more than one theater and in that sense may be considered as operating a circuit of theaters and admit that each such circuit contracts for the pictures exhibited in the theaters operated by it.

Wherefore these defendants demand judgment dismissing the complaint as to them with costs.

(S.) Geo. H. Armistead, Jr., Attorney. American Trust Building, Nashville, Tenn.

Of Counsel: McConnico, Armistead, Waller & Davis, American Trust Building, Nashville, Tenn.

[fol. 9] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

ANSWER OF LOUIS ROSENBAUM AND NETTIE E. SUDEKUM, PARTNERS DOING BUSINESS UNDER THE TRADE NAME OF MUSCLE SHOALS THEATRES; AND MUSCLE SHOALS THEATRES, A PARTNERSHIP—Filed September 14, 1940

Defendants Louis Rosenbaum and Nettie E. Sudekum, partners doing business under the trade name of Muscle Shoals Theatres, and Muscle Shoals Theatres, a partnership, answering the original bill, allege and say:

1. Defendants have no knowledge as to the allegations of Section 1 to 8, inclusive of the bill.

2. Answering Section 9 of the bill, and the amendment thereto, these defendants allege that there is no corporation of the name Muscle Shoals Theatres, Inc., but these defend-

ants operate a business under the style of Muscle Shoals Theatres. Such business is a partnership and it does operate one or more theatres in each of the towns, Athens, Florence, Sheffield and Tuscumbia, Alabama.

3. Defendants admit the allegations of Section 10 of the bill, excepting they deny that said Anthony Sudekum is an officer or director in Muscle Shoals Theatres, a partnership.

4. Defendants have no knowledge of Section 11 and 12 of the bill.

5. Answering Section 13 of the bill: Louis Rosenbaum is not a vice president and director of Muscle Shoals Theatres, but he is a partner in said enterprise.

[fol. 10] 6. Answering Sections 14 to 27 of the bill, defendant has no knowledge as to the matters of fact therein alleged.

7. Defendants admit the allegations of Section 28 to 33 of the bill inclusive.

8. The allegations of Section 34 and Section 35 are not universally true, and upon information and belief defendants deny the allegations of said sections.

9. Defendants have no knowledge of the allegations of Sections 36, 38, 39, 40, 41, 42, 43, and 44 of the bill, and require strict proof.

10. Answering Section 37 of the bill, defendants deny that the allegations of Section 37 of the bill are universally true, but they admit that they are to some extent and in many instances true.

11. Defendants deny the allegations of Sections 45, 46, 47, 48, and 49 and 50 of the bill, and demand strict proof.

12. Defendants deny the allegations of Section 51 to 54, inclusive, of the bill, and require strict proof.

13. Defendants deny the allegations of Section 55 of the bill.

And now having fully answered, these defendants pray *and* they may go hence dismissed, with their reasonable cost in this behalf expended.

Mitchell & Poellnitz, Attorneys for Defendants, Nettie E. Sudekum, Louis Rosenbaum, and Muscle Shoals Theatres, a partnership.

[fol. 11] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF MOTION TO AMEND COMPLAINT—Filed December 27, 1940

To McCONNICO, Armistead, Waller and Davis, Nashville, Tennessee, Attorneys for Crescent Amusement Company, Inc., Lyric Amusement Company, Inc., New Strand Company, Cumberland Amusement Company, Strand Enterprise Corporation, Rockwood Amusements, Inc., Cherokee Amusement Company, Inc., Kentucky Amusement Company, Inc., Kentucky Amusement, Inc., Anthony Sudekum, R. E. Baulch, Kermit C. Stengel; W. H. Mitchell, Florence Alabama, Attorney for Nettie Sudekum and Louis Rosenbaum; Canale, Glankler, Loch and Little, Memphis, Tennessee, Attorneys for RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Vitagraph, Inc., Warner [fol. 12] Bros. Pictures, Inc., Cornelius McKinney & Gilbert, 3rd National Bank Bldg., Nashville, Tennessee, Attorneys for Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Universal Pictures Company, Inc.:

Please take notice that plaintiff herein will appear before the Honorable Elmer D. Davies in Room —, United States Court House at Nashville, Tennessee at 9 a. m. on the 3d day of Jan. 1941, and move the court for the entry of an order granting leave to amend the complaint herein by striking therefrom the allegations contained in paragraphs numbered 50 to 53 inclusive thereof, upon the ground that said paragraphs contained allegations which the plaintiff does not intend to support by proof at the trial of the case.

A copy of the order sought is attached hereto and expressly made a part hereof.

Owen W. Hughes, Assistant United States Attorney for the Middle District of Tennessee, Nashville Division; Allen A. Dobey, Special Assistant to the Attorney General.

[fol. 13] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION—Filed December 27, 1940

The United States of America, plaintiff herein, and the defendants, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Vitagraph, Inc. and Twentieth Century-Fox Film Corporation, hereby stipulate and agree by their respective counsel that an order may be entered herein dismissing the complaint as to said defendants.

Owen W. Hughes, Assistant United States Attorney for the Middle District of Tennessee, Nashville Division; Allen A. Dobey, Special Assistant to the Attorney General; Canale, Glanklin, Loch and Little, Harold S. Luckler, Memphis, Tennessee, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, Vitagraph, Inc., Warner Bros. Pictures, Inc.

[fol. 14] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER AMENDING COMPLAINT—January 3, 1941

Upon the motion of the plaintiff herein, due notice thereof having been served upon counsel for all defendants and the court being fully advised in the premises; it is hereby Ordered, Adjudged and Decreed that the plaintiff be granted leave to amend the complaint herein by striking therefrom all of the allegations contained in paragraphs 50 to 53 inclusive thereof and said paragraphs are hereby stricken from said complaint.

Enter: Elmer D. Davies, Judge.

O. K.: O. W. Hughes, Asst. U. S. Atty.

[fol. 15] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

CLERK'S CERTIFICATE—Filed January 17, 1944

I, L. B. Ormes, Clerk of the United States District Court for the Middle District of Tennessee, hereby certify that the Supplement to Complaint, filed July 24, 1941, in Civil Action No. 54, styled United States of America, Plaintiff, vs. the Crescent Amusement Company, Inc., et al. Defendants, was filed in open Court by verbal direction of the Court, and no written order was signed by the Court directing that said Supplement to Complaint be filed.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid Court at Nashville, Tennessee, this the 17th day of January, 1944.

L. B. Ormes, Clerk. By H. M. Hutchison, Deputy Clerk. (Seal.)

[fol. 16] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENT TO COMPLAINT—Filed July 24, 1941

Plaintiff alleges that since the filing of the complaint herein the defendant exhibitors have continued to combine with each other and with each of the distributors, referred to therein as the "defendant distributors", unreasonably to restrain interstate trade and commerce in motion picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures and the operation of motion picture theatres in the Crescent towns and in other towns referred to in said complaint and bills of particulars filed herein in violation of Sections 1 and 2 of the Sherman Act in the manner alleged in said complaint and bills of particulars and will so continue to combine unless and until relief prayed for in said complaint is granted.

Horace Frierson, Jr., United States Attorney.

Thurman Arnold, Assistant Attorney General, By Robert L. Wright, Special Assistant to Atty. Gen.

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DISMISSING COMPLAINT AS TO PARAMOUNT PICTURES, INC., ET AL.—January 3, 1941

Upon the stipulation of counsel for the plaintiff and the defendants, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Vitagraph, Inc., and Twentieth Century-Fox Film Corporation, it is hereby Ordered, Adjudged and Decreed that the complaint be dismissed as to said defendants, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Vitagraph, Inc. and Twentieth Century-Fox Film Corporation.

Enter.

Elmer D. Davies, Judge.

O.K. O. W. Hughes, Ass't U. S. Atty.

[fols. 18-169] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENTAL ANSWER OF DEFENDANTS—Filed July 7, 1941

The defendants herein, The Crescent Amusement Company et al., having heretofore filed an answer to the complaint in this cause, now come and supplement said answer by averring that the answers made as to the respective paragraphs of the complaint are intended to be in response not only to said paragraphs of the complaint as originally filed, but also as supplemented by several bills of particulars filed by plaintiff herein.

(S.) Geo. H. Armistead, Jr., Attorney, American Trust Building, Nashville, Tenn.

Of Counsel: McConnico, Armistead, Waller & Davis, American Trust Building, Nashville, Tenn.

[fol. 170] [Caption omitted]

[fol. 171] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PROPOSED FINAL DECREE—Filed May 6, 1943

This cause having come on for hearing before this Court upon the pleadings and upon the testimony, both oral and documentary, introduced at the trial of this cause, and the same having been argued by counsel both orally and upon briefs submitted, and the Court having made and filed its Findings of Fact and Conclusions of Law herein on the 3rd day of March 1943:

It is hereby ordered, adjudged and decreed as follows:

(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Co., Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each of the distributors Paramount, Fox, and [fol. 172] Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(2) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, enjoined and restrained from continuing in combination with each other for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(3) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, enjoined and restrained from continuing in combination with each other for the purpose and with the effect of eliminating, suppressing, and preventing independent competition in the territory in which each operates; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(4) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, enjoined and restrained from continuing in combination [fol. 173] with each other, and with the major distributors, Paramount, Fox, Warner, Loew's, RKO, and United Artists in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(5) That the defendant United Artists Corporation, be, and it hereby is, enjoined and restrained from continuing in combination with Cumberland, Rockwood, and Stengel to eliminate its independent theatre competition at Rogersville, Tennessee; and is further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(6) That the defendant United Artists Corporation, be, and it hereby is, enjoined and restrained from continuing in combination with Rosenbaum, Sudekum, Rockwood, and Stengel to eliminate independent theatre competition of Muscle Shoals at Athens, Alabama; and is further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(7) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amuse-

ments, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from creating or maintaining as unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

(8) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and [fol. 174] with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

(9) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is enjoined and restrained from coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

(10) That all existing franchises to which The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, Cherokee Amusements, Inc., Lyric Amusement Company, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum, Kermit C. Stengel, or Louis Rosenbaum, hereinafter referred to as the exhibitor defendants, is a party, be, and they hereby are, declared invalid.

(11) That all existing agreements not to compete in the future to which any exhibitor defendant is a party, be, and they hereby are, declared invalid.

(12) That each exhibitor defendant, be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation.

(13) That each of the corporate exhibitor defendants, be, and it hereby is, required to divest itself of the owner-

ship of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and each such defendant is hereby enjoined and restrained from acquiring the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc.

[fol. 175] (14) That the defendant, Louis Rosenbaum, be, and he hereby is, required to terminate and dissolve the partnership of Muscle Shoals Theatres, and to divest himself of any interest which he may have in any of the corporate defendants, and said defendant Rosenbaum, is hereby enjoined and restrained from acquiring any interest in said corporate defendants.

(15) That the defendant, Anthony Sudekum, be, and he hereby is, required to resign as an officer of any corporation, except The Crescent Amusement Company, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except The Crescent Amusement Company, by acting as an officer thereof, or otherwise.

(16) That the defendant, Anthony Sudekum, be, and he hereby is, required to divest himself of any interest which he may have in any of the corporate defendants, except The Crescent Amusement Company, and said defendant is enjoined and restrained from acquiring any interest in any corporate defendant except The Crescent Amusement Company.

(17) That the defendant, Kermit C. Stengel, be, and he hereby is, required to resign as an officer of any corporation, except Rockwood Amusement, Inc., which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except Rockwood Amusements, Inc., by acting as an officer thereof, or otherwise.

(18) That the defendant, Kermit C. Stengel, be, and he hereby is required to divest himself of any interest which he may have in any of the corporate defendants, except Rockwood Amusements, Inc., and said defendant is enjoined and restrained from acquiring any interest in any

[fol. 176] corporate defendant, except Rockwood Amusements, Inc.

(19) That the acts of dissolution described in paragraphs (13), (14), (15), (16), (17), and (18) hereof shall be performed within one year from date of entry of this decree.

(20) That the exhibitor defendants, and each of them, be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres outside Nashville, Tennessee, except after an affirmative showing before this Court that such acquisition will not unreasonably restrain competition.

(21) That the jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and decrees as may be necessary or appropriate for the construction or carrying out of this decree, for modification or termination of any of the provisions thereof, for the enforcement or compliance therewith and for the punishment of violation thereof.

(22) That the costs of this action shall be taxed against the exhibitor defendants and United Artists Corporation.

(23) That the Bill of Complaint be, and it hereby is, dismissed as to the defendants Strand Enterprises, Inc., Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Columbia Pictures Corporation, and R. E. Baulch.

Elmer D. Davies, United States District Judge.

Dated this — day of March 1943.

[fol. 177] In the District Court of the United States for the Middle District of Tennessee, Nashville Division

Nashville Civil No. 54

United States of America, Plaintiff,

vs.

Crescent Amusement Company, Inc., et al., Defendants

Order re Objections to Form of Decree—April 20, 1943

On this April 19, 1943, the plaintiff presented a decree for entry in this cause. Objection being made to the form of

the decree by defendant United Artists Corporation and by other defendants, the Court ordered that all objections to the form of the decree as proposed by the plaintiff be submitted to him prior to May 6, 1943, and ordered further that on said date the decree in this cause would be finally settled and entered on the minutes of this Court.

It is further ordered that on said date of May 6, 1943, the Court will hear and determine all motions filed herein by the defendants to amend the findings of fact and conclusions of law filed herein by the Court on March 3, 1943.

Enter: April 20, 1943.

Elmer D. Davies, United States District Judge.

[fol. 178] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

TRANSCRIPT OF ARGUMENT ON FORM OF DECREE TO BE ENTERED ON FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed August 25, 1943

[fol. 179] Thursday, May 6th, 1943.

Appearances:

Robert L. Wright, for the Government.

W. H. Mitchell, for Muscle Shoals Theatres.

Wm. Waller and Geo. H. Armistead, Jr., for Crescent Amusement Company.

The Court: All right, Gentlemen, are you ready to proceed in this matter?

Mr. Mitchell: Counsel for the several defendants, may it please the Court, have conferred about the order and they suggested that I open the discussion with regard to the Muscle Shoals Theatres.

[fol. 180] The Court: All right, Mr. Mitchell, you may proceed.

Mr. Mitchell: May it please the Court, I have filed here some motions or a motion for modification of certain find-

ings of fact that appear on the file and for some additional findings of fact. Those elements of the motion are so plain on the face of it, I think, and your Honor is so familiar with the record that I thought I wouldn't devote any time to that discussion at all.

I discovered, in checking, that there are a couple of typographical errors I want to correct and probably one error as to the facts in the record that I want to correct also before I get to that. But it is my intention to devote a brief space of time, as briefly as I can, considering what is involved, to the item of relief.

The Court: Well, I think we should take up the decree first and then hear any objections as to the findings or requests for proposed findings and amendments.

Mr. Mitchell: Of course, if it were interesting to your Honor and if we had a great deal of time it would be very pleasing to me to go over the findings of fact one by one, but as I said before, the additional findings of fact that I have asked for are practically undisputed on the record, and they are asked for additional clarity, and when put in, I think the record is acceptable from that standpoint, in the [fol. 181] event of any review of the case.

The findings of fact that exist there in some respect, I think, need modification in order to speak the truth, as I see it, but certainly there are substantial elements in the case that I am sure your Honor will be willing to cover because they are—

Now, if I understood you, when you said take up the decree, really it was in my mind to address myself solely to that phase of the decree that touches Muscle Shoals Theatres in the matter of relief.

The Court: Well, you may have a copy of the proposed decree. Do you have it in the file, that was submitted by the Government?

Mr. Wright: What is it that your Honor wanted a copy of?

The Court: I want a copy of the proposed decree that was submitted by the Government. I don't know—was it left with the Clerk? I think the District Attorney had possession of it.

Major Frierson: I have in my file the original.

Mr. Mitchell: (Handed copy of the decree).

The 14th item of the decree corresponds, as I understand it, with your Honor's conclusions of law. I don't dispute that.

[fol. 182] "The defendant Louis Rosenbaum be, and he hereby is, required to terminate and dissolve the partnership Muscle Shoals Theatres and divest himself of any interest which he may have in any of the corporate defendants, and said defendant Louis Rosenbaum is hereby enjoined from acquiring any interest in such corporate defendants."

The Court: Of course, of the corporate defendants that were found to be in the combination.

Mr. Mitchell: I think it is undisputed in the record that Rosenbaum owns no interest in any of the defendants, and that element of the decree is proper but in that requirement asking Rosenbaum to dissolve the partnership and in the Muscle Shoals Theatres——

The Court: All right.

Mr. Mitchell: In your conclusions, and it would follow in this decree, proposed decree, it is declared that your Honor will retain control of the decree for the purpose of doing justice and making modifications from time to time, and that is a sound provision in it, and it is in my mind that on the entire record the injunctive relief that is granted will supply every protection which the Government has sought in bringing this action. We have lost the lawsuit. We recognize that fact and we are law-abiding people and good [fol. 183] soldiers and we are able to travel and work under the conditions and rules as they are.

I think it is plain in this record, your Honor remembers the record well, that this man Rosenbaum has been a successful businessman. He is a man that it was not suggested anywhere that he was a law violator because he never had any tendency of that kind. It is probably plain from the record that if he has violated the Sherman Act, or we may say, since he has violated the Sherman Act that he probably did it without any knowledge that there was such a law, or if he knew there was such a law, as to what the law meant. As a matter of fact, it has been a matter of great difficulty on the part of any lawyer and many times for the courts to know what is a violation of the Sherman Act. It is a matter of recent history that probably one of the big-

gest corporations in the world, the Aluminum Company of America, was indicted for three or four years before Judge Caffey in New York with all the vigor and vehemence that the Government was able to put into it, and a thing that is commonly known as a trust, though Judge Caffey said there was no violation of the Sherman Act involved in it. As far as Rosenbaum and his theatres are concerned, it is a little unit in some little towns in North Alabama. He has built them up and he has made a living out of it, a living that is [fol. 184] very important for a man to have for himself and his family. It is plain in this case, even from the Government's theory, from the Government's claim, that it is rare that his business has ever touched the business of the Crescent Amusement Company or its affiliates. All of our files, correspondence and files, and all the files of the Crescent Amusement Company and its affiliates have been before the Government, such part of them as felt they were interested in were presented to the Court and there has no evidence been disclosed from the ffles of the Muscle Shoals Theatres and the Crescent Amusement Company that there was any particular cooperation or friendship, and certainly nothing that approached collusion or agreement in that.

The only way that was brought out was from the files of the Distributors, those inter-office communications that were presented here by photostats where some Atlanta man would write New York a letter and join the names of Sudekum and Rosenbaum but as to that, much of it that was recited there was misapprehension and not the truth because what was written down was misinterpreted. The man who wrote it could so misinterpret what he had heard or what he knew. Your Honor will also know that those inter-office communications were introduced under a stipu- [fol. 185] lation to which the Muscle Shoals Theatres was not a party and we had a continuing objection in the record on that ground. The Government apparently had misapprehended the fact; it probably believed what they alleged, that Muscle Shoals and the Crescent Amusement Company were the same thing, and that when they had the stipulation of the Crescent that they had a stipulation of Muscle Shoals.

The Court: I remember something about that.

Mr. Mitchell: Well, that is a fact but if you take all these inter-office communications as being the truth, if you just

assume that, and it pleases me—I assume it for the purpose of argument, not as an admission—all that was ever showed was that Rosenbaum came to Nashville one time and negotiated a Fox franchise at or about the same time Sudekum was negotiating a Fox franchise and that someone named Paul Wilson wrote up a memorandum in which he put them all on one deal and Sudekum said they were not dealing—that he had a separate piece of paper for his but that Sudekum, without any authority from Muscle Shoals, hooked the thing on a piece of paper where all those were written out. But that in itself was an isolated item, if all that the Government said was so. That was one item in twenty-five [fol. 186] years in which Sudekum and Rosenbaum had worked together, having a contract down there and a contract up here. Well, that is not a course of business.

Every distributor that got on the witness stand here, one or two of them had worked for three or four different companies—said that Rosenbaum always made his own contracts. He always bought his own pictures. He never bought for Crescent and Crescent never bought for him. The things were totally separated.

I wish to suggest this, may it please the Court, without touching too much in detail. I was trying to illustrate what I think of as the innocence of Muscle Shoals of any intentional wrongdoing with regard to the Sherman Act and to say—

The Court: Let me have a copy of the findings. I just wanted to refresh my recollection as to what I found to be the facts in that respect, the reason I asked for the findings.

Mr. Mitchell: Well, in your findings of fact you refer to that as a joint deal.

The Court: If I recall, Mr. Rosenbaum was in Atlanta when that thing was said to have been done, or might have been said to have been done and he talked with one of the officers down there and then came back to Nashville and [fol. 187] talked to Mr. Sudekum about it.

Mr. Mitchell: That is a fact. Whether it was true of the Fox franchise or the Warner franchise, I am not sure, but it was like this: They said to Rosenbaum: "We haven't even traded with Sudekum and want you to help us trade with Sudekum. You boys are friends." He said: "If I could help any, I would be glad to." There was some talk about prices and he conveyed Sudekum a message. He

either went to see him or telephoned him or something of that order and did intervene at the request of the distributor and brought the two parties to terms. But that had nothing to do with his own trade and he did make his own trade. I don't think there is any dispute about the facts about that, may it please the Court.

I was trying to make the simple point that here is a man of character, a law-abiding man, a respectable man, a man of high standing in the opinion of his neighbors, and if he violated the law did it probably unconsciously and we think a mere suggestion from the Court would probably be enough to hold him in line and certainly an injunction by the Court, a cease and desist order would restrain him. If he were a different kind of man from the kind of man I am talking about; if he were one of these intentional law-violators, one of these persistent violators that needs to be cited for contempt—that will handle him, and since the Court is in [fol. 188] the act of keeping jurisdiction of the case, retaining control over the decree, if at any time when it seems proper to the Court to do it, that you could just put this dissolution proposition down. There is no reason for me to speak to your Honor—your judicial temperament—I think we ought to speak about the judicial attitude and invoke the justice in the case but I have sat in this court in the summer of 1941 time after time before this case would be opened and there would be matters here of convictions on criminal charges, and I was always impressed with what seemed to me to be the very proper reasonableness in the attitude of the Court toward convicted criminal offenders.

Well, here is a defendant that has been convicted in an equity case on an anti-trust charge. It is common practice, not only in this Court but throughout the United States, to put a man on good behavior, under parole, if you call it that, and make him report or check him up, and if there are indications pointing that way, to put on him, at a later time the punishment that is merited by the crime. The old Gilbert and Sullivan version, you know, in one of the operas, let the punishment fit the crime, is a universal rule of justice.

You see, the Government, in filing its bill here and its [fol. 189] suggested conclusions of law, puts in some stock phrases there about relief that can be had under the anti-trust act and that has sometime been granted in severe cases where sound judgment merited it about dissolutions, but the

fact that there is a top punishment that can be inflicted in a case, in any case, criminal or civil, does not mean that of necessity and as a matter of justice that the Court — the duty to write that down. And your Honor knows that well and all of us know that well.

Now, I want to call your Honor's attention to what a pursuit of the proposed dissolution decree would mean in the Muscle Shoals case. We have never presented, never have undertaken to present anything about relief here. As a matter of fact, when we argued the merits of the case, maybe I am quite wrong but it would have seemed to me rather thoughtless and rather silly to say to the Court "Please dismiss this case because it has not made out a case" or "Please find for the defendants because of the burden of proof; the defendants are innocent", and at the same time have undertaken to pre-judge the case for your Honor and to say "If you find us guilty then please fix up this question of relief." I think that if I had undertaken such presentation that your Honor would have said: "Well now, listen; I don't want to think about that now. I want to look at the law and look at the facts of the case and decide the merits of the case. When we get down to relief, [fol. 190] why, let's talk about that then, if any relief is to be granted. Maybe there is not any merit to it and maybe you are just taking up my time for nothing." Now, we have come before the Court for the first time and I think properly for the first time to speak about relief.

Rosenbaum is here ordered to dissolve the partnership. I don't know how a partner can dissolve a partnership. He can stop operations. Rosenbaum is the manager; he could close his houses down and that is a matter of importance to him personally and of importance to the public to have the entertainment going on, picture shows. To close them down would be one way of dissolution and I am sure that your Honor doesn't have that sort of thing in mind.

The Court: No. I suppose the only way that he could dissolve the partnership would either be to make the other partner an offer to buy or sell, and if that were not successful or practical, then it would be necessary to file suit in a court of competent jurisdiction of that county to dissolve the partnership and sell the assets.

Mr. Mitchell: I assume that would be true.

The Court: I haven't particularly pursued that matter. [fol. 191] Mr. Mitchell: I presume that to be true, and then what happens? You get all of the business stopped and you get all over the different objections of court processes and go on into the Courts of Alabama and you get down to the business of a sale and the court officer, the register in chancery, is ordered to sell the property. It is a matter in the Court's discretion as to how the property be sold, whether it be sold for cash or be sold on credit, or whether it be sold for this or whether it be sold for that, and the Court tries to make a sale or the Court does make a sale, and when I say "tries" I mean an adequate sale, because there you have got property in which there is an inventory of probably $350,000.00 in three counties; two theatres on leased property and the other is owned outright. If you sell them in bulk who can buy them? Of course, Paramount, Fox and Warner, they are in the business. They have got theatres; they operate theatres but they are under injunctions and decrees as to this, that and the other. You can't go up and ask them to buy the places, buy this property, because they say: "Oh, no, we will be in contempt of court; we can't buy them."—Then you go to a man named Willby or another named Shien, who is running a big chain and being prosecuted by the Government under the anti-trust laws and you say: "Please come in here and buy this enterprise from us, this investment of $350,- [fol. 192] 000.00" and they say: "We can't come in there; we can't do that. We would be glad to own it but the Government doesn't think well of that and the courts, they are holding us down for a while and we are just not interested." Then who are you going to get? We have got to get a cotton merchant or a banker or some businessman that has no experience in business of this kind to come in and buy this property, and what do they know about running theatres? You go to one of them and try to get $500,- 000.00 or whatever they are worth—they are worth more than that but that is the investment,—but besides that, if he had the money I can't pick up a novel system here and try to go into it and try to do something with it. We are in war times and the business looks good now but I remember how it was beginning in 1929 and 1930, through the years of the depression, and the stuff might just blank out on me and I won't have anything. Of course, I will go to the action that the court produces and I will buy, maybe

I can buy them for a song; maybe I can buy them for one half value or one third value, and you won't have any competition at the sale. Crescent can't buy it because it is precluded by the decree. Rosenbaum can't buy because he hasn't got enough money. He has got a half interest in the property but when you take out the court costs and all that is involved in a dissolution proceeding he just owns a half interest and he would have to borrow the balance and [fol. 193] put a mortgage on the stuff, and what do people do about mortgages? The war is over, we hope, in a minute and he is faced with maybe a depression like we had after the first world war. I might go and ask Roger Babson some questions and the District Attorney and they don't know, but a man of the age and experience of Rosenbaum, who has built up something as a life work, he doesn't like to cover himself up with numerous mortgages that may cost him a life's investment. That is a tragedy. He can't look at that.

Now, if you take the thing that your Honor suggested above a give and take offer, of course, his partner doesn't have to either give or take. You can't make anybody do that, but suppose they were—suppose that was a desirable act and suppose Mr. Sudekum would like to do it, I doubt if the Government—I suspect that the Government would protest to the Court against Mr. Sudekum's purchase of that property because they would say that was collusion between us and Tony Sudekum and the expansion of the Crescent down in that territory was a very vile thing. But if Mr. Rosenbaum bought certainly his partner is not going to sell to him at an inadequate price and he would be covered up the same mortgage, and that is just bad business practice.

[fol. 194] Then we get to another thing, may it please the Court, that is where it is mighty easy, you know, to put something down in a prayer or a bill, just put down some language there that sounds like it is wonderful but when you try to put it into practice the problems are problems of meat and bread and life and death. Let's suppose Mr. Sudekum could buy; there was no objection to it, and Rosenbaum would sell his half interest, what has Rosenbaum got? He has got some dead dollars. You can't do anything with dollars. I mean the banks have got too much money, these dollars; they can't lend money. There are no deals for investment open. You have just got some dollars and a

savings account don't pay any interest. Rosenbaum is a working man who has had one practice all his life, the theatre business. He has got nowhere to go with his money. He is deprived, in a sense, of the staff of life, that is, if he sells.

And here is another thing, the income taxes of this concern were introduced by the Government and even there it is claimed that their income was in the high brackets. Of course, these theatre properties have been depreciated from year to year in value, and income tax returns depreciated down as much as the Government will. let them be depreciated down in order to save income taxes in years that have gone by, and any sale of this property at anything that [fol. 195] approached its market value—and surely it is not interesting to the Government or to the Court to make a man sacrifice his property and sell it at less than a fair price—but to sell it at a fair price will show a great big profit on the original investment there and that profit is income, and being income, taxes at a very high rate will wipe out the proceeds of a sale; just take it away. A man—so far as looking at the income tax problem, a man can buy a farm and it will quadruple in value and there is no income tax on the increase in value but if he sells his farm and converts it into cash, that accumulated profit there, the profit is income and many a man in these days has deferred from selling property that he has owned when it shows a fine profit; he has deferred because he really doesn't get that profit.

All of us like to work for the Government on account of this being war times and everybody has a patriotic pride but it is preposterous in having the Government take out of his pocket a substantial or very large portion of it, eighty or ninety per cent of it, to help pay for the national defense. That is a patriotic duty that the average man has a pride in but our Government hasn't got to the point of forcing people to sell their properties in order to realize profits that are involved in these increased values and thereupon surrender to the Government, in the way of in- [fol. 196] come taxes, a real life's profit. There is no attitude like that in the Government at all. It wouldn't be the Government attitude that would force that, I mean the income part of the Government that would force that on any citizen and not on Rosenbaum, but if through the processes of this Court and the decree in this case he should be forced

to sell and get an adequate price—if he got an inadequate price that is a tragedy—if he gets an adequate price and the greatest part of the price is income, why, it immediately becomes capital taxed against him and he has in his pocket, in the place of a going concern in which he is happy and with which he takes good care of his family, a comparatively small piece of money.

The Court: What about the legal right of the Court to order dissolution of a partnership where only one partner is a party to a suit or proceeding?

Mr. Mitchell: Well, may it please the Court, I wouldn't try to pass on that question. I think Mrs. Sudekum is a party defendant. She was in the original suit and if she has been dismissed, I don't remember it. I appeared for Mrs. Sudekum in the case, Muscle Shoals Theatres, Rosenbaum and Nettie Sudekum as one, Muscle Shoals, whoever the parties be.

[fol. 197] The Court: It was in my mind that she was not a party.

Mr. Mitchell: If it would be a problem I would be glad for it to be a problem but I don't think that it is. She is a party to the case.

It has been impossible for me to figure out any way that Rosenbaum can carry out the proposed operation here without a tragic outcome of his business. The Government itself has deprived him of a market for the property, but to market anything at this time would work an undue loss on it. You can't buy without covering the stuff with mortgages, if you assume that the partners will deal with themselves and that our price would be a satisfactory buying price to him. It is just beclouding the future. I know your Honor knows, and it is common knowledge that debts, bad debts are the tragedy of the world. One of my law professors said to me, said to his class: "Young men, before you leave my classroom let me tell you this, stay out of debt,"—and then he recited the tragedies of his early experience in the law practice in which he had incurred debts because he was accustomed to living in pretty good style and he didn't know any other way to live, and he borrowed money because his credit was good, and he spoke of the hardship it worked on him and his family. It is not just words when you speak of a thing like that. Anybody that walks around [fol. 198] with a big load of debt on him is staring at tragedy all the time.

I say, may it please the Court, that we have lost the lawsuit and we are making no complaint in the world to your Honor about that. This is not the time or the place to speak of such a thing. I am taking the decision as it is and I am saying to your Honor that the injunctive relief that is specified in these paragraphs of this proposed decree are ample to take care of the relief that your Honor wants to enforce. There is an injunction. Let the franchises go—we have no issue with the Court about them. Just mark the franchises off; buy separately; all right; that is just fine. Don't condition your purchases in competitive towns with the distributor being willing to sell at the big price in non-competitive towns. All right, that is just fine. We will take all that. We take all these injunctions that are laid down here that are intended to protect the theory of the Government against anti-trust violations; we take them all and undertake in good faith to carry them out and the Court has every means to require him to report or the Government has every means to investigate and if there is ever developed a situation that is offensive to the Court's idea of propriety in this matter the Court has got supervision of the thing with ample means to enforce, if the time should [fol. 129] ever come when it seems it is essential to accomplish justice and put down a dissolution order, why, put it down then.

I have every confidence,—I mean confidence of man to man—confidence in your Honor's appreciating the gravity of it is what I am speaking of. I really feel like the Government ought to have the same reaction. Of course, all of us are partisans and the Government may not have that reaction.

The Court: Well, I had been under the impression that Mrs. Sudekum was not a party to the suit. I had looked into that question and had made investigation at the same time I was considering the fact that some of the distributors who were named as co-conspirators were no longer parties to the suit but I recall now, as you refresh my recollection. I thought she was a party to the suit. However, she wasn't found to have been guilty of any violation of the Sherman Act in this case.

Mr. Mitchell: Her name never appeared in the record except as a party because she never had anything to do with it. She just draws checks, that is all, a totally silent partner.

The Court: All right, let me hear from the Government about this matter. What do you say about it?

Mr. Wright: If your Honor please, the relief that was granted in this decree as to the defendant Rosenbaum we regard as extremely mild, as in fact——

[fol. 200] The Court: As to what?

Mr. Wright: Very mild.

The Court: How could it be any more severe?

Mr. Wright: We think that the findings of fact that were made would have warranted a decree of actual divestiture, that is, a decree compelling Mr. Rosenbaum to divest himself of theatres in Athens where he had committed unfair practices against Buchanan. Now, this decree merely provided, with respect to this dissolution, that the partnership be dissolved. It didn't prevent him from continuing to operate any of these theatres or the Muscle Shoals business or the taking over of the whole business himself. I assume that is the logical consequence of what is required here, that he and Mrs. Sudekum would dissolve the partnership by transferring all her interest to him. That would, I take it, be the normal consequence of the relief that is decreed here. In other words, all that this says to him is simply that he shall operate that business independently of Mrs. Sudekum and the Crescent interests, in effect, as a protest that he had been doing in the past——

The Court: Of course, that was in line with the principle that I have in mind of dissolving the combination.

Mr. Wright: Yes sir, precisely. As I say, I think your Honor's decree in dissolving the combination, insofar as [fol. 201] Rosenbaum is concerned, does it in the least objectionable way that it could be done, insofar as he is concerned, because he is not restricted in his operations in any way. His business is not affected. He is able to keep it intact. All that is required of him is that he sever his connection with the Crescent interests which he now holds through the partnership with Mrs. Sudekum.

Now, this question of the tax problem here, I think is wholly premature. What the tax liability would be, he thinks would be and how this dissolution would be enhanced and all those things, of course, are matters which I don't think Mr. Mitchell is in any position in argument to speak with any certainty about. I suppose that that wouldn't come up until after the decree of dissolution is entered. Then they have a year in which to accomplish it,

provided any question about the plan failing to comply with the court's intention, I suppose it would be brought in here for a hearing of any inequities that might develop, and could be disposed of at that time, but certainly the problem doesn't even arise until we do have the decree entered which does require Mr. Rosenbaum to disassociate himself from the other members of the combination, and the provisions that your Honor has ordered seems to me would be the minimum required for that purpose.

[fol. 202] Insofar as the Court's power is concerned, as Mr. Mitchell pointed out, the partnership itself is in here before the Court. It is not Mr. Rosenbaum but Muscle Shoals Theatres as a partnership that is present and any decree which your Honor enters is fully able to effect the other partner as well as Mr. Rosenbaum.

The Court: Well, I had been under the impression that Mrs. Sudekum was not a party. I suppose I received that impression by reason of the fact that her name wasn't mentioned hardly through the trial and no charge——

Mr. Mitchell: It never was mentioned.

Mr. Wright: That is right. That is, any evidence, of course, was confined to Mr. Rosenbaum because Mrs. Sudekum was a silent, inactive partner in the business.

The Court: I can't hear you, Mr. Wright.

Mr. Wright: I say the evidence was necessarily confined to Mr. Rosenbaum because Mrs. Sudekum was a silent or inactive partner in the business.

Unless there is some point that your Honor would like for me to discuss on that, I think that is all I have to say about it.

The Court: Well, the argument of Mr. Mitchell rather appealed to me; that it might work an undue hardship on [fol. 203] this defendant and probably the same results could be accomplished by use of the injunction.

Mr. Wright: If the Court please, he points out the injunction doesn't hurt him. He is perfectly agreeable to the other injunctive proceedings because they don't have any present application to him, that is, our requirement that in any conditioning of films because he hasn't got any competition left in those places. All the rest of this relief is, I should say, purely theoretical as far as Mr. Rosenbaum's situation at the present is concerned. The only practical result of any real consequence of this decree,

as far as Mr. Rosenbaum is concerned, is the dissolution provision, which does break up the combination and compel him to operate this business separate and apart from the other defendants. Without that I should say that the decree would be virtually meaningless insofar as Muscle Shoals was concerned.

The Court: No, the injunction would prevent him from buying with Mr. Sudekum or the Crescent in any further film deals, any future film deals.

Mr. Wright: That is true, your Honor. To that limited extent it would perhaps be effective but as long as you permit him——

The Court: After all that is what the complaint is based on, isn't it?

[fol. 204] Mr. Wright: Well, the complaint, of course, is based on that abuse of the relationship between the two companies and is, of course, what led to the filing of the suit, and that, in turn, led to the finding that the law had been violated by Mr. Rosenbaum and Mr. Sudekum in combining their interests. The only question you are confronted with here, as I see it, is purely one of the proper remedy. This relief that is being granted here is not, as I understand it, by way of punishment at all. It is purely remedial: that the purpose in ordering the dissolution was to make sure that the conduct that was condemned in the finding would not be repeated, and the only way that such assurance could be gained, as I see it, is not merely to issue an injunction against repetition of the former conduct in the same manner but to go further and actually effectuate a separation of the two businesses, and that is the theory on which the dissolution was asked and on which, I presume, that it was granted.

The Court: All right. Thank you, Sir.

Now, Mr. Mitchell, you mentioned something about the findings that you wanted—two or three matters that you wanted to call to my attention.

Mr. Mitchell: Yes sir, I do. May it please the Court, on the fourth page—you will have to count it because they are [fol. 205] not numbered. There is an indented paragraph. Exhibit A in the indented paragraph there, the last sentence, I believe, is not sustained by the evidence in the case and I want to amend the proposition by striking out those words. My motion is just to strike that out.

The Court: I don't know that I am looking at the same thing you are. What do you refer to?

Mr. Mitchell: That last sentence.

The Court: All right.

Mr. Mitchell: In the indented paragraph.

The Court: No. 29?

Mr. Mitchell: Yes, sir, the last sentence of that indentation.

The Court: "Athens, Alabama, twelve miles from Tennessee City."

Mr. Mitchell: That is the first part of it.

The Court: "Also the same agreement referred to by which Muscle Shoals took over the Buchanan situation at Athens * * *."

Mr. Mitchell: That allegation is not in evidence in the case at all and therefore is an improper request on my part, and therefore I want to amend the motion by striking out that last sentence.

The Court: What do you say about that, Mr. Wright? What part of the record do you refer to?

[fol. 206] Mr. Wright: This is a proposed amendment of his. I don't know just what the significance of that additional phrase is, if your Honor please.

The Court: You say that if the 29th finding is not struck it should be modified so as to——

Mr. Mitchell: That is right.

The Court: I thought you wanted that last sentence stricken because there was no evidence to support it.

Mr. Mitchell: I am asking the Court to add where it is in quotation marks and indented——

The Court: The general 29th finding of fact?

Mr. Mitchell: Sure. And now I am withdrawing my request of the Court and including in the objectionable language the last sentence because that would be asking the Court to say something that is not in evidence in the case.

The Court: You are asking the Court to strike that last sentence?

Mr. Mitchell: Yes sir. I am offering to amend.

The Court: You want to amend your modification here by striking out that last sentence?

Mr. Mitchell: I do.

The Court: Let it be granted. I didn't understand.

[fol. 207] Mr. Mitchell: Now, if you will turn over to the 41st finding of fact.

The Court: That is relative to Lawing.

Mr. Mitchell: It is my proposed additional finding of fact in my motion. It is not in your record. I have mis-used the word there. I wrote the word "Bama" theatre when I intended to say Plaza theatre.

The Court: All right.

Mr. Mitchell: In the 53rd in my motion I want to strike the last sentence. It is identical with the one we struck a moment ago, and those are the only changes, may it please the Court.

The Court: Now, I thought there was some particular point that you wished to call my attenton to, or some particular request.

Mr. Mitchell: Those are the ones. I trust I have made myself plain on this, may it please the Court, that I have been arguing, those things, because on the other I don't think they are required. I think they will be plain to your Honor. I have tried to be fair with them and I don't see any use of taking up the time of the Court to talk about them. Of course, I am insisting on my motion to amend the findings of fact and to make additional findings of fact, as set out in my motion there but expect your Honor to look at them in open court today.

[fol. 208] The Court: Well, I will have to go over these things and I expect probably will have to—unless there is some particular matter that you wish to call my attention to and wish to discuss; if you do, I will give you an opportunity.

Mr. Mitchell: I don't know of any, and that is very kind of you.

The Court: Well, I am going to consider this request as to the modification of the decree on behalf of Mr. Rosenbaum. Of course, what the Court had in mind in the conclusion was to sever all relations between the Rosenbaum theatres and the Crescent circuit. However, I am not ordering dissolution of any Crescent corporations or affiliated corporations. I don't know that I should go so far as to single out Mr. Rosenbaum and order a dissolution of the partnership in his case. I am rather impressed with the request. I will pass on it.

All right, now, do you wish to take up the next?

Mr. Armistead: I reckon I had better come up next, your Honor.

The Court: All right, Mr. Armistead.

Mr. Armistead: May it please the Court, I am not here this morning to discuss our proposed findings of fact. We have the matter of the Government's proposed decree and I want to get some further instructions from your Honor in regard to that, and also make some suggestions to your Honor, which I believe will accomplish the purpose that the Government has in mind.

[fol. 209] Of course, under Rule 65 of the new rules, the injunction must be specific enough that the party being enjoined may know just exactly what the limitations are or to what extent the injunction goes, and I will discuss that later on.

Now, if your Honor will turn to Paragraph 1 and Paragraph 10—Section 1, Paragraph 10——

The Court: In the decree?

Mr. Armistead: In the proposed decree submitted by the Government, you will find that the defendants Crescent Amusement Company, Muscle Shoals, etc., "be and they hereby are enjoined and restrained from continuing in combination with each other and with each of the distributors Fox, Paramount and Warner in making franchises for the purpose and effect of maintaining their monopolies and preventing independent theatres from competing with them."

Now, Section (10) provides "That all existing franchises to which the Crescent Amusement Company, Muscle Shoals, etc., are parties be and hereby are declared invalid." Now, those were franchises and this matter of franchises throughout this whole trial was stressed by the Government, and as I understand it, there were three things the Government claimed which made these franchises invalid. I don't get the contention of the Government to be that a franchise in and of itself per se is illegal but these particular franchises were illegal for this reason, first, they contained a repeat clause; second, because of clearance; and third, because they extend for a particular length of time, that is, too long a period of time.

[fol. 210] The Court: I am of the opinion, regardless of what the Government contended, that the franchises of this sort are per se illegal and are contracts in restraint of trade, and that is what I tried to hold.

Mr. Armistead: Well, the Government claimed that we have got too many of these franchises; that we took up all

the product and just so the competitor would have the right to three of these major companies, three out of the eight, that that would be enough product for him, but they took the position that we have had four or five franchises and we had too many of them.

Now, here is the suggestion I have to make in regard to the franchises, that each year there shall be a re-negotiation in regard to clearance. In other words, let them have a franchise, then that provision in that franchise relative to clearance; let it be taken up each year because there might be some fellow who wants to get in some nearby town and if this provision, if it remains in full force in that franchise, it would naturally affect the operation of his theatre.

Now, second, the repeat run clause. Your Honor will recall that a repeat run clause is where you have an option to re-show a picture. In other words, when they buy these pictures they may get fifteen or twenty of them in all and they don't know which ones are going to be good. It may turn out that there is one outstanding picture. Well, the [fol. 211] exhibitor wants the right to repeat that run in the future and makes that contract to start out with because if it wasn't in there then the distributor would just charge any kind of price he wanted or it wanted to the exhibitor for the privilege of re-showing the picture.

Now, we will say this; here is my suggestion in regard to that provision; that if any competitor enters any of these towns where the exhibitors are now operating theatres that then the repeat run clause becomes automatically stricken from the contract.

The Court: Well, if that is your position in the matter what is the use in putting it in there at all then?

Mr. Armistead: I want it in there until somebody does come in.

The Court: You want it in there to keep them out and when they do come in you will take it out?

Mr. Armistead: No, I want it in there so that I won't be subjected to exorbitant demands on the part of the distributors for the exhibition of that feature picture, outstanding picture in this particular theatre.

The Court: No, I can't be sitting down here as a Court telling the Crescent Amusement Company every few months or every few weeks or every few days what they can do

and what they can't do under this contract. I don't think [fol. 212] it is contemplated that the Court should do that and I don't propose to do it. What I propose to do is to decide this lawsuit and, if possible, get rid of it. If it is necessary to retain it in court for one or two little things, why, I will have to do it. I don't want even to do that, because I don't want to sit down here and act as a moderator between the Government and the Crescent Amusement Company and have this thing coming up continually and that thing coming up. That is not my purpose. My idea is to decide the lawsuit and get rid of it and not sit here and act as a referee all the time. I don't anticipate with any degree of pleasure at all any feeling on the part of Crescent or anybody else that they feel like they have to come down here and get my consent before they can do anything. I want them to be able to decide those matters for themselves. If they are right, all right; that is all right; if they are wrong, then that is a different matter.

Mr. Armistead: What I had in mind was to make these suggestions now relative to any decree, which could be embodied in the decree. The franchise in and of itself is not illegal. Crescent will only be allowed in any situation outside of Nashville to make franchises with only two of the [fol. 213] big five, big distributors, and in those franchises there must be those provisions that I have just referred to, namely, in regard to clearance and in regard to repeat runs. Now then——

The Court: Before we get away from that, Mr. Armistead, that brings up this other question that has been mentioned in the case before that is embodied to some extent in the consent decree that was entered in this case in New York,—now, I don't have the question before me and I didn't intend to decide that—was whether the Crescent monopolized the market for these films by having franchises with any given number of distributors. I just held as to all the distributors that they did have a franchise with that that constitutes a monopoly in restraint of trade. I don't think it is incumbent upon me to say that it would not be a monopoly or restraint of trade for them to have franchises with only two or with three. Now, I had a more definite idea about this franchise proposition and was more specific in my findings in regard to the franchises, whether it is made clear or not in the conclusions, that these franchises in themselves are, per se, absolutely contracts in restraint

of trade and counsel were enjoined from executing any more like them, and that is all I am holding and that is all I am——

[fol. 214] Mr. Armistead: I am not complaining about that in the least, I really am not, but what I want to know is whether or not we could—and I mean by "we" Crescent—make a contract with a distributor and then not be subject to being cited for contempt of court because that question is up right now and I told them "You hold off of that thing until I get a little advice."

The Court: All I can say is that you can't make any more franchises like those you have made. I am not ruling in advance on what some other franchise might be or might not be.

Mr. Armistead: Just like your Honor stated a while ago, I hate to take up so much time discussing this particular point but really it is rather important for my client to know how to be guided in the future. In other words, I don't want to be coming down here—I wouldn't think of it—every few days and saying "Here is a franchise, will this be all right?" Why certainly not. But if I know in advance that—I mean that your Honor doesn't hold that franchises, that all franchises are illegal, then I will know how to proceed.

Now, there are two things I understood from the Government in arguing this case and the proof all the way through here. You have got clearance in it; that is one side, and you have got this repeat run in here. That is reasonable but you have too many franchises.

[fol. 215] The Court: In those things to tie up films for five years; that is another proposition.

Mr. Armistead: That was two franchises. I am not arguing with your Honor about that at all but whether we are right or wrong about it——

The Court: I don't see that the injunction in this case would prevent you from making a regular film contract for another year, and I am not making any particular holding as to clearance or matters with reference to the repeat run. In other words, I am not laying down any rule of conduct that the distributors and exhibitors shall follow from now on. All I am saying is that these franchises in themselves are illegal per se and contracts in restraint of trade. Now, if you make any other kind I might have to decide that

question when we come to it, like Mr. Mitchell suggested awhile ago.

Mr. Armistead: All right then, according to your Honor's ruling then that knocks out paragraph 1 of the Government's proposed decree.

The Court: Knocks it out?

Mr. Armistead: Yes sir.

The Court: What do you mean?

Mr. Armistead: "That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusements Co., Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each of the distributors Paramount, Fox, and Warner in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects."

[fol. 216]

The Court: Here is the 10th conclusion of law:

"The franchises entered into between the co-conspirators, Paramount, Fox and Warner, and the defendant exhibitors are contracts in restraint of trade or commerce among the several states, tending to perpetuate the monopolies of the defendant exhibitors involved, foreclosing competition by independent exhibitors, with the defendant exhibitors in the licensing of film over large areas and for long periods of time."

Well, I just think that all that would be necessary would be to enjoin them from further violating the Sherman Act. It is not necessary to mention the franchises or anything else. I have held in here what one of the violations was and then if they want to make other franchises, why, as the old saying goes, sufficient unto the day is the evil thereof. We will wait until that time and see whether they have violated the Sherman Act.

[fol. 217]

Mr. Armistead: The only thing, it looks like to me that that Section 1 should be clarified now so that we will know whether or not——

The Court: I have clarified that. I don't see that it needs to be any further.

Mr. Armistead: All right, Sir, we will strike that one out then.

The Court: Let's see what Mr. Wright has to say about that in a few minutes.

Mr. Wright: Well, if your Honor please, the purpose of conclusion or Section 1 is to give effect to the conclusion of law that is expressed in your conclusion No. 10. That simply follows the precise language of that conclusion and the additional conclusion 19, that the plaintiff is entitled to the injunctive restraint indicated herein, from continuing said conspiracies in restraint of trade and commerce and from entering into any similar combinations or conspiracies for similar purposes and objects.

Now, all that this paragraph 1 does is insert in the decree the injunction that your Honor decided the plaintiff was entitled to in conclusions of law Nos. 10 and 19. [fol. 218] Again, this particular provision was not prepared by us as one which we thought granted by any means the maximum relief to which we were entitled under the findings in the case. We say that under the findings that were made that we would be entitled to a decree which would flatly prohibit the making of franchises with these distributors by these defendants because of the manner in which they had abused the privilege in the past, but it seems that your Honor had clearly not intended to go that far. You had in your conclusion of law No. 10, had this limiting language——

The Court: Well, if they make any other franchises in the nature of these they certainly would be in contempt of court and violating the Sherman Act too, wouldn't they?

Mr. Wright: That is right. A provision as this one is now, so qualified, I would say that any violation of that injunctive provision, that is, the making of these franchises with the distributors with the purposes and effects that are prohibited by the Act would, in effect, mean a violation of the Act also, but that in itself, of course, does not deprive us of the right to the relief we are entitled to; that is, we are entitled to have that additional contempt section imposed there inasmuch as they have already violated the Sherman Act in this matter, and next we are entitled to an injunction prohibiting further violations which would [fol. 219] make them liable for contempt, as well as for any other proceedings that might occur under the Act.

The Court: Don't you think that just simply the decree saying that the defendants are enjoined from further violating the Sherman Act in any manner in the future as they have been held guilty of doing in the findings and conclusions would be sufficient?

Mr. Wright: Well, I take it that that substantially is what was done in this decree and that it was merely spelled out with somewhat more precision than that by simply taking the conclusions of law and putting them into this protective or injunctive provision to show what was covered. I would suppose that the complaint upon their part against the injunction as being vague or indefinite would probably be insisted upon by them if that method had been adopted instead of the method that was adopted of tracking the Court's conclusions in the prohibitory paragraphs of the decree.

The Court: I see, you were just endeavoring to make it broad enough, is that it?

Mr. Wright: I beg your pardon.

The Court: I say you were just endeavoring to make the decree sufficiently broad to cover any situation that might arise?

[fol. 220] Mr. Wright: Well, no, if we wanted to make it broad enough to cover any situation it would simply be a prohibition against making franchises with these distributors. That would be our idea of a properly broad paragraph. This paragraph is slightly restricted by the requirement there of not only making of the franchises but making them with a particular purpose and effect. Now, those qualifications are in there not for our benefit but those are in there for the benefit of the defendants.

The Court: In other words, you say that so long as they can make franchises which don't have the purpose and effect of maintaining their monopolies to prevent independent theatres from competing with them that those franchises, of course, would not be prohibited by the Act?

Mr. Wright: They wouldn't be prohibited by paragraph 1. I think the Act is broader than paragraph 1 of the decree, as it is drawn. That is my contention. And when I say limit the language in paragraph 1——

The Court: Well, according to your theory then, just limiting the injunction to enjoin them from further violating the Sherman Act would be broader than paragraph 1.

Mr. Wright: I think it probably would, yes. Suppose

they would object to it on the ground, that it was too broad, too vague and indefinite.

[fol. 221] The Court: Well, you have to have some basis for the issuance of an injunction. Of course, I couldn't enjoin them from doing anything that they haven't been doing, as I see it. I don't know but what Mr. Wright may be right about it. It may be better for you to leave it in there. What do you think, Mr. Armistead?

Mr. Armistead: Well, I don't think so, your Honor, because I think that the defendant is entitled to know whether or not, if he does make a franchise—now, I understand if they make franchises similar to any franchises before made, as brought out in this record, that then this defendant will be in contempt of court and that contract will be illegal and void, but I do say it looks like to me that the defendant would be entitled to know if it makes a franchise which does not contain these evils which the Government contended were contained in those other franchises that then it would be all right.

The Court: Well, it may not contain those evils but might contain other evils and it would have the same effect of maintaining monopolies to prevent independent theatres from competing with them and you would still be violating the injunction.

Mr. Armistead: May I use this illustration?

The Court: Yes sir.

Mr. Armistead: Your Honor will recall that in the buying seasons the distributors and exhibitors lots of times couldn't [fol. 222] get together. Suppose they got together in the middle of the season and Crescent will go ahead and say: "Yes sir, I want this year's product and I want the ensuing year's product. I want to get a selection out of both of them." Now, according to the contention of the Government, as I catch it, that would be a franchise which would be illegal. I want to find out things like that because I don't want to be cited down here every time——

The Court: The only franchises that I think that would be the basis for the issuance of an injunction in this case were those franchises—I think there were those from three to five years, the provisions that those had. I didn't mean to hold that a contract for one year's product was a franchise; that that was illegal. I certainly didn't mean to do that. And I don't think I did.

Mr. Armistead: No sir, your Honor didn't. You didn't.

The Court: Well, I don't understand your question then. I thought you said you were concerned about making a contract for half a year's product.

Mr. Armistead: Plus the ensuing year's. In other words, getting the benefit of two years product, selection from two years' product if I didn't make a contract, say, until in the middle of the season.

[fol. 223] The Court: I haven't decided in this case that a two years franchise is invalid.

Mr. Armistead: That is right. That is the reason I wanted this section 1 or paragraph so that I can tell whether I do have a legal right to enter into a franchise or contract.

The Court: Well, you may not have the legal right—you may have the legal right to make such contract as that and you may enter into such a contract and it might be a violation of the Act but not a violation of the injunction because the injunction is based upon the findings and conclusions in this case. Do I make myself clear?

Mr. Armistead: Yes sir.

The Court: It could be possible for you to make such a franchise and that franchise could violate the Act yet it wouldn't necessarily violate the injunction that I have issued because my injunction is based solely on my findings and conclusions. Anything outside of that, why, I couldn't consider and couldn't act upon, and certainly you wouldn't be in contempt for doing something that has not been covered by either.

Mr. Armistead: Now, if your Honor will turn to section 2 of the plaintiff's proposed decree and that is about—the defendants are enjoined and restrained from continuing in combination with each other for the purpose of dividing [fol. 224] the territory in which theatres may be operated by any of them, etc. That, in our opinion, is notice to the—in other words, here is Cherokee and Rockwood, two separate corporations, who operate in, your Honor recalls, East Tennessee. Now then, Rockwood also operated down here in West Tennessee close to Crescent towns. Must Rockwood confine itself to East Tennessee or Crescent confine itself to Middle Tennessee? I just don't know.

The Court: You don't expect me to construe the decree beforehand, do you, in this case?

Mr. Armistead: Yes sir.

The Court: I see you do.

Mr. Armistead: I just want your Honor to lay down rules for me so I can obey them. I sure don't want to get in the wrong town or have Crescent getting into the wrong town.

The Court: Now, what was your question, Mr. Armistead?

Mr. Armistead: By dividing, and, of course, we don't—it doesn't charge, the conclusion of the Government, that the territory has been divided—we don't argue that. What I am trying to find out about is "the purpose of dividing the territory in which theatres may be operated". Rockwood and Cherokee both operate close to each other. Does that mean that one of them has got to get out of that territory? And Rockwood also operates down here in West Tennessee close to where Crescent operates.

[fol. 225] The Court: Well, let's see what Mr. Wright's construction of that is. What is your construction?

Mr. Wright: If the Court please, I would say that the obvious purpose of this paragraph is not to confine any of these defendants to any particular territory but to encourage them to compete with each other in every territory that they can find. There is certainly no restriction there on any defendant moving into any territory he pleases. All this prevents them from doing is to agree to stay out of each other's territory.

The Court: From getting together and saying they will stay out of each other's territory?

Mr. Wright: Absolutely.

Mr. Armistead: May I ask counsel, is it the contention of the Government that we will have to get out of some of these towns or can they stay in the same towns they are in?

Mr. Wright: Certainly this paragraph No. 2, as I read it, doesn't tell any defendant to get out of any town. It tells them to stay in there and compete wherever he can.

The Court: This happens to mean any agreement that is made after the entry of this order, Mr. Armistead.

Mr. Armistead: Well, we are enjoined though from continuing.

The Court: You are enjoined from continuing in combination with each other for the purpose of dividing the ter-[fol. 226] ritory. That is, if there are divisions, of course, it would seem to me.

Mr. Armistead: If there are not, we can stay where we are now without violating this injunction?

The Court: I would think so.

Mr. Armistead: May we add such provision to the decree?

The Court: You can submit——

Mr. Armistead: I am submitting to counsel——

Mr. Wright: If the Court please, the purpose of this decree, as I understand it, is to tell these people what they can't do. We didn't try the suit to give them what would be the permissive rights here.

Mr. Armistead: We are entitled to a standard to know how to be guided in the future.

The Court: All right, you can submit what you think would protect you in the case. Do you have it ready?

Mr. Armistead: There is no objection to section 3. That was the one we were just talking about—I mean no objection to 2. Nos. 2 and 3 are the same practically about dividing the territory. No, I am wrong. No. 3, I haven't discussed that yet.

Now, No. 3 is also vague and indefinite, your Honor. These defendants named therein are enjoined and restrained from continuing in combination with each other for the purpose of and with the effect of eliminating, [fol. 227] suppressing and preventing independent competition in the territory in which each operates. And are further enjoined and restrained from entering into any similar combination or conspiracy for similar objects and purposes. Well, that similar purpose and similar objects—I don't see what they are referring to there.

The Court: Referring to the combinations that are set out in the findings and conclusions, I assume.

Mr. Armistead: Will your Honor indulge me while I get it?

The Court: Yes, sir.

Mr. Armistead: Now, section 4, on which there will be the same ruling—the only objection is when you get to the words "for the purpose and with the effect of maintaining their theatre monopoly". We have a monopoly in each town where there is only one theatre.

The Court: I don't know that there is anything we can do about that, but if somebody comes into that town and opens up a theatre, the only effect that I could see that the injunction would have would be to prevent the Crescent from then putting in effect against that competitor such practices as they have engaged in in the past. We can't just move a motion picture theatre in one of these towns where you have a monopoly to keep you from having a monopoly. I

don't think it refers particularly to monopoly as to one particular town.

[fol. 228] Mr. Armistead: May I speak to counsel just a moment, your Honor?

The Court: Yes sir. (Conference.)

Mr. Armistead: May it please the Court, if your Honor will refer to section 4 again.

The Court: You mean paragraph 4?

Mr. Armistead: Paragraph 4, yes sir, right after the words: "United Artists licensing of films for the purpose of and with the effect of maintaining their theatre monopolies". If your Honor will not object to the elimination of the words "Maintaining their theatre monopolies", I think that our suggestion that these words be stricken will not be opposed.

The Court: That wouldn't make sense, Mr. Armistead, to strike the word "maintaining". It would read that "Crescent, Rockwood, etc. are hereby enjoined and restrained from continuing in combination with each other and with the major distributors, Paramount, Fox, Warner, RKO and United Artists in licensing films for the purpose of and with the effect of their theatre monopolies".

Mr. Armistead: Of preventing. You see it reads "Maintaining their theatre monopolies", and those words come out and just keep that "with the effect of preventing theatres from competing with them—"for the purpose and with the effect of preventing."

The Court: You wish to strike out the word "maintaining"?

Mr. Armistead: "Their theatre monopolies".

[fol. 229] The Court: And insert in lieu thereof "prevent"?

Mr. Armistead: No, it will read all right and be coherent then.

The Court: "For the purpose of and with the effect of preventing independent theatres competing with them"?

Mr. Armistead: That is right.

The Court: What do you say about that, Mr. Wright?

Mr. Wright: Why, as your Honor indicated, I think, to me they mean the same thing, substantially, as maintaining, and the other would consist of preventing independent theatres from competing with them. I take it that the intention there is co-extensive. I don't see that it makes a great deal of difference whether you strike out those addi-

tional words or not, except for the sake of consistency inasmuch as we have attempted to follow the exact language of the conclusions of law all the way through here. I would prefer to see it stay in there.

The Court: Well, I was thinking about the result that would come from the change. Now, they are enjoined from continuing in combination with the distributors in licensing films for the purpose of and with the effect of maintaining their theatre monopolies. Of course, that applies to the present monopolies that they now have. Of course, it may be said that if they would enter into a contract this month with a distributor for a two year franchise in a certain town where they had no competition and that next month [fol. 230] an independent theatre would come in and open up and find that this franchise had been made, of course, the Government would say that those films have already been licensed to enable them to maintain their monopoly and are violative of that injunction. I assume something of that order is what they may have in mind.

Mr. Wright: Well, if that is what they have in mind we would, of course, object to the elimination of the provision but we would certainly contend that if that was done that would also come under the prohibition there that follows, preventing independent theatres from competing with them. I take it that such franchise of that kind would also have that effect. That was the theory on which I said it didn't make any difference but if they feel there is something prohibited by the one phrase that is not prohibited by the other then I think they both ought to be in there.

The Court: Well, Gentlemen, we can't presuppose every situation that might arise under the decree, one of this kind, and you can't make provision for it. You can change this decree a thousand different ways in order to cover some situation that you think might arise and then put the decree down and some situation entirely different from what you thought about would be the first thing to arise. Now, in a situation of that kind, such as I mentioned a few minutes ago, where contracts of that nature had been executed as to [fol. 231] whether or not it would be violative of the injunction would depend entirely upon the facts that are presented about the matter. If the Government thought that such a situation as I mentioned was violative of the injunction they would bring the proper proceedings; I would see the facts. If I found the facts to be that when those

contracts were entered into Crescent had no idea that they would have such a position, that there was no purpose of maintaining monopolies or preventing this competitor from coming in, in the execution of those contracts, I would say, of course, they haven't violated the injunction but if I should find even that the contracts were for one year or six months; that they had been executed for the purpose of maintaining their monopoly and preventing independent theatres from operating with them, why then, I would find that they did violate the injunction. It is a question of fact. You can't presuppose every situation that might arise about these matters. All right.

Mr. Armistead: May it please the Court, it is not just shortly before 12 o'clock and I believe I can save some time, in view of what your Honor has said——

The Court: That is just an expression of my idea, Mr. Armistead. I might be wrong about it. I thought I would give you the benefit of my thought.

[fol. 232] Mr. Armistead: That is right. If your Honor don't mind, I wanted to adjourn now so I could discuss it with counsel.

The Court: We will adjourn until 1:30.

Afternoon Session

Court convened at 1:30 p. m. when the following proceedings were had:

The Court: All right, Mr. Armistead, you may proceed.

Mr. Armistead: May it please your Honor, I hate to take up so much of your Honor's time in discussing this decree, these provisions which we think are ambiguous but we feel it is rather important to us. If your Honor will turn to section 7 of the plaintiff's proposed decree. We feel that should come out because it is absolutely ambiguous. Now, what is an "unreasonable monopoly of the business of operating theatres"? That, in substance, just means to say don't ever violate the law any more. You are enjoined from violating the law.

The Court: Well, of course, in some of these towns they have a monopoly now. I wouldn't construe that this means that they had to close up picture shows and go out and hunt some competition or something like that. What do you say as to the necessity of that, Mr. Wright?

[fol. 233] Mr. Wright: Why, this paragraph, if the Court please, was put in there to make effective your Honor's conclusion No. 9 (a) where you said that each of these defendants that are named in this paragraph violated the Sherman Act in the following manner:

(a) Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, Central and Western Kentucky in which each had theatres."

Now, I take it, that that violat-*ng* having been found, we are, of course, entitled to an injunctive provision specifically directed at that violation. That is what this paragraph 7 does.

The Court: Well, of course, that applies to a monopoly looking at it as a whole, as I see it.

Mr. Wright: I assume that from its express terms. Now, there again, as far as more specific relief is concerned, we would prefer a decree which told them to get out of certain of these towns in which they had committed unfair practices and maintained an unreasonable monopoly and ask for divestiture of theatres.

The Court: That would take them out of most of the towns.

Mr. Wright: A very substantial part but, as I say, the job we attempted to do in the present decree was to present a decree that we thought was required by your Honor's de-[fol. 234] cision rather than one that *that* represented what we though the relief ought to be. We merely incorporated in there the relief that we understood your Honor had ordered in the findings and conclusions of March 3rd, so that whatever vagueness there is in there is again in there as a protection to the defendants and does not confer any benefit on us.

The Court: I can't restrain them from creating a monopoly because it has already been created.

Mr. Wright: While that is necessarily true, there still are spots in this territory that is referred to here, Tennessee, Northern Alabama, Central and Western Kentucky, in which they haven't yet created a monopolistic condition, which they might in the future, if they follow the course of conduct that was pursued in the past. I suppose that is the purpose of having the word "create" in there as well as "maintain."

Mr. Armistead: If your Honor will turn to paragraph 20—don't you think that takes care of the situation? "That the defendant exhibitors and each of them be and they hereby are enjoined and restrained from acquiring any financial interest in any additional theatres outside of Nashville, Tennessee except after an affirmative showing before this Court that such acquisition will not unreasonably restrain competition".

[fol. 235] The Court: Well, it is questionable in my mind that I ought to put that in there. That is the thing this morning that I had in mind that I would have liked to have avoided. Why do you say that should be left in there, Mr. Wright? In paragraph 20?

Mr. Wright: Which paragraph are you referring to?

The Court: Paragraph 20.

Mr. Wright: Well, paragraph 20 again was put in this decree in order to comply with conclusion of law No. 20 of your Honor's decision.

The Court: Yes, sir, but I am not entirely satisfied in my own mind that I should have had that in the conclusion. I adopted that from the proposed conclusion which you submitted but what is the necessity for such a provision?

Mr. Wright: Well, the necessity for the provision lies in the fact that the decree's purpose is preventive and the only way that you can make it effective from the standpoint of preventing a recurrence of situations that have been condemned by the findings is to insist that before these defendants move into another situation that the matter be presented here.

The Court: Do you mean that I sit down here and supervise from now on the activities of the Crescent Amusement Company as to whether or not they should open up theatres in other towns?

Mr. Wright: Oh, not at all. I assume that the purpose of this is to prevent an expansion by the Company and whether [fol. 236] there would be any occasion to use that proviso would be entirely up to them. If they were content to remain in the same places, the same size territory, there would be no occasion ever to resort to this Court, but certainly, in view of what has happened, there ought to be some prohibition against further expansion on their part.

The Court: Well, wouldn't they be entitled to extend their business so long as they didn't violate the Sherman Act?

Mr. Wright: No. In view of the history that was shown

here, I would have said again that we were entitled, on the basis of these findings, to a flat prohibition against further acquisitions. This is a qualification again, which, it seems to me, is for their benefit.

The Court: That wasn't what you asked for. You asked for just exactly what was put in here. I followed this (indicating) in doing this (indicating). This was adopted from your conclusions that you submitted.

Mr. Wright: Well, that may be but I say, it seems that qualification there brings out, that makes a possibility—that is in there for their protection.

The Court: Don't talk about what you are entitled to but what you asked for because you didn't ask for what you might have been entitled to in that respect.

[fol. 237] Mr. Wright: I agree that this is what we asked for but I say if there was a question in your Honor's mind as to whether or not you ought to be subjected to the necessity of having to review such applications as might be made to go into new situations that the cure for that is not the elimination of the provision but to simply say flatly that they shall not be allowed to expand into other towns. That, it seems to me, is the answer to the particular problem that has been raised rather than to just say "We won't have any such provision."

The Court: What legal objection would there be to them expanding as long as they didn't violate the Sherman Act? How would the Government be interested?

Mr. Wright: Well, they already have violated the Sherman Act in expanding and I think the court has so found.

The Court: You wouldn't say that, in itself, was a violation of the Sherman Act. You have to look at all these matters as a whole.

Mr. Wright: That is right.

The Court: That is just one of the circumstances incident to the violation.

Mr. Wright: Well, I take it that the circumstances under which they did expand were these violations. By the elimination of competition, by the methods that they used, they violated the Act, and having done so, there should, it seems [fol. 238] to me, be a clear provision which will prevent a recurrence of that sort of thing.

The Court: Well, wouldn't an injunction prevent a recurrence?

Mr. Wright: I think clearly it would.

The Court: I wouldn't be entitled to just enjoin them from expanding at all as long as that expansion had nothing to do with violating the Act.

Mr. Wright: I don't think your Honor can say that expansion would have nothing to do with violating the Act when all the evidence that has already been presented here—we have facts that their expansion in the past has been a violation of the Act, therefore, you enter a decree which, you say, will check that and prevent future violations of that character.

The Court: No, I don't agree with you. I don't find that the expansion by itself alone was a violation of the Act.

Mr. Wright: Well, again assuming that the findings that you made were based upon all the evidence in the case, of course, the fact remains that a violation has occurred and as a result of that violation the Government is entitled to impose certain restrictions on these particular defendants. They are not to be treated at the end of this lawsuit, a proved violation, just like anyone else who would come in fresh without any violations, and what your Honor is saying, as I see it, in effect, is that you should not do anything [fol. 239] to these defendants that you wouldn't do to people who had never been before the Court.

The Court: Wait a minute. I said that I thought I put that in the conclusions but I don't see it in the conclusion. I recall that you had it in the——

Mr. Wright: It is in conclusion No. 20, if your Honor please.

The Court: Oh, yes, I see it.

Mr. Wright: In the last four lines.

The Court: You say it is in 20—I don't see it in 20. Wait a minute—yes, I see it now. Is there anything else you want to say about this, Mr. Armistead?

Mr. Armistead: No, your Honor, there is not.

May it please the Court, this thought occurs to me. Suppose, for instance, we will take Clarksville, Tennessee, because it looks like this injunction is going to be in effect for a pretty good while. If one of these theatres at Clarksville gets dilapidated or burns down and Crescent wants to put up another theatre, I don't think that this injunction would or that it is the intent of your Honor to enjoin Crescent from constructing another theatre in Clarksville in the event one of its theatres becomes so old it had to purchase another lot and put another theatre up there.

The Court: No, I don't think so. From a theoretical [fol. 240] standpoint this order dissolves the monopoly and any monopoly created there must be a new monopoly. It depends, as I said awhile ago, on a question of fact, it seems to me. It seems to me it would be sufficient to say that they are hereby enjoined and restrained from maintaining an unreasonable monopoly. I am not quite able to get the logic of the situation because, as far as a monopoly is concerned, it has already been created, this particular monopoly, and that, you say, was what you had reference to in the conclusions. Well, they might be enjoined from creating any new monopoly. I suppose that is what it would have to refer to because I can't enjoin them from doing something they have already done.

All right, what is the next one, Mr. Armistead? I am ready to pass upon this.

Mr. Armistead: Your Honor, suppose we skip section 8 because I want to discuss that with section 22; they are both rather similar.

We will come to section 11, and if your Honor will turn to your findings 30 and 31. Now, that is on pages 18, 19 and 20 of the printed copy. Now, as I understand section 30 or finding 30, your Honor has held that those restrictions on account of—I mean those agreements not to compete are rather unreasonable, but now in 31 your Honor has found that "in addition to the aforementioned agreements [fol. 241] the following non-competitive agreements were narrowly limited in area, were taken from the exhibitors indicated at the time their theatres were acquired."

Now, my inquiry at this time is whether or not your Honor holds those agreements referred to in section 31 of the findings are illegal. I am particularly interested in that because there is an agreement we had there with John D. Henry in connection with the theatre at Hickman, Kentucky and if that is turned loose and that agreement, along with similar ones, are held unreasonable we will meet Mr. Henry tomorrow morning with another theatre he will want to sell.

The Court: Yes, I think all those agreements, when construed as part of the purpose of building up a monopoly, would be invalid.

Mr. Armistead: Well now, may I make this inquiry then: suppose we take those agreements separately. For instance, I don't want John D. Henry to be used as an illustration and come here and say: "The Court has already held

the agreement you have with me is illegal and invalid and I am coming on back into town and I am going to sue you."

The Court: That is a matter that would have to be tried out with Mr. Henry in a separate proceeding, as I see it. I couldn't bind him by any ruling that I would make in this matter.

Mr. Armstead: But you are binding Crescent. What I [fol. 242] am trying to dodge there, as your Honor can readily see, and the probabilities are there will be a good many treble damage suits growing out of these agreements. I am not arguing about 30 but I am about 31 because they are limited in area and time.

The Court: Well, I would say that conclusion No. 20 covered all of them.

Mr. Armistead: Your Honor, if you will look on page 19, your Honor has found at the bottom down there—that is section 30—"Each of these agreements not to compete with Crescent or its affiliates in other towns extended far beyond the protection of the business being sold, and demonstrated a clear intention to monopolize theatre operation wherever they or their affiliates secured a foothold."

Now, there is no such finding in connection with section 31 and your Honor, I judge, predicated your conclusions in regard to those agreements on section 30 by just parenthetically mentioning there were other competitive agreements—non-competitive agreements obtained but they were limited in scope.

The Court: That is true. They were limited but they played their part in the whole scheme.

Mr. Armistead: Well, would your Honor object to the decree being modified then, and we so suggest that each of these agreements mentioned in section 31 in and of itself is not declared to be illegal or intended to be held or to be [fol. 243] declared illegal?

The Court: No, I didn't hold that.

Mr. Armistead: I asked *if* would your Honor have such provision entered into the decree.

The Court: I have no objection if the Government has none.

Mr. Wright: Well, if the Court please, we certainly object to it. What he is talking about now is modification of your Honor's decision rather than the decree here. The conclusion in No. 20 clearly provided for the invalidation of all of these agreements, and the decision seems to us clearly right

insofar as it held that all of those agreements not to compete were executed as part of a scheme to monopolize, and therefore, they were all invalid.

Mr. Armistead: That is not so found; that is not contained in the findings. The only thing contained in the findings in regard to that were those mentioned in section 30.

The Court: In the findings?

Mr. Armistead: Yes, your Honor.

The Court: Well, there was just more emphasis put on the ones in section 30 than there was on those in section 31. While they were not as broad in scope, didn't they give the protection that the others might have had as they played their part in the whole, and although a limited part, should [fol. 244] be looked to as a whole?

Mr. Armistead: I catch your Honor's ruling as to that. I am not going to argue that point any longer but I was trying to get this in the decree, that your Honor didn't hold and does not hold that any particular one of those agreements, in and of itself, is illegal and void.

The Court: Well, that is something different. In and of itself I don't think it would be illegal and void. An agreement not to re-enter business within a certain time, agreements of that kind where a business is sold by one person to another, are frequently made and in and of themselves are not objectionable, but as far as the Sherman Act is concerned, when viewed as part of the whole thing in building up a monopoly, it is objectionable, is only what I intended to say, and whatever I would say about this matter would not be binding in a controversy that you might have with Mr. Henry or anybody else about their business because if Henry took steps to go ahead and open up business in violation of, or in what you would consider a violation of his agreement, and you file suit in the chancery court to enjoin him from violating his agreement, that court would hear the facts. It might very well say: "Well now, as far as the decision of the United States Court in this matter holding that the agreement was invalid in concerned, that [fol. 245] was viewing that particular agreement as part of the whole monopolistic scheme and was not binding on Mr. Henry, of course, in any way. He was not a party to the suit, and while it may have been invalid in that respect, yet this court can see nothing objectionable about the agreement. Such agreements are made every day and this Court

finds that Mr. Henry should be compelled to abide by his agreement." I think the Court could very well take that position.

Mr. Armistead: Now, Your Honor, in regard to section 12, which is practically the same as section 8, which we skipped; "That each exhibitor defendant, be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation."

We would like to add this, in addition to that: "Nothing herein provided shall be construed to prohibit any exhibitor from licensing films in competitive situations from the same distributors from whom films in other of their situations are licensed, it being the intent of this paragraph only to prohibit and make illegal and void any agreements or side agreements, express or implied, to make the deal for the competitive situation contingent upon the deal for the other situations."

In other words, the defendants don't want to run the [fol. 246] risk of being cited for contempt of Court when they have two or three situations in one place and in another place they have a competitive situation and they want to buy films on a competitive basis from the distributor wherever this competitor has the same opportunity as the defendant exhibitor has, but they don't want to be placed in the position of saying "you can't buy from that distributor because you bought from him for your other situations in towns where you don't have any competition."

The Court: H[illegible]e you a copy of that, Mr. Armistead, that you just read?

Mr. Armistead: I will give your Honor this one. (Handing paper to the Court.)

The Court: Is that the only one you have got?

Mr. Armistead: Yes sir.

The Court: I will look it over and then I will show it to Mr. Wright.

Mr. Armistead: Mr. Waller informs me that we have already sent Mr. Wright a copy of that and also your Honor.

The Court: Well now, let me see. (Looking through papers.) I received a memorandum from you but I haven't received any proposed copy of decree.

Mr. Armistead: It was hitched onto the back end of that memorandum.

[fol. 247] The Court: Well, he must have forgotten to hitch it because it is not hitched on here.

Mr. Waller: We will get your Honor another copy of it.

The Court: Suppose I hand this to Mr. Wright.

Mr. Wright: I have found it. I think I have the same thing.

The Court: What do you say about that?

Mr. Wright: It seems to me, your Honor, that it rather confuses rather than clarifies the provision that is already in there. I don't see how that helps any insofar as certainty is concerned. This last—I would say down to the point, take the first phrase—"Nothing herein shall be construed to prohibit any exhibitor defendant from licensing films in competitive situations from the same distributors from whom films in other situations are licensed—"

Well, obviously there is nothing on the face of the prohibition that would do any such thing. It seems to me to rather cloud the issue to put a qualification like that, in that, that plainly is not within the prohibition anyway. Then, when he goes on to say "It being the intent of this paragraph only to prohibit and make illegal and void any agreement or side agreement, express or implied, making deal for the competitive situation contingent upon the deal for the other situations."

[fol. 248] Now, that elaboration there, it seems to me, would complicate rather than simplify that prohibition. I take it that what is intended here is to prevent the conditioning of the licensing of films in competitive situations upon the other situations, and that prohibition should prevail whether conditioning is accomplished by agreement or side agreement or in any other manner. It seems to me the intent of the paragraph is perfectly clear from the statement as originally written, and that this additional contributes nothing but confusion.

The Court: I am inclined to agree with you on this, Mr. Armistead, if you can make it a little clearer to me. I just don't quite understand what you have in mind.

Mr. Armistead: I don't think all the provision there in 12—I think that ought to have the express provision to the effect that if the exhibitor has a théatre in one town where there is competition and he has several theatres in another town where there is no competition that it wouldn't

be in violation of this injunction if he buys in this competitive town from the same distributor that he purchased pictures from in the other towns.

The Court: I wouldn't think he would be unless it was conditioned upon the licensing of films in the other situations.

Mr. Armistead: I don't think it would either but I wanted to be sure about that. You see, your Honor, I don't want [fol. 249] to get cited down here for contempt of court.

The Court: Well, I don't think you are going to get cited.

Mr. Armistead: Now, your Honor, I haven't got much longer to talk. I said I was going to—well, I have got one paragraph that we want to put in here right at the first and it is this: "The injunctive relief granted the plaintiff in the foregoing paragraph——

The Court: Which paragraph?

Mr. Armistead: Right after paragraph 12, I am going to add another one: "The injunctive relief granted the plaintiff in the foregoing paragraph is not intended to prohibit, and shall not be construed to prohibit, acts or agreements in the conduct of the defendant's business of a character not specifically herein found illegal in the findings and conclusions of the Court in this case."

The only reason we want that put in there is that will protect the defendants from being cited for contempt of court in this case on facts thus far. They may in the future do something innocently and would be subject to an independent anti-trust suit. In other words, your Honor has said, as I caught it, two or three times that what you mean by this injunction is, for instance, coercing, predatory practices, and that means just exactly as found in the findings of fact and that would define all these other sections of the injunction.

[fol. 250] Your Honor has, for instance, referred to similar combinations and conspiracies several times. I say your Honor—I mean this decree, this proposed decree. Now then, what your Honor was referring to, as I caught from the remarks of your Honor this morning, was to the findings and conclusions that your Honor has already found in this case.

The Court: Well, the basis of the injunctive relief is the findings and conclusions and I assume that in order for any violation of the injunction to occur, the act would have

to be of the same nature or same class as these matters that have been before the Court and passed upon by the Court.

Mr. Armistead: That is the main thing I wanted to find out, your Honor, in regard to that. That takes care of the situation. Now, your Honor has stated this morning——

The Court: Suppose you let me have that proposed amendment.

Mr. Armistead: I will have it written out on the typewriter.

The Court: Before we pass from that, do you wish to have anything to say on that, Mr. Wright?

Mr. Wright: This last is apparently the same thing, now, your Honor. I take it that last provision you read is not in the decree. It is attached to your memorandum?

[fol. 251] Mr. Armistead: No.

Mr. Wright: I would say that that was quite a drastic modification of the Court's decision. The decision, as I understood it, was intended to prohibit not merely the precise repetition of precise acts by which they had violated the decree but, of course, included the doing of similar acts.

The Court: I said similar acts or acts of the same class.

Mr. Wright: Yes sir, but I say his proviso here quite clearly opposes not only what your Honor just stated now but what was in the decision and what I understood the practice is with respect to all of these decrees. All of those that I have seen always prohibit similar violations, as well as repetition of the violation, in the precise form in which they occurred.

Mr. Armistead: I will have this typed and hand it to your Honor.

Now, in discussing the balance of this proposed decree, we respectfully submit that the Government can accomplish everything on earth that it wants to accomplish by restraining the defendant from unreasonably interfering with interstate commerce, or, just, in substance, provide, as it is provided in section 12 of the decree and section 8: "That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in [fol. 252] any competitive situations outside of Nashville upon the licensing of films in any other of their situations."

Now, if that is done that means that any competitor in any country town or city or any town where Crescent or

any of these other defendant exhibitors operate, that that man has got just as much chance of buying his pictures from the distributor at the same price as Crescent has or Rockwood or Cherokee because Rockwood and Crescent and Cherokee are enjoined from telling the distributor: "Now, here, if you don't sell me for this town over here where I have competition I won't buy my films from you for towns where I haven't got competition."

The Court: Why shouldn't he have that right?

Mr. Armistead: The exhibitor?

The Court: Yes sir. Why shouldn't he have the right to buy films just as cheap as Crescent or anybody else?

Mr. Armistead: Why, he should have that right.

The Court: I understood you to say that it would mean if this man goes in there that he wouldn't have the right, implying that he should not have, and I asked, why shouldn't he.

Mr. Armistead: No. I didn't mean that he wouldn't have the right but what the Government was contending in this case, as I understand it, is, for instance, for Crescent to say: "If you don't sell me for Paris, Tennessee I won't [fol. 253] buy pictures for the circuit" and the independent in Paris wouldn't be able to buy pictures because the distributor would go ahead and sell Crescent in Paris, for instance, so that he could get to sell to all these other towns. This injunction prevents anything like that from being done.

The Court: I think that it should be prohibited.

Mr. Armistead: I am not arguing with your Honor about that at all. No siree, I am not saying that is wrong; no sir, I am not saying that at all but I am saying that is the way to break up this alleged monopoly.

The Court: Oh.

Mr. Armistead: Without the necessity of Crescent selling any stock it has in any other corporation. Now, the decree provides that there must be a divestiture; that Crescent must sell all the stock it has in othef affiliated corporations, and the same way with Rockwood and the same way with Cherokee.

Now, Crescent had a fifty per cent interest in Cumberland and Lyric and Nu Strand. By the way, your Honor, the case was dismissed as to Nu Strand.

The Court: I wouldn't consider that that would apply in that case because that corporation wasn't found guilty of violating the Act.

Mr. Armistead: Crescent owns a half interest in Lewis-
[fol. 254] burg, Shelbyville, Strand Enterprises.

The Court: Didn't I make an exception in these findings in that respect?

Mr. Armistead: As to Strand Enterprises. But Nu Strand didn't exhibit any pictures up there at Kingsport. They had the three buildings up there and leased them to Willby, I believe, or somebody like that.

Now, if Crescent, for instance, has to sell its stock in the Lyric down here at Huntsville, Alabama, it would work a great hardship not only on Crescent but on the heirs at law of Mr. C. A. Crute. Mr. Crute did all the buying for Lyric, which only operated three theatres, until his death in 1939 and then Mr. Sudekum took over the buying, and the Crutes, his interest in these theatres is owned by the young married daughter and a son who is not yet twenty one years of age. Neither one of them knows a thing on earth about how to operate a theatre. Now, Crescent though must sell its stock. To whom, I don't know whether they are in a position to buy or whether they are not in a position to buy and your Honor doesn't know. There is no proof to that effect, and, as was held in this recent case of the Pullman Company where they tried to dissolve the Pullman Company—anyhow, they held in that case that if the Court was of the opinion that proof was necessary to be introduced in order to allow the court to be in position [fol. 255] to say whether stock in a certain corporation should be sold in order to accomplish certain purposes, that that could be done. As was said in this Pullman Company case, recently decided: "On the other hand, we do not mean to be peremptory regarding the appropriate decree. Counsel for both sides are entitled to be heard with regard to its form and it may be that such testimony to some of the points will be helpful. If so, we don't want to say in advance that we don't wish to hear it."

Now, Your Honor doesn't know the condition of this Crute family down there and I respectfully submit—I am not trying to testify, but I do submit that it would work a great hardship on them because there is no proof in this case that they know anything on earth about the purchase of films.

The Court: I think the only reason Lyric was retained in the matter was on account of the franchise.

Mr. Armistead: That is exactly the reason your Honor held it in there. They were not guilty of predatory practices. There is no proof in the record that they ever intended to expand. Your Honor said that you held them in the case because—this is not your Honor's exact language but it is the substance of it—because they were included in the franchise.

Now, we are enjoined from making any franchises like [fol. 256] we made in the past and it would certainly work a hardship on them to have to see their stock sold. On the other hand, their interests would certainly be affected if your Honor ordered a dissolution between Crescent and Lyric.

Now, let's take the Cumberland Amusement Company, for instance. Crescent owns half of that stock. All the film buying for Crescent or for Cumberland was done by Oldham and Mr. Hill, prior to his death, prior to the time he sold his interest. Cumberland never was included in any franchise, never did have any franchise, and the only thing on earth that Cumberland ever did, so far as this record goes, is going up here to Rogersville, Tennessee and opening up a theatre, building a theatre and opening it up, and it sold that theatre a year and a half before this case was ever brought; sold it to Rockwood.

Now, you come to Rockwood and Cherokee——

The Court: They are the ones that had the building with United Artists up there, aren't they?

Mr. Armistead: Yes sir, a year and a half before the suit was brought.

Now, you have Cherokee and Rockwood. There is a situation and the only proof in the record thus far in regard to that is what Hendren testified to; that he and Parrott were broke when they sold out and formed this new [fol. 257] corporation.

Now, I feel sure that the proof will show that these gentlemen are not in a financial position to buy Rockwood's interest in Cherokee. The thing to do in regard to that, it appears to me, is this: let Hendren go ahead and do the buying for Rockwood and Cherokee and Mr. Stengle, for instance, and Mr. Sudekum can buy for Crescent and Lyric and Oldham continue buying for Cumberland. Now, both of them, all four of these defendants are enjoined from

conditioning the purchase of any films in competitive situations on the buying of films where there is no competition.

Now then, another thing, may it please the Court, suppose Rockwood just goes ahead and sells all of its stock, and Cherokee operates up there in those little mountain towns. It costs money for overhead and Rockwood would have to have separate overhead and Cherokee would have to have separate overhead, but the Government's purpose would be accomplished if these little old theatre corporations could go ahead and have one buyer and one manager, but if that stock has to be sold I don't know who will buy it.

Now, about these affiliated corporations, if Crescent must sell all its stock——

The Court: Apparently, from what you say, Mr. Armi- [fol. 258] stead, they wouldn't be able to get along as well independently as they did as part of the combination.

Mr. Armistead: That is exactly right. That is just exactly right; they can't. They can have one overhead, one manager for both of these theatres, whereas if they have them separately, why, it is going to cost each one just that much more. There is no need of my getting up here and I am not going to argue that Rockwood and Cherokee, if they stand together up there, will have a better opportunity of serving the public and managing the theatres than if they were divided up.

I am not arguing now in the least they have got to have any connection. I am not asking that there will be any connection between Cumberland and Rockwood and Cherokee on the one part, or Crescent and Rockwood and Cherokee on the other part, but this whole case can be solved by enjoining these corporations: "Cumberland, you buy for yourself and don't buy a picture in a competitive place conditioned upon the fact that you will get that picture in your non-competitive situation", and that same thing will apply to Crescent.

The Court: Well, that may be true but if there is no financial interest, one in the other, the temptation will be less on those officials to do those things.

Mr. Armistead: Still they can't though. I am suggest- [fol. 259] ing that Mr. Hendren do all the buying for Rockwood and Cherokee and Mr. Stengle wouldn't have anything to do with them. He will do the buying for Crescent. That is just one suggestion I have to make to see that this decree is carried out.

Now then, you take the opinion in the case of this Aluminum Company. It is said: "It is elementary that the relief granted by this Court, sitting as a court of equity, must be equitable and not penal or punitive in its nature and must be designed to prevent a repetition of the thing which the Court has found to be illegal."

Now, the Court has found in this case that films were purchased by some of these corporations, some of these defendant exhibitors and taken away from competitors, or at least the competitors didn't have an opportunity to buy them simply because they say: "Here, if you don't sell us in all of our situations we won't buy in any of the situations."

The Court: Well, I felt that I had been rather lenient in the nature of the relief granted in this case. Apparently Government counsel seem to think or have the idea, and if I had followed their request and wishes and actions in the matter I would not only dissolve the combination, but I would have dissolved all these corporations and then you would have——

Mr. Armistead: And fired all the lawyers. The Govern-[fol. 260] ment, they are after us too hard, your Honor.

The Court: I am inclined to think you got off a little lighter than you seem to think.

Mr. Armistead: I really don't. I just don't see how we can gain anything on earth by Crescent having to sell its stock in the Cumberland Amusement Company. There is a corporation there that does its own buying, that is not included in any franchises, and the proof, the uncontradicted proof shows that Cowan Oldham did the buying, and what would they gain by having to sell stock out of this poor little Lyric down here at Huntsville, Alabama?

The Court: I am inclined to listen with some degree of receptivity to what you have to say about this.

Mr. Armistead: Well, your Honor, I can't tell you anything without getting outside the record.

The Court: Why didn't you file a petition in this case about this matter?

Mr. Armistead: I thought your Honor said you didn't want to see us down here much.

The Court: No, I didn't say that. I said if you had any matter to present that there was any merit in I would be glad to hear you.

Mr. Armistead: Now, in regard to this provision in the decree, would your Honor let me read you just a moment [fol. 261] about this Great Lakes Towing case, about where they asked for a dissolution in that case and the Court said no. It says:

"In the instant case, the evil to be remedied is not the ownership by the towing company of the corporate stocks of the Dunham and Union Companies, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and the Great Lakes Towing Company, Limited. These companies were not substantial competitors. No good would result from distributing to the stockholders of the towing company the stocks of the five companies above enumerated; and the government does not so request. Nor does the evil reside in the mere ownership of the corporate stocks, or physical properties, or both, bought from the other corporations or individuals. It is concededly impossible to restore to the sellers the properties so bought. The combination represented by the towing company violates the Sherman Act because it is a monopoly created by abnormal and unfair means . . .

"Unless for such means, purposes, and practices, the size alone of such combination, or the mere unification of the towing interests thereby brought about, would surely not justify putting the towing company entirely out of business."

And again:

"The towing company is before the court and subject to [fol. 262] its injunctive processes, including punishment for disobedience thereto; and if we can impose upon that company prohibitions, susceptible of enforcement, which shall eliminate such abuses and remove obstacles to free competition, such course would provide the most effective relief available, and so would manifestly be for the public interest."

Now, what will be accomplished by having Crescent sell its stock in the Cumberland Amusement Company? They are not buying any pictures together. They would be enjoined from combining with each other to purchase any pictures. They never did belong, have franchises—the only thing on earth, I repeat, that your Honor found that Cum-

berland did was to go up here at Rogersville a year and a half before this suit was brought and erect a theatre and sell it.

We take the Kentucky Amusement Company——

The Court: Well, they put one man out of business there. They sold it to another affiliate.

Mr. Armistead: Not at Rogersville. They sold it to Rockwood. As a matter of fact, they weren't doing any good.

The Court: I say they sold it to an affiliate, Rockwood.

Mr. Armistead: Not the Cumberland.

The Court: Well, indirectly, I would say.

Mr. Armistead: You see, your Honor, Mr. Miller was the [fol. 263] independent and he didn't sell it until a long time after that and he stated at the time the only thing he turned over to them was just the keys of the town.

You take the Kentucky Amusement Company, for instance. Your Honor provides here and this decree provides that they must sell, Rockwood must sell its interest in the Kentucky Amusement Company, which is a fifty per cent interest in it. Well, as a matter of fact, the Kentucky Amusement Company, that fellow Hobbs up there owes over $20,000.00. He can't buy it and the Kentucky Amusement Company owes about $50,000.00. Now, if Rockwood has got to sell that stock I don't know how it is going to get along, and that is certainly a case where the proof would not justify the decree in providing that Rockwood sell its interest in the Kentucky Amusement Company.

I know your Honor stated awhile ago that maybe if they were divorced entirely, that is, Cherokee and Rockwood, just as an illustration, that they might get along a little better, but I want to make this suggestion that if your Honor sees fit to adopt that course that I have suggested, namely, that we be enjoined from conditioning the purchase of pictures in one place upon the sale of them in another place, to give a test period on that of two or three years and if the Government finds out we are violating anything in this [fol. 264] then they come on down here and they can ask for more relief and your Honor certainly will be justified in granting it.

The Court: I don't want to hear all this lawsuit again. What do you say, Mr. Wright?

Mr. Wright: With respect to the limited divestiture, the relief that was granted in your Honor's decision as it is incorporated in the decree, the argument that was made on the basis of the Great Lakes case, I take it, was already won by Mr. Armistead when your Honor concluded that it was not going to be necessary to dissolve the Crescent Amusement Company, but when you decided that you felt that you could grant the relief that was appropriate merely by ordering it to sell its stock that it held——

The Court: Dissolve the combination.

Mr. Wright: —of these other companies. Precisely so. There is no way, as there was in the towing case, of taking the company apart and distributing its assets among any other persons. Now, insofar as this divestiture relief that your Honor did grant is concerned, that seems to me to be the minimum by which the decree could be made effective. That says that these people shall no longer divide the territory. Any decree which would restore at all competitive conditions that previously existed between Crescent and [fol. 265] these companies that it acquired would have to necessarily compel Crescent to dispose of its stock that it has acquired in the course of eliminating that competition between them.

The Court: I was just speaking with reference to Lyric now. There is a little company down there that no complaint was made about any of their transactions in this case, whether competition or monopoly, and the only way that they appeared in this case was in some of the film deals where they were put in the franchise along with Crescent and some of these others.

Mr. Wright: Yes sir, but I take it, if your Honor please, the basis for the relief or your order compelling Crescent to sell its stock in Lyric is not predicated against Lyric at all but that is not dependent on any showing that Lyric did anything.

The Court: Of course, it is not but it might have that effect on some people who have not been guilty of violating the Act.

Mr. Wright: Now, of course, the question of whether anybody is going to be hurt or not is something that I don't think can be decided on Mr. Armistead's argument. The theatre there in Huntsville seemed to operate before Crescent came in there and I don't think your Honor is

justified in, would be justified in assuming that the theatres there couldn't be operated by the Crute family without assistance of Crescent or without Crescent owning a half interest in them. Any assumption such as that would, of [fol. 266] course, defeat any attempt to divest Crescent or any of these other companies of any interest they have in theatres. I think that is quite in the scope of unreality to assume for a moment that these companies that Crescent has got into or these theatres that they came into could not be operated as they were before Crescent came into the picture. I take it that the objects and purposes of the divestiture that was ordered is to restore a competitive situation as it existed prior to the time Crescent came in and took over this half interest, which enabled them to split up the territory with these people and to make these franchise deals.

Now, with respect to Cumberland, it is not correct to say that they have had nothing to do with the franchises. With respect to the Warner franchise particularly, Cumberland was a party to the original agreement that was made and the testimony with respect to Miller and Warner shows that at the time the Warner product was sold away from him to Cumberland the Atlanta exchange manager wrote him and told him that they were not able to negotiate with him because they had made a deal with the entire Sudekum circuit, and the Sudekum circuit deal or the Crescent deal was, of course, a deal made under the old franchise.

Now, to the extent that affiliated corporations are con- [fol. 267] cerned in this divestiture we assume, and I think Mr. Armistead assumes too, that you only intended to refer to those affiliated corporations which were involved in the finding of violations, that is, those which were either involved in the franchises or in the division of territory, and in order to make it perfectly clear that there was no intention to include a number of other corporations which, as far as I know, appeared in the case only in the answer to interrogatories, I prepared a revised final page of that decree and I supplied Mr. Armistead a copy of this, which expressly eliminates those affiliated corporations which do not appear as having been involved in any violations. That was done by adding paragraph 19, which reads as follows: "Wherever reference is made in this decree to affiliated corporations such reference shall not include the

following corporations". Then are listed thirteen corporations which the interrogatories showed that Crescent had an interest in but which are not involved in the findings as violations that your Honor made.

The Court: Let's see that. (Handing paper to the Court).

Well, of course, that is correct because some of them were not even mentioned in this lawsuit, as far as that is concerned.

Mr. Wright: The only place in which they appeared was [fol. 268] in the answers of the defendants, defendants' answers to interrogatories which disclosed these other interests about which no evidence was introduced.

As stated before, I don't think that the defendants are in any position to object to this divestiture or have any standing here before your Honor and object to it on the ground that it is not going to be fair to or is going to injure these other people who owned the other half of these businesses. I take it they are perfectly able to speak for themselves and if they have any objections or are going to sustain any damage here as a result of what the Court is decreeing they will always have an opportunity to come in and be heard, but insofar as the question here is concerned, it is a very narrow one of what shall be done with these defendants that are before the Court and clearly they have no standing to object to that on the ground that someone else might be adversely affected.

In connection with this question of vagueness, I would like to read to your Honor what Judge Woolsey had to say in another motion picture case, the case of United States vs. First National Pictures. That was one which went to the Supreme Court and this is the opinion of Judge Woolsey on the entry of decree after remand by the Supreme Court. That decree found the conspiracy illegal, which had been [fol. 269] tied up with the formation of these credit bureaus, which the industry had employed, how it was referred to in the contract that was made. The decree enjoined and restrained them from, individually and collectively carrying out the conspiracy and then he said: * * * "or further engaging in or carrying out said conspiracy or any other conspiracy similar to or having the purpose or effect similar to said conspiracy", from doing any act or thing whatsoever having the same purposes or effects as the

acts done in the conspiracy. He said a conspiracy to promote or tending to promote any purposes and effects thereof.

Complaint was made that those provisions were vague and uncertain and here is what Judge Woolsey said about that at page 554 of 57 Fed. (Sec.). (Reading).

Now, the provisions of the decree that I read here and the provisions that have been incorporated here with respect to similar combinations or conspiracies are stock provisions which have been incorporated in a number of decrees, and I can run through some of them if you wish but I don't want to bore the Court by referring to those similar provisions unless you feel that it is necessary, but I can assure you that those provisions are very common and have been repeatedly used in substantially the same form that they are incorporated here.

Now, with respect to the necessity for the limited di-
[fol. 270] vestiture that was granted here, in addition to the other injunctive provisions we, of course, would never have spent the time or taking up the time of the Court and offered the volume of evidence that we did here as to what had happened with respect to these defendants over this period of time if all that we expected to come out with was simply a warning to these defendants not to violate the Sherman Act again. The purpose of building up that record was to show exactly how they had reached their present position of dominance and the monopolistic and illegal means they were using to achieve it.

Now, of course, the record is very clear that in the course of building this monopoly up, for all practical purposes, competition was virtually eliminated and it is almost nonexistent today in any place where these defendants operate. Now, having brought that situation about they are not the ones to complain that this relief, which is necessary to grant in order to achieve any practical result in the situation, is going to cause hardship to them because you have created conditions under which competition will again be possible. The fact that they have so completely eliminated it as to make that relief necessary is entirely their responsibility and there is no reason whatsoever for any objection on their part based upon the character of this relief.

[fol. 271] I think it is clear that, of course, they would be delighted with a decree here which did nothing more

than to remonstrate with them not to violate the Act any more and leave them in full possession of the monopoly that they have illegally acquired, but obviously such a decree would not meet the situation in any respect or apply the remedy that the Government is entitled to under the law and the facts of this case.

The Court: Well, we will take a little recess at this time.

(Recess.)

The Court: Do you wish to take up any other phase of it?

Mr. Waller: Yes sir. If your Honor please, Mr. Armistead did not discuss paragraphs 17 and 18 of this proposed decree, and I want to say a few words about it, as to how it would apply to the individual defendant, Mr. Stengel.

Now, the findings of fact or rather the conclusions referred to Mr. Stengel in his official capacity as an officer of three corporations, Rockwood, Cherokee and Kentucky, and the final paragraph of the conclusions states that the individual defendants are to resign as officials of any affiliate corporations. Now, in preparing this decree the Government and or the plaintiff has construed that to mean that Mr. Stengel can stay as an officer of Rockwood but that he can't have anything to do with any other corporation. [fol. 272]. Now, Mr. Stengel, as the proof showed and found by the Court also, assists Mr. Sudekum in Crescent. Now, frankly, Mr. Stengel—and this is, of course, out of the record because there has been no proof as to what will happen to these different corporations or these different individual defendants, but I think it is proper to state what might be shown if there were evidence on this point—that he might prefer to remain as an assistant to Mr. Sudekum in the Crescent Amusement Company rather than to have anything to do with Rockwood if Rockwood is to be shorn of Cherokee and these other affiliates for the reason that would leave a sort of little bob-tailed corporation that wouldn't justify his entire time.

The Court: The only thing I had in mind in that connection was preventing any one officer of any company being an officer of an affiliated company, and as far as the company that he chooses to remain with, it was my idea that he could take his choice.

Mr. Waller: That is what I had in mind.

The Court: It is immaterial, as I see it, which one he remains with just so long as he is not an officer of any of the rest of them. What do you say about that, Mr. Wright?

Mr. Wright: I think that is probably right, your Honor. I assume that, of course, on the basis of the proof that the Rockwood Company was the one which Mr. Stengel had [fol. 273] developed and was associated with.

The Court: Of course, he had been the prime mover in the affairs of Rockwood and probably would. I don't mean to require him to stay with that company.

Mr. Waller: Of course, as long as Rockwood has these other affiliated corporations where he can handle such various matters jointly for them, that is one proposition, but if you only have the little Rockwood with only a few theatres in it, that would make a different proposition. What I had in mind there that this decree perhaps should not specifically tell these individual officers of the corporations what they ought to do but should be predicated or directed against the corporations as was done in the Pullman Company decision, which Mr. Armistead referred to. There they said: "We see no necessity for orders directed against individual defendants by name where corporate practices are forbidden or ordered. The usual inclusion of corporate defendants, and their directors and officers is sufficient without mentioning individual defendants by name." In other words, just enjoin a defendant corporation and their officers and agents from doing such and such things.

The Court: Well, that is true but these officers were made individual defendants in this case.

Mr. Waller: Well, they were in this case (referring to Pullman Company case). It says "individual defendants". [fol. 274] Conditions change; people get old and change their interests and corporations employ new men. What might be feasible today may not be feasible tomorrow.

I just wanted to call your Honor's attention to those paragraphs in the decree.

The Court: Do you have a proposed substitute for them?

Mr. Waller: Well, it is not that merely——

The Court: Gentlemen, you are specifying these things to do. That is what this hearing was set for.

Mr. Waller: We did present a form of decree. We compiled it and sent it to your Honor. We sent a copy to Mr. Wright.

The Court: I don't see anything mentioned in that respect.

Mr. Waller: It is in paragraph 5 of our proposed draft of decree toward the end. We ask for a trial period, and I want to mention that again about the plan of divestiture—"would require the defendant Sudekum to resign any office he may hold with any defendant exhibitor corporation other than Crescent Amusement Company and require the defendant Stengel to select one defendant exhibitor corporation in which he shall hold office and resign any offices he may hold in any other defendant exhibitor corporations."

That is paragraph 5 of the draft that we had submitted.

[fol. 275] The Court: I think the same thing would apply, wouldn't it, relative to the interests owned by these defendants? You have here "The defendant Stengel be and is required to divest himself of any interest which he may have in any of the corporate defendants except Rockwood Amusements." He may prefer not to keep his interest in Rockwood Amusements; I don't know. He may prefer to keep this interest he has in the Crescent Amusement Company, I have no objection to that.

Mr. Waller: I don't think this paragraph 21 of your Honor's decree requires that. I don't understand it to. I mean these conclusions, paragraph 21 of the conclusions.

The Court: (Reading) "* * * and requiring the individual defendants found guilty of violating the Sherman Act, to resign as officers of any affiliated corporation, and requiring the defendant Rosenbaum to terminate and dissolve the partnership of Muscle Shoals Theatres, and requiring him to divest himself of any interest which he may have in any of the corporate defendants."

That doesn't cover any but the defendant Rosenbaum. They have a paragraph in this proposed decree relative to Mr. Sudekum in that respect to, paragraph 15, no, No. 16. I don't see that that is specifically covered by the conclusions.

Mr. Waller: No, it is not.

The Court: What do you have to say in that respect, Mr. Wright?

[fol. 276] Mr. Wright: The conclusion makes it specifically on the defendant. While neither defendant is mentioned

by name the requirement of divestiture says "require him", apparently referring to the defendant Rosenbaum.

The Court: Yes.

Mr. Wright: However, we assume that the treatment your Honor intended was to be uniform as between all three defendants and the defendant corporations; that the purpose of it was to insure complete independence of management and control as between all these corporate defendants that were involved here and Muscle Shoals, and, of course, the only way in which that could be accomplished was to apply the same relief that was directed here specifically as to Mr. Rosenbaum to Mr. Stengel and Mr. Sudekum. That was the reason why that was done.

The Court: Well, no, the situation was different as to Mr. Rosenbaum. I don't know that Mr. Rosenbaum—I don't recall now whether the record shows Mr. Rosenbaum has any interest in Crescent or any of its affiliates; I don't think it does.

Mr. Wright: I don't think he has but I take it the purpose of this provision was to be sure that there were no inter-locking interests there held by individuals such as Mr. Rosenbaum or through corporations. That, as I understood it, is what your Honor had in mind in that final re- [fol. 277] quirement that appears there. That is, I assume that your Honor was interested in seeing that the separation would be made complete not only with respect to the ownership of stock by one corporation in another but also by prohibiting the dominant stockholder—that would be Mr. Sudekum—from holding an interest in the other corporations. As far as—taking Rockwood and Stengel for example, it seems to me on the record they are virtually indistinguishable, the entire stock of Rockwood being held by him——

The Court: You mentioned by a transfer of stock between individuals that the dissolution of the combination as to stock ownership of the corporations would be defeated.

Mr. Wright: Entirely defeated. It would be completely nullified unless there were similar prohibitions as to these individuals who were found guilty of violations here as well as their corporations.

The Court: Is there anything further?

Mr. Waller: Now, it seems to me that is just an indirect way of getting some defendants in this case that were not

in here and effecting rights of people that are not before the Court.

The Court: Stengle and Sudekum were before the Court.

Mr. Waller: They were before the Court, yes sir. Now, you take these corporations that were mentioned in the case because they happened to be in franchises that were not [fol. 278] defendants in the case at all.

The Court: Well, according to this new paragraph 19 that has been added, it wouldn't affect any of the other corporations at all.

Mr. Waller: Well now, that is true as to all of them that were not included in the franchises but he is still referring in two or three cases—For example, take this Lawrenceburg business; take Chickasaw, Mid-State, Dickson. Now, Mid-State, Dickson and Chickasaw, the only violation, as they call it, is that Stengle owned half the stock of these corporations. Rockwood doesn't own any stock in those corporations. They are not defendants at all in this case. Those are just little individual partnerships in the corporate form with Stengle individually yet they are not involved in this case.

The Court: Well, evidently I based that finding, I mean that conclusion, upon the finding which showed, as I now recall—I can't keep the facts all in my mind, but as I recall the finding showed that all stock ownership outside of ownership of stock in Crescent, that ownership in all the affiliates was corporate ownership, wasn't it?

Mr. Waller: No sir.

The Court: Except Stengel's ownership of Rockwood.

Mr. Waller: Well, Mr. Stengel owned the stock in Rock- [fol. 279] wood but now Rockwood has no connection at all with Mid-State, Dickson and Chickasaw. Those are three corporations in which Mr. Stengel owns a half interest individually. Rockwood has no connection with them and they are not involved in this case; they are not defendants and they were never brought into the case except when the franchises were introduced in evidence, it appeared in the franchises that some of them were included in the franchises.

Now, your Honor's conclusion No. 21 doesn't say a word about Mr. Stengel divesting himself of any interest in those corporations. That has just been brought into this decree, which is outside the scope of your Honor's ruling.

The Court: Yes sir, I don't think I considered that. I don't see any evidence of it.

Mr. Waller: Now, there are a few other corporations that are non-defendants, which are: Ruffin Amusements, Newport. They are affiliated with Rockwood in that Rockwood owns a half interest in Ruffin Amusements and Cherokee owns a half interest in Newport. We don't think any of those corporations ought to be affected by this decree. Cherokee owns a half interest in Newport. In other words, we think these corporations ought to be included in that paragraph 19 that Mr. Wright suggested.

The Court: What corporations do you think should be included?

[fol. 280] Mr. Waller: Mid-State, Dickson and Chickasaw. They are the ones that are not affiliated with Rockwood at all. And then three others that are not defendants in this case, Laurenceburg, Newport and Ruffin.

The Court: What do you say about that, Mr. Wright?

Mr. Wright: If the Court please, I believe it is correct that in the ownership of Chickasaw, Dickson and Mid-State a half interest is held by Stengel individually rather than by the Rockwood Company. I think the reason that this finding got in here though and the fact that Rockwood held a half interest was because Stengel in his testimony, referred to those companies and these situations as Rockwood towns, Rockwood affiliates. In other words, he made no distinction apparently in his treatment of the companies in which he owned a half interest as an individual and those in which the Rockwood Company, of which he was sole owner, owned a half interest, and it is difficult to see how, for practical purposes, there is any substantial difference in those situations: that is, the relationship of Mr. Stengel in either case and the company's in question is exactly the same.

Now, there was evidence with respect to Chickasaw and there are findings how that half interest was acquired. That was the deal in which half of the Chickasaw Company went [fol. 281] to Ruffin and the other half was bought by Mr. Stengel, and Mr. Stengel negotiated the franchise, including Chickasaw towns with the other Rockwood towns.

The same thing is true with respect to Dickson and Mid-State insofar as the franchise was concerned. Those were treated as Rockwood towns by Mr. Stengel and negotiated by him and included in the Rockwood franchises and I take it that was the reason why they weren't put in the excluded list of affiliated corporations because they were involved in the violations which your Honor found had occurred.

The Court: Which ones were those now, Chickasaw, Mid State and Dickson?

Mr. Wright: Yes sir.

The Court: What about this 15?

"That the defendant, Anthony Sudekum, be, and he hereby is, required to resign as an officer of any corporation, except The Crescent Amusement Company, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except The Crescent Amusement Company, by acting as an officer thereof, or otherwise."

Do you have any objection to that?

Mr. Waller: I don't think, as far as Mr. Sudekum is con- [fol. 282] cerned, there is any sort of objection to it.

The Court: That is what he would in all probability want to do.

Mr. Waller: Except perhaps if Lyric is out of the case. If your Honor does leave Lyric out—we think Lyric ought to be excluded.

The Court: How would that affect this?

Mr. Waller: I don't think it is particularly affected. I mean being an officer doesn't make much difference there: He is permitted to buy for Lyric.

The Court: Now, in that respect do you wish to file a petition for those other stockholders of Lyric in this matter?

Mr. Waller: Your Honor here is what we had in mind a minute ago. I would like to be heard just a few minutes in support of our proposed paragraph 5. It takes the place of the plaintiff's decree about this.

The Court: You have no objection then to paragraph 15?

Mr. Waller: Except I would say this. I don't think the individual defendants ought to be mentioned by name at all in the decree. If they are to be mentioned, I think that is all right. Now, this last clause in there "by acting as an officer thereof, or otherwise", in paragraph 15. As I say, that would be involved in the Lyric situation because——

The Court: All right, now, in place of 17 you propose that [fol. 283] it be changed to require the defendant Stengel to resign any office and require the defendant Stengel to select one of the exhibitor corporations in which he shall hold an office and resign any office he might have in any other company or defendant exhibitor corporation? Is that it?

Mr. Waller: Yes sir, I think that would be preferable.

The Court: Well, that is, as I see it, not objectionable. The fact is I didn't intend to require him to stay with any particular corporation. It was my idea to permit him to stay with whichever one he preferred.

All right, now, what next?

Mr. Waller: 16 and 18, we think they ought to come out entirely.

The Court: All right.

Mr. Waller: Now, the next thing, I want to go for a few minutes, if your Honor is interested in hearing it, to our proposition that this divestiture should be postponed until the injunction is given a trial period. I think that is a very usual provision in a case of this kind, for example, the American Can Company case. That very thing was done there. The Court held that the American Can Company was in violation of the Sherman Act, monopolizing the can business, and the whole question in this opinion was the question of relief and the Government asked for dissolution of the company. There wasn't any question of any owner-[fol. 284] ship of stock in any other corporation in that case. The dissolution of course, of a corporation of that kind would be analogous to divestiture in this case.

Now, the Court decided that it was possible that the dissolution ought to be decreed if it turned out, after trying this injunction out, that the injunction was insufficient, and here is what they said, and we think that that is this case exactly:

"In passing upon the government's contention, little will be added to that which has already been said. Jurisdiction of a court of equity is remedial, not punitive. A dissolution may not be decreed, unless there is reason to believe that more good than harm will come of it. * * * It is the duty of the courts to give effect to the legislative will, but it is equally their duty to shape their decrees as to bring about the result desired by Congress with the least possible waste of anybody's time or of anybody's money."

Then the Court discussed the public interest that was involved.

The Court: Of course, I don't know what the particular facts were in that case. There might have been certain circumstances that would have justified that.

Mr. Waller: Each case stands on its own facts. I am [fol. 285] just trying to get the principle before the Court. There the Court said this: "If, as has been suggested, jurisdiction over the case is retained" and, of course, it would be retained for the purpose of contempt proceedings and applications for relief."

The Court: Well, it is retained for those purposes.

" * * * the assurance that the defendant will not resort to unfair practices will be well-nigh absolute. Under such conditions it will not be likely to accept a competitor's offer to sell out to it, and thereby add to that size and power which, acquired as they were, in defiance of the law, the court must necessarily view with suspicion and distrust. Under such circumstances the passing of a decree for dissolution seems both unnecessary and unwise. The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal * * *"

The Court: As Mr. Wright says, "let the punishment fit the crime."

Mr. Waller: "In this case it appears probably that all potential restraints upon free competition now imposed by the size and power of defendant will pass away as speedily without as with dissolution, and that dissolution will cause far more loss and business disturbance than will attend the gradual re-establishment of competitive conditions by the [fol. 286] play of economic forces. If so, no dissolution should now be decreed."

So, what the Court did was to enjoin those unfair practices and retain the case in court and tell the Government, "Now, if this doesn't work, you come in and ask for dissolution."

Now, I think, if your Honor please, the economic factors in this situation are something that ought to be considered by the Court. Without any evidence on that question your Honor orders one corporation to divest itself of another one. I want to just show your Honor about this Rockwood and Cherokee situation. Rockwood has these little towns, some in East Tennessee and one up in Guthrie, Kentucky and two or three of them down in West Tennessee. They are scattered all over Tennessee. There is no contention—

I think Nashville is the central place to buy the pictures for those towns. It is the central place to have the headquarters. Cherokee is an affiliate. Your Honor will recall Parrott & Hendren were about to go broke and they formed this partnership, we will call it, with Rockwood. Now, if you divorce Cherokee and Rockwood you have got two very small chains of small town theatres. Now, I think it is well known that local men can operate theatres in their own home towns just like a local man can operate a filling station. He can take one theatre and if he has a fair chance, he can make a go of it but when you take several theatres together and one man tries to operate them he has to have enough of them where the overhead won't be so much per [fol. 287] theatre as to absorb his profits. You can take a very small corporation and it will make a go because of the local atmosphere, etc., or you can take one somewhat larger, but when you get to this intermediate class your economic hardships are such as to make it very difficult to survive.

Now, take the question of bookkeeping. You have got a central bookkeeping system and one man can look after your taxes, look after your leases—there are a lot of things in addition to purchasing films. Now, if you take these little chains, Cherokee and Rockwood, and leave them together with Newport, that only takes half of Mr. Stengel's time approximately to look after this central organization. If you cut these to pieces the problem of getting a central management is very difficult. Now, especially is that true in times like these with war going on. We think that a fair trial of the injunctive relief ought to be granted before that cutting apart of these little corporations is decreed. Now, as I say, that is a principle that has been followed and tried. They give a fair trial to the injunctive relief proposition, leaving the door open for the Government to come in, if the Government thinks that there has been a violation. It is rather difficult to conceive in these little towns of a violation of the Sherman Act by excluding competitors unless one of these theatres gets run down to where [fol. 288] some fellow will want to come in and compete. In other words, it is all little towns where it is recognized they are not big enough but for one theatre and so far as Rockwood is concerned, I think the proof shows it never had any competition but in one place and that was in Rogersville after Rockwood had bought out the Rogersville Theatre from Cumberland. Now, there is certainly no harm

in combining these situations in the purchase of films. Naturally they would get pictures cheaper for this reason. In other words, there is no question there of squeezing out a competitor or even obtaining a competitor although the decree leaves plenty of room for a competitor to come into a town that is big enough for two theatres. There is no question of anything except combining theatre situations in making a film deal so that you can get a little better price on the pictures from the distributors and that don't hurt anybody. The distributors save money, the exhibitor saves money and there is no competitive situation involved there.

Now, we think in cases like that the injunctive relief is certainly sufficient because your injunction provides the minute any competitor does come into one of those towns then that town must be left out of any circuit deal. Just the minute a competitor comes in that town is set apart from all those other towns, and when the competitor doesn't come in there, what harm is there in letting them pool [fol. 289] those theatres for saving overhead, buying pictures or any other purpose? We think that at least ought to be given a fair trial for some fixed period before the dissolution of these little theatres is decreed.

The Court: What do you want to say about that Lyric, Mr. Waller?

Mr. Waller: I just wanted to add to what Mr. Armistead said about that—I think these Crufes, the two children owning the other interest, certainly ought to have some rights in this situation, which have not been represented in this proceeding, and I think they are entitled to some hearing on the matter before——

The Court: Well, are they complaining about it?

Mr. Waller: They are not before the Court. They are not complaining.

The Court: They might be glad to have an opportunity to buy this interest.

Mr. Waller: I think your Honor can't pass on that.

The Court: As I say, I don't know.

Mr. Waller: For the reason, I say, I don't think this case is in shape now for your Honor to rule on any material right——

The Court: I can't go out and ask them to come in and tell me. If you want to file a petition in their behalf I will permit you to do it.

Mr. Waller: Here is this proposal we had, that in the [fol. 290] event the Government files a petition for dissolution all interested parties shall be given an opportunity to be heard whether now parties to this proceeding or not. Now, if your Honor overrules that suggestion and thinks the dissolution ought to be decreed immediately without the different parties——

The Court: You can just forget about the trial period under the injunction. I am not going to consider that at all. I am not going to have that matter before me. I am going to get rid of this lawsuit.

Mr. Waller: I think the proper solution would be to have a reference to determine the economic aspects of this Lyric situation so that your Honor will have some proof to go on and that can be determined or they can come in by petition.

The Court: I don't know. They may be glad of the opportunity to buy this stock.

Mr. Armistead: Then we want to file a petition.

The Court: All right, I will permit you to file it. How many days do you want to file it?

Mr. Armistead: We can dictate it tomorrow and send it down to Alabama and get it back by Saturday or Monday.

Mr. Wright: If the Court please, it seems like the filing of a petition at this time is premature. We have here a holding of the Court that the stock of this corporation [fol. 291] is illegally acquired and held by the Crescent Company. Now, a decree, it seems to me clearly, should be entered on the basis of that finding.

The Court: I am going to enter the decree and permit them to file a petition to try to show that it would work a hardship on them if that decree be carried out in that manner.

Mr. Wright: There is no objection. I thought perhaps you intended to postpone the entry of the decree until it was in.

The Court: No. Is there anything further? I understood you had some objections and proposed amendments to findings on behalf of Rockwood and two or three others, Mr. Waller.

Mr. Waller: They have been filed, your Honor. I understood that your Honor wanted to pass on those without oral argument.

The Court: How is that?

Mr. Waller: I didn't understand that your Honor wanted oral argument on those.

The Court: Gentlemen, I told you I would hear you on everything that you wanted to be heard on, provided, we could get it in one day.

Mr. Waller: I wrote your Honor a letter telling you we weren't going to argue them.

The Court: If you don't care to argue them then I will take them and act on them.

Well, I haven't heard from the amicus curiae yet.

[fol. 292] Mr. J. F. Caskey:

I am glad to sit at the same table with Mr. Wright. I don't prefer to be on his side of this controversy. The five distributors whom I represent, interested in this case and listed in the first twelve paragraphs are interested simply in clarity and preciseness. A great many years ago the Government commenced an anti-trust suit against several of them, which was prolix and ambiguous, and after the case had reached the Supreme Court Mr. Justice Holmes condoned the prolix and ambiguous language and ever since then anti-trust complaints have been prolix and ambiguous but we think that under the new rules there should be as much certainty and clarity as is possible.

Now, as I sat here today listening to the discussion and comment of the Court I think I understand this decree a great deal better than I did and I have studied it prior to this hearing. The searching comments of the Court and the concessions of the Government have made it quite a different document. We are only hopeful that in the final draft that clarity which has been attained by the discussion here today will be embodied in the language.

Our interest comes because we have to continue to deal not only with the various components of these circuits but also with their competitors. We would like to know as [fol. 293] best we can what we can't do. I appreciate it is no duty of either the Government or the Court to draw a chart for us to light our path but what your Honor says this morning about franchises is most illuminating. You stated that the one which had been entered into were invalid per se. Now, we know what that means because those documents are in evidence. And then your Honor abjured us not to make any more like them. Now, I understand

that if your Honor will just put that down on a piece of paper and sign it we will have a chart. There won't be any need for lack of clarity. And, of course, we will be able to compare proposed documents, if any such be contemplated, and I might say that I know of none, with what has been condemned, and, of course, the duty will be for us to determine at our peril whether what is proposed is like what has been condemned or is not.

Again, as to the maintaining of the monopoly, we are appreciative of the fact that the Court recognizes that in most of these situations there is no competition and that, therefore, our dealing with whoever shall be the purchasing agent or the new elements will not be a violation of the decree, because I say to you frankly that I am not interested in the law as to whether or not persons who have actual knowledge but who are not defendants can violate [fol. 294] a decree. We have no purpose to participate with anyone in the evasion of or violation of any decree of this Court whether we be technically bound by it or not, but the clarification that came from the discussion is helpful.

There again clarification came as to section (7). We think now we understand that Mr. Wright simply means that future violations of section 2 of the Act are prohibited. Of course, we would prefer that the language of the statute, which is monopolizing and not counsel's language, unreasonable monopoly, be used but I think now we have had a clarification of it.

So again as to the provision as to the covenants in restraint of trade for competitive situations, while that may not directly affect our dealings it, of course, does affect us if any adjudication by this Court is to be the basis of future litigation, and I think when it is appreciated, as your Honor has so clearly stated, that what is held to be illegal is that which was a part of the plan or scheme of monopolization, that there again we have light and clarity.

I am doubly appreciative of the opportunity to appear here as a friend of the Court and to have had this opportunity to say these few words.

The Court: We are delighted to have you, Mr. Caskey. We are sorry we couldn't keep you in this lawsuit.

[fol. 295] Now, Mr. Wright, if you have anything further to say about paragraph 20 now is the time to be heard.

Mr. Wright: I have only this to say and I can say it in five minutes: That if paragraph 20 is eliminated from your decree then if I were the Crute heirs or these other people who were going to have an opportunity to acquire these businesses as a result of this divestiture I wouldn't want to acquire it. Unless I had some assurance, unless these people have the assurance that this paragraph is intended to give them that Crescent would not move, or these other defendants cannot move into these towns again and put them through exactly the same course of conduct they went through before and caused them to sell out originally, then I would say there is very little purpose in attempting to re-create the competitive condition that prevailed at one time.

The Court: I agree with you in that respect. Is there any method by which that can be obtained without keeping the case in court?

Mr. Wright: The only other method, the only substitute for that is to simply say that the exhibitor defendants are enjoined and restrained from acquiring a financial interest in any additional theatres outside of Nashville. This provision there was put in for their benefit.

[fol. 296] The Court: Could you go a little further, as you have in some of these others, and say for the purpose of creating or maintaining a monopoly for preventing competition?

Mr. Wright: Well, I don't think—our experience has been that that, of course, is a general provision that is in the Act. Now, we have showed it at great length and it has taken two years to do it that way. The general prohibitions contained in the Act were not sufficient to prevent these companies from expanding into these areas and taking over the independents who tried to stand up to them and compete with them. That certainly has been demonstrated by this record and by your Honor's own findings and conclusions.

Now, on that record we are certainly entitled to a decree which goes further than just to say you can't do this again except where you do it in such a way as to violate the Act.

The Court: As not to violate the Act.

Mr. Wright: Yes, sir, but I say we think that without this——

The Court: Here is what I can't get in my mind. It is not a violation of the Sherman Act to have a large number of theatres. The number by itself is not a violation of the

Sherman Act. It is only when the number is used in such a manner as to obtain a monopoly and prevent free com-
[fol. 297] petition in the marketing of films in interstate, considered in connection with other matters, such as we have in this case, if that assumes anything of an unlawful aspect. Now, just the mere fact that some circuit has a large number of theatres is not a violation of the Act. They might have a large number of theatres and never be engaged in any unlawful practices, as contemplated by the Act. Now, here is a company——

Mr. Wright: That did engage in unlawful practices.

The Court: ——that did engage in unlawful practices all right. They have been enjoined from further engaging in any unlawful practices and the combination has been dissolved. All right. Now, I assume as I know to be a fact in this case, I assume that these gentlemen, of course, will do everything possible to avoid any further violation of the Act. As long as they do so, as long as they don't violate the Act, why should not they be allowed to have just as many theatres as they want?

Mr. Wright: If the Court please, it is a question of how many bites at the apple you intend to allow the particular defendants. Now, any individual at all is subject to the restraint of the Sherman Act, and if somebody, who had never gone through a trial, who was not indicted and brought in here and found guilty of—The Sherman Act itself, of course, prohibits them from going out and acquir-
[fol. 298] ing a theatre for the purpose of eliminating competition or for the purpose of establishing an unreasonable monopoly.

Now, as I say, the entire lawsuit has been, it seems to me, a very great waste of time if when we get all through all we have is a decree which tells these people, whom we have gone at great length to prove have built up an illegal monopoly by illegal means, that they are not subject to any more restraint than they were at the beginning of the suit or than anyone else is, who has never come in here.

The Court: No, I wouldn't say that. If they build up another monopoly they would be but if they acquire other theatres without necessarily building up another monopoly——

Mr. Wright: It is not a question of another one. It is adding to this one.

The Court: Or adding to this one.

Mr. Wright: They have already been found to have been acquired by illegal means. Now, I say that in order to make the decree effective against such monopoly the Court should go further than to simply enjoin them against further violations of the Act. There ought to be definite and positive assurance such as a provision like this, that they will not have an opportunity to again expand in this manner and then have such punishment as would occur to wait a two or three year trial. It seems to me we are at the point now [fol. 299] where definite preventive action is required, that is, that they should be in a position where they would have to come in and make an affirmative showing that they were not going to violate the Act in any case where they move into new territory and acquire new theatres. That is just an ordinary simple preventive measure.

The Court: How would that be done? Suppose they file a petition down here and want to buy a theatre in this town. All right, they say they are not going to violate the Act in any way; that it won't add to their monopoly, and I give them permission to do it. Then they come in again later and want to buy another theatre and so on and so on and so on until they have bought fifteen or twenty more theatres, and then they start violating the Act. They could do that just as easily after I had given them permission to buy these theatres as they could have if I just leave it out entirely.

Mr. Wright: We haven't, your Honor—there is a very important substantial difference in this. Before they can get your Honor's approval the party who is here complaining, his competitor who is going to be hurt, would have an opportunity to come in and be heard. He would be given a hearing and your Honor would have the question before you before the damage was done. Of course, it is perfectly true that under the law, after the law, after the acquisition [fol. 300] is made, if the competitor is run out of business we can come in and file a lawsuit as we have done here, and after we make the necessary proof, then we get a decree.

The Court: This though would limit that to acquiring any additional theatres outside of Nashville where there is a theatre in operation.

Mr. Wright: Where there is already a theatre in operation because they might want to acquire a theatre in some town or build a theatre in some town that doesn't have a theatre.

The Court: If they do, I think the people there ought to have the right to have a theatre show and see pictures.

Mr. Wright: I think your Honor is correct in that insofar as it is a question of furnishing facilities to people that haven't had them before. That, of course, should not be discouraged but I don't think this provision does that. That kind of modification would certainly be preferable to the elimination of any restraint.

The Court: Anything further?

Mr. Wright: Just one thing that is occasioned by Mr. Caskey's remark. I don't understand that I have conceded here or made any concessions with respect to what the decree means. Anything that has been said here by me has been an interpretation in my language. I thought I made it very clear that what I attempted to put into the decree [fol. 301] was your Honor's language to comply with your Honor's decision.

The Court: I think Mr. Caskey made an unfortunate choice of words when he intimated that you conceded anything. (Laughter.)

Mr. Wright: As far as Mr. Caskey is concerned and his clients, we have a suit pending against those clients and any relief that we are entitled to against them we intend to see that we get there, so I think the question of how this decree here affects them is purely academic.

The Court: What he means is that he had interpreted the decree differently from the way you interpreted it.

Mr. Wright: It is so understood and I have no objection to him saying that.

Mr. Waller: Can we hand in our draft of the decree tomorrow morning? We had two or three insertions to put in as a result of the discussion.

The Court: Yes, sir, that will be all right. I won't have time to work on it before tomorrow anyway.

Now, Mr. Wright, we had some argument in this matter two or three weeks ago when Mr. Raftery was here relative to the phase of the case concerning United Artists. He has offered a short suggestion here that I will hand to you. I don't know whether you may have it. Was Mr. Wright furnished a copy of this, Gentlemen?

[fol. 302] Mr. Cornelius: Yes sir, if your Honor please. General Frierson did.

Mr. Wright: I have a memorandum of law that was submitted by the United Artists Corporation, if that is what your Honor referred to.

The Court: That was relative to the injunction?

Mr. Cornelius: Yes sir.

The Court: He said you shouldn't issue an injunction against him. Do you want to be heard on that?

Mr. Wright: I want to be heard to the extent your Honor wants to hear me. As I understand his point, it is simply that inasmuch as competitors were eliminated in those situations, therefore, that your Honor ought to forget all about that.

The Court: I am not particularly impressed with his proposition on the injunction but he did bring up a question in regard to the costs, which I think—of course, that is in the discretion of the Court. I don't see that his client should be onerated with all the costs of this cause.

Mr. Wright: Now, as to costs, if your Honor please, our practice is simply to assess costs all against the parties or whatever defendants are liable, and then I assume that any adjustments made as between the defendants may be made and should be properly made at a hearing, at a later hearing in which the Government would not necessarily be in- [fol. 303] terested. That is, the costs, I think, in the first instance should be taxed against all the defendants and then the Court is in position to make any equitable distribution of those costs that is thought to be desirable but I don't think that problem comes up in the first instance or is one that the Government is concerned with because as far as I know all these defendants in the suit are solvent. I don't think we have any particular interest in the attempt to collect all or any of the costs from anyone particular defendant and that whatever division your Honor wishes to make as to costs among the several defendants would be a matter in which we would have no interest. We would be entirely agreeable to any such division as you work out on a hearing between them.

The Court: Now, he says that—have you seen this memorandum of proposed changes in the findings and conclusions?

Mr. Wright: Yes sir, I have a copy of it.

The Court: Do you want to be heard on that?

Mr. Wright: Proposed amended findings of fact——

Mr. Cornelius: No. Mr. Wright, that was withdrawn.

The Court: He withdrew the one that was set for the date in question, April 14th, and they had another one which just contained two changes.

Mr. Cornelius: We furnished General Frierson with two copies of it.

[fol. 304] The Court: Mr. Clerk, will you have assembled all of the objections and amendments to the findings filed by the defendants and put them in one envelope so I can have them sometime next week?

The Clerk: All right, Sir.

The Court: Who all filed them, Muscle Shoals, Rockwood and some other defendants, didn't they?

The Clerk: I am not able to say.

Mr. Waller: Cumberland and Rockwood.

The Court: Is that all?

Mr. Waller: Crescent's haven't been completed.

The Court: Do you wish to file any?

Mr. Waller: The truth of the business is, we just didn't have time to get to it. We thought we would do it within ten days after the decree.

The Court: You will have ten days after the entry of the decree.

Mr. Waller: Unless your Honor would rather have it before.

The Court: No, I want to get this decree entered and we will get that out of the way. Then I won't pass on any of these findings until ten days after this decree is entered. Then you file your petition within that time for these heirs who are in this Lyric Theatre.

Mr. Wright: If the Court please, I would like to say a few [fol. 305] words about this last memorandum and the change that he proposes in finding 112. The significance of that escapes me.

"112. For the most part theatres operated by independents in competition with the defendant exhibitors and their affiliates" and he proposes to insert in here after the words "for the most part", "except as specifically found herein with respect to Henry's Theatre in Union City and the independent theatre in East Gadsden, Alabama."

The Court: What I meant by that was, for the most part theatres operated by them have been greatly inferior to

those operated by the defendant. The proof shows that Henry's theatre down at Union City and this theatre that he refers to at Gadsden were not inferior.

Mr. Wright: Well, it shows that even without this insertion. There is no conflict between your Honor's finding and that fact, in any event. I don't see what the insertion accomplishes. The finding is accurate as it exists. I have not checked the record enough to know off-hand whether those are the only two in which there were supposed to be a finding that the independents were superior but in any event I find it there as to comparisons, and I don't see any occasion to try to summarize the different situations you cited in this finding 112. I just don't see what he is trying to accomplish here by this.

The Court: Well, he had one thing in mind and Mr. [fol. 306] Waller had the same thing in mind and they got in a huddle here about that on the floor and both of them agreed on that proposed change, as I recall.

Mr. Waller: Here is what it was. There was no express finding that the Rogersville Theatre, Mr. Miller's, was inferior to the Cumberland Theatre and there were not express findings in several of those situations but there were express findings in those two, and as I understood that, what Mr. Raftery was asking for was an express finding in the situation ~~and your~~ Honor stated that rather than to make an express finding on these others you would just exclude those two.

The Court: I don't see that that is a whole lot different.

Mr. Wright: I fail to see the materiality of it myself. The change in the conclusion there in No. 13 is simply a change in your Honor's decision.

The Court: I don't think he wanted—Well, that was based upon the theory, as I understood it, that he would agree with him on his principle of law that the injunction should not issue against him, if I recall correctly. Is that right?

Mr. Cornelius: No, I think on that—to refresh your Honor's recollection, and I think that we are rather at a disadvantage because April 19th was set for a hearing on this matter and I thought General Frierson made a very complete reply on the part of the Government. Now, when [fol. 307] our big gun is withdrawn here we have been forced to depend upon a pop-gun, but I think I can refresh

your Honor's recollection a little bit on what Mr. Raftery had in mind.

The Court: That was on the combination, wasn't it?

Mr. Cornelius: Now, if your Honor will notice 13, paragraph 13—

The Court: In the conclusions?

Mr. Cornelius: Yes sir, on page 148 of this printed copy. It is paragraph 13 of the conclusions.

The Court: Is that where you were in some undesirable company?

Mr. Cornelius: Yes sir. Here was his argument: that he did not combine with each of these major distributors and you put him in a class, when he was found guilty, when Mr. Raftery's client was found guilty, in an isolate case. Now, then, he pointed out this, that section 17 specifically finds wherein United Artists violated the law and, therefore, they should not be mentioned in this general provision.

Mr. Wright: I think the answer to that, your Honor, is in the fact that paragraph 13 does not purport to be a conclusion of law on the part of United Artists. No. 13 refers to the manner in which the defendant exhibitors have violated the Sherman Act and that was why—there is no duplication in any sense between 13 and 17.

The Court: It don't say the distributors have violated it at all, it says—well, it would infer that. It says the dis- [fol. 308] tributors or the exhibitors have violated the Sherman Act by combining with each other and with the major distributors, Paramount, Fox, Warner, Loew's, RKO and United Artists.

Mr. Cornelius: Now, United Artists only combined with Cumberland, Rockwood, Rosenbaum and Sudekum. You have got that in 17. Now, you put them up here in 13 and it is much broader than that, I am sure you intended to find from the evidence. I don't see [illegible]y the Government objects to it. You have got there wherein United Artists violated the Sherman Act by combining with these specific defendants. Now then, 13 is certainly a mis-statement. We didn't combine with all the exhibitor defendants, and that is the clear inference from 13.

Mr. Wright: I respectfully submit, your Honor, that it doesn't seem to me that United Artists has any complaint about 13 because that is the whole conclusion as to what the defendant exhibitors did and it is not made the basis for

the entry of any injunctive provision against United Artists at all.

The Court: I understood him to say that, if I recall, that if the Court would re-write that and make it read that the defendant exhibitors have violated the Sherman Act by combining with each other and with the United Artists and the major distributors, Fox, Paramount, Warners and Loew's, it would be satisfactory.

Mr. Wright: This paragraph 4 of the decree and paragraph 13 only enjoin the defendant exhibitors. It does not [fol. 309] enjoin United Artists or any distributor from doing anything. That is why, it seems to me, that any objection from United Artists as to either that conclusion or the paragraph that it is based on is wholly academic. As to United Artists, I feel that they escaped very lightly in the conclusions and in the decree. There is a finding on the Gadsden situation, which, it seems to us, clearly called for a conclusion of violation.

The Court: That happened after the lawsuit was filed.

Mr. Wright: That is quite true but nevertheless that was within the issues.

The Court: No, I don't think I can grant any relief that happened after the filing of the suit unless it was brought in by a proper amendment.

Mr. Wright: I think, if your Honor please, we went all through that before we introduced the Gadsden proof and there was, as I recall, an amendment filed which charged United Artists with continuing violations that followed along the Gadsden situation after the filing of the suit, and there is a finding of fact to the effect that United Artists and all the other distributors had most unreasonable clearance on the Dixie there.

The Court: Where is the Gadsden situation found in this finding?

Mr. Wright: The finding that I was referring to is No. 100, the last two paragraphs or next to the last paragraph of 100. It is at page 87 of the printed copy. I don't know [fol. 310] what it says in the other one.

The Court: Well, I say there: "Other than the situation resulting from the execution of the franchises in question, the Court views evidence relative to the Gadsden area as significant only in comparison of the preference accorded the Ritz Theatre in Alabama City."

Mr. Wright: I take it that that preference was, in effect, an illegal discrimination which had resulted from the application of pressure by Crescent upon these distributors somewhere similar to the Interstate Circuit situation but I don't wish to argue the point here because we assume that your Honor had given the matter consideration and had decided——

The Court: I considered that part of it and I considered the fact that all that had transpired since the lawsuit was filed. Apparently I overlooked the amendment in that respect. I didn't recall any amendment being filed and I didn't see it in the file. I don't know that I searched for it particularly. I just couldn't keep all those things in mind.

Mr. Wright: Yes sir. (Looking for amendment) Well, I can't put my finger on it right now.

The Court: I know I had in my mind that that was something that happened after the lawsuit was filed.

Mr. Wright: That is right, it did. There is no question about that.

[fol. 311] The Court: For that reason I didn't pay any particular attention to it.

Mr. Wright: I don't think it is of great importance except to show that the, as they say, relief that was granted against United Artists was less than co-extensive with the violations that they had been involved in, and as far as they are concerned, it seems to me that United Artists have no ground for complaint whatsoever as to the limited extent to which they have been put in this decree.

The Court: I don't think they are complaining very much. Suppose you let me have that finding back so that I can keep the record, the one I handed you——

Mr. Cornelius: Do I understand your Honor to say that you were not very much impressed with Mr. Raftery's argument that no injunction should be issued because those two situations had occurred and had been passed?

The Court: I suppose you did, Mr. Cornelius.

Mr. Cornelius: Well, I was just amazed because I was very much impressed when I heard his argument

The Court: I was more then than I am now myself.

Well, Gentlemen, if you send these matters to me, please mail them to me at Columbia because I will be in Columbia all next week and I will take this with me and I will try to write the decree next week.

[fol. 312] Mr. Wright: Couldn't we write it now?

The Court: They say they have got some particular matters that they want to incorporate in this decree. I thought I had them all here. I got part of it from this other order and I understand that there was something else that they wanted to put in.

Mr. Waller: We can have ours to you tomorrow, your Honor.

Mr. Wright: Insofar as these motions to amend and findings are concerned, of course, the entry of the decree doesn't necessarily have any effect on those. That is, as I understand it, retains jurisdiction under 52-(b) to make any changes in the decree which may be occasioned by such changes as you may want to make in your findings or decision. I understood that here we had covered completely the question of whether or not the decree that was presented did conform to the decision that was made, and if it did, I assumed that it was going to be entered or was going to be made to conform at this hearing.

The Court: I am ready to act on it if counsel want me to act on it. They asked for an opportunity to present those changes in one or two paragraphs. I don't want to cut them off from that opportunity.

Mr. Wright: Excuse me, may I ask, were those changes offered based on changes in the decision or changes which you regard as necessary to make the decree conform to the [fol. 313] decision that rendered?

Mr. Waller: Based on the discussion this morning. We simply want to adopt—not any change except to conform with the discussion today and the Court's rulings on the interpretation.

The Court: Just what is it that you wish further to present? I have your request here as to paragraph No. 17, which I am inclined to grant, relative to Mr. Stengel, or which I will grant, as far as that is concerned, in that he shall hold office in the corporation that he chooses to. Now, I have your proposed decree which embodies that and which I can dictate from your language. There was something else, I don't recall just what it was, one particular paragraph.

Mr. Armistead: It was a paragraph that I suggested be added right after paragraph 12, which we wrote out in longhand and which we stated we would have transcribed.

Mr. Wright: That was the paragraph, if your Honor re-

calls, which undertook to limit the scope of the injunction so that it would only apply to precisely similar violations to those which have occurred in the past. I didn't understand that your Honor was given such limitation as that consideration.

Mr. Waller: Shall I read that to your Honor?

The Court: I will prefer for you to hand in what you want and I will get in my office by myself and have it there [fol. 314] and write my own decree. I have got a pretty good idea of what I have in mind, but it is five o'clock now and I am getting a headache and I don't feel like doing a whole lot more on it.

Mr. Wright: Your Honor, there is no particular occasion for me to stay around then, I take it. I would stay over if there was any further use.

The Court: I don't think it would be necessary. I have heard your position about these matters, and I agree with you in most all matters except one or two relative to paragraphs 16 and 18. I think I will take those out, and paragraph 20 I am going to change and make it read that they are enjoined and restrained from acquiring any financial interest in any additional theatres outside of Nashville, Tennessee where there is already a theatre operation, in a town where there is already a theatre operation.

Mr. Waller: That is without the affirmative showing. Is that what is meant?

The Court: That is leaving off of there affirmative showing before the Court that any such acquisition would not unreasonably restrain competition.

Mr. Waller: What I mean, the jurisdiction of the Court would permit us to come in any time, one of these defendant exhibitors come into court and get permission to accept an offer from a small theatre to sell out, if it would not unreasonably restrain competition?

[fol. 315] The Court: I don't know as it would. Why would it be necessary to get permission of the Court?

Mr. Waller: What I meant was, suppose some fellow in a town has got a theatre and he wants to get out of business, sell out, and he wants to sell to the highest bidder and he offers it to us with no predatory practice involved, would that decree prohibit us from buying that theatre?

The Court: The decree, as it is drawn now, would permit you, yes sir. Probably that language should be limited,

limited to the extent that no theatre may be acquired in any town for the purpose of entering into competition.

Mr. Wright: Well, I think, your Honor, as you originally stated, that that serves a very useful purpose in removing any temptation to use predatory practice to acquire a theatre in a town where there already is one. It seems to me that the prohibition serves a very salutary purpose.

The Court: That wouldn't necessarily mean that they couldn't acquire that theatre, would it?

Mr. Wright: I think that would be desirable though to give the independent operator who was there some assurance that he was not going to be subject to pressure from Sudekum——

The Court: He wouldn't be subject to any pressure if he had a theatre there and he knew Sudekum couldn't come in and build one in opposition to him. There wouldn't be any [fol. 316] reason why he would want to sell out.

Mr. Wright: Except, of course, he has other men exerting pressure such as clearance through surrounding towns. I would regard it as certainly weakening of the provision that your Honor suggested.

The Court: Well, it might not but on the other hand, it may be in restraint of trade itself, the decree of the Court might be. Suppose a man had a theatre that he wanted to sell and he couldn't find a buyer for it in this town but Mr. Sudekum would be willing to buy it and would pay him value for it, pay him more than any buyer on the limited market in that town would pay him, why couldn't he sell it to Mr. Sudekum?

Mr. Wright: Well, if the Court please, that gets down to the heart of this matter. I suppose there is not any question but that Mr. Sudekum can afford to pay more for any theatre in any of these towns, because he would make more money out of it by combining with the buying power he has got in his affiliated circuit. The minute you open the door on situations of that kind then the decree does not perform its function in preserving such independent competition as may exist or may arise in this area without any coercion at all.

Mr. Armistead: May it please the Court, if we follow the argument of counsel and a decree is entered in this case as he contends should be entered your Honor will be violating the Sherman Act. That is exactly right.

[fol. 317] The Court: I am cutting off a man's market.

Mr. Armistead: Yes, sir, you are cutting his market off, you are cutting off competition, people that want to buy and compete with each other, and he can't do it.

Mr. Wright: There is no question about that, your Honor, but that is implicit in any attempt that is made to prevent the expansion of a monopolistic combination such as you have got here. There is no question but that the monopoly can make more out of a theatre than an independent and can pay the best price for it. If you go on the assumption that that fact justifies the acquisition of all independents by the monopoly then, of course, the whole procedure does not serve any useful purpose and the thing to do is simply get the independents into the Sudekum fold at sometime and keep them there. I take it the theory upon which the relief has been granted here is that it is desirable to prevent that from happening and to keep and preserve such independent competition as now exists or may spring up in the future and it can't be preserved if arguments of that kind are recognized, that, well, Mr. Sudekum can make more money out of a theatre than anybody else so he ought to have it.

The Court: I am not looking at it from Mr. Sudekum's aspect. I am looking at it from the aspect of the owner of a theatre in a small town that wants to sell and he can't find anybody in his town that wants to purchase it, nobody that [fol. 318] will purchase it. In a situation of that kind where there is only one theatre there why shouldn't he be allowed to sell it to Mr. Sudekum?

Mr. Wright: He certainly wouldn't have a market for it or there wouldn't be any other buyers unless the buyers had some assurance that they were going to be allowed to compete there on even terms with Mr. Sudekum. Unless he has that assurance I don't suppose you can make any such market. Now, any time you try to accomplish—wherever you put any restrictions on the monopoly you, of course, limit the independent's right to sell out to the monopoly but that limitation is done in the interest of the public. That decree that is to be entered here is being entered to vindicate the policy of the Act and the policy of the Act is to keep the independent in business whether he thinks he can make more money by selling out to the monopoly or not. The purpose of the decree is not to enable him to make a profitable sale to the monopoly but it is to serve the public interest by keeping the independent in business.

The Court: All right, Gentlemen, I probably won't get to work on this matter before the first of next week, so when will you be ready with the matters, now, with your proposals?

Mr. Armistead: I expect to have it tomorrow. I am starting it right now.

[fols. 319-325] The Court: If you will send it down to me tomorrow it may be that I can get this matter behind me on Saturday, because I won't get interrupted by myself.

Is there anything further at this time?

Adjourn Court until 9:30 Monday morning at Columbia.

[fol. 326] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION OF DEFENDANTS, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., AND KENTUCKY AMUSEMENT COMPANY, INC., FOR MODIFICATIONS IN FINDINGS AND CONCLUSIONS OF THE COURT FILED MARCH 3, 1943—Filed March 23, 1943

Come the defendants, Rockwood Amusement Company (hereinafter referred to as Rockwood), Cherokee Amusements, Inc. (hereinafter referred to as Cherokee), and Kentucky Amusement Company, Inc. (hereinafter referred to as Kentucky), and respectfully petition the Court to modify the findings and conclusions filed on March 3, 1943 in the respects hereinafter stated (the paragraph numbers being taken from the aforesaid findings and conclusions of the Court):

Findings

18. Change: "The equipment for the Tracy City theatre was given to Stengel by Sudekum" to: "A small part of the equipment for the Tracy City theatre was given to Stengel by Sudekum."

19. Eliminate Chickasaw Amusement Company, Dickson Theatres, Inc. and Mid-State Theatres, Inc., because there is no evidence that Rockwood owned any interest in them, and supplement by adding the following paragraph:

[fol. 327] "At no time has Rockwood had theatre competition in any town except in Rogersville, Tennessee and Cen-

tral City, Kentucky. In 1938, when Rockwood acquired the Rogersville theatre from Cumberland Amusement Company, W. P. Miller was operating a theatre in a converted warehouse and the said Miller sold his equipment to Rockwood later that year, becoming manager of the Rogersville theatre. Miller's theatre had no sewerage connection and its heating system had been improvised by Miller who had rigged up a 20 H. P. threshing machine boiler in an outhouse and Miller had been competing in this theatre with a new up-to-date theatre which had been constructed by Cumberland in 1936. In 1937 Rockwood acquired the Selba theatre in Central City, Kentucky, at which time F. M. Pittman was operating a competing theatre known as the Empress, and about a month later Pittman sold the Empress to Rockwood. In neither of these instances is there any contention or was there any evidence that any distributor discriminated in favor of Rockwood and against the competition in making film deals."

20. Supplement by adding the following paragraph:

"In 1940 Rockwood itself was operating theatres in thirteen towns having an aggregate population, according to the 1940 Census, of 41,193."

21. Supplement by adding the following paragraphs:

"At no time has Cherokee had theatre competition in any town except about three days in Spruce Pine, North Carolina. Cherokee purchased the equipment in the competing theatre at the request of the owner, J. A. Taylor, who testified that he was afraid that film rentals would go up with two theatres in the town. The only instance where plaintiff now contends that there was discrimination by any distributor in favor of Cherokee is that Paramount included Spruce Pine in a franchise agreement with Rockwood and [fol. 328] affiliates covering 1937-1938 and subsequent product. The facts on this point as found by the Court will be subsequently stated.

"In 1940 Cherokee was operating theatres in eleven towns having an aggregate population, according to the 1940 Census, of 22,847."

25. In the second paragraph eliminate the sentence "As a part of the deal, Parrott & Hendren agreed that Chero-

kee would pay Sudekum a salary of $200.00 a week for his advice and assistance in running the business." This language is adopted from the Government's brief and is contrary to the evidence, which was that the arrangement with Mr. Sudekum was made at a considerably later date and was not in any sense a part of the deal with Parrott & Hendren.

26. In the first sentence eliminate the phrase "a subsidiary of Rockwood" and in the third sentence eliminate "and shortly thereafter, Ruffin was sold a half interest in Chickasaw." This language is adopted from the Government's brief and is not supported by anything in the record. The facts are that Stengel, individually, owns 50% of the stock in Chickasaw and that Ruffin owns the other 50%, having purchased it from one Frank Shepherd.

32. Eliminate the words "negotiated by Sudekum" in the paragraph captioned "*Columbia*", because there is no evidence that the May 3, 1939 deal with Columbia for ten Rockwood and Cherokee towns was negotiated by Mr. Sudekum. The language to this effect is adopted from the Government's brief and is based entirely on incompetent and hearsay evidence, viz., certain tabulations (Exhibits [fol. 329] 3, 4 and 5) filed by Columbia Pictures Corporation in response to discovery interrogatories propounded by plaintiff, in which Sudekum was erroneously listed as the person who negotiated this deal.

Eliminate the first three sentences in the paragraph captioned "*Loews*". These sentences are adopted from the Government's brief and merely summarize a letter written by one Loews representative to another in 1937; and such a letter is not competent evidence as to the truth of any statement of fact therein contained. There is no other evidence that Mr. Sudekum closed this deal for the so-called "Sudekum Junior Circuit".

In the paragraph captioned "*Paramount*", eliminate the phrase "and that Sudekum did not confine himself to the Crescent situations is shown by his insistence that Huntingdon, a Rockwood town, be granted clearance over McKenzie (Ex. 151)." This language is adopted from the Government's brief, which cites Exhibit 151, a letter from one Paramount representative to another which is not competent evidence of any fact stated therein. There is no other evidence that Sudekum insisted that Huntingdon be granted clearance over McKenzie.

35. Eliminate the phrase "In addition to the joint negotiation and execution of licensing agreements" in the first paragraph, because there is no evidence of such joint negotiation. Eliminate the phrase "as a virtual branch of the Crescent business" in the second paragraph, because there is no evidence that Crescent has any interest whatever in Rockwood.

36. Eliminate the last sentence in the second paragraph in which reference is made to "the obvious fact that Stengel and his Rockwood Company were nominal owners of Sudekum's interest in the Rockwood theatres, or so-called Sudekum Junior Circuit". This language is adopted from the Government's brief and there is no evidence whatever in [fol. 330] the record in support of said statement.

37. Eliminate in the second paragraph the sentence "Moore then spent $8,000.00 in improving his theatre." And in the third paragraph eliminate the phrase "subject to acceptance by Mr. Sudekum". The language in question is adopted from the Government's brief and there is no evidence in support of same.

Supplement the second paragraph by adding: "Stengel had been approached by Mr. Dunlap, the Worshipful Master of the Masonic Lodge at McKenzie, who had attempted to interest Rockwood in the McKenzie theatre after Rockwood had acquired a theatre in Huntingdon, a neighboring town, on the ground that Moore was delinquent in his rent and that the people of McKenzie were desirous of having better theatre facilities which could be afforded only by making extensive improvements of the building pursuant to a long-term lease. Moore had told Stengel that he would make extensive improvements and convert his theatre into an up-to-date theatre if Stengel would abandon his negotiations with Mr. Dunlap, and it was then that Stengel agreed to do so. Moore did arrange for a long-term lease with the Masonic Lodge and paid in advance rentals aggregating $3,500.00 and also spent about $2,000.00 in moving some pillars in the theatre building which had been obstructing the vision of the audience and some celotex on the wall. He also spent about $3,000.00 for new booth equipment, but failed to convert the theatre into an up-to-date theatre or to make any changes of substance, with the exception of the removal of these pillars and the purchase of the new booth equipment."

59. Eliminate the next to the last paragraph, which is adopted from the Government's brief and summarizes the flat rentals but ignores the percentage pictures and hence is misleading. Eliminate the last paragraph, which is adopted from the Government's brief and is a mere argument to the effect that Paramount lost money by switching [fol. 331] the runs as between Huntingdon and McKenzie. Reference is made to a letter from one Paramount representative to another which was not competent evidence of any fact stated therein. Supplement by adding, in lieu of said two paragraphs, the following:

"No issue of discrimination by Paramount against Moore was raised in the pleadings or bills of particular filed by plaintiff and cannot be considered as a basis for relief. On the facts, however, there is no evidence that Rockwood would have included Huntingdon in the franchise at the film rentals actually agreed upon, which were stepped up each year, except for the understanding that Huntingdon would have clearance over McKenzie for the succeeding term of the franchise. Paramount may have reasonably expected to receive larger aggregate film rentals from Huntingdon and McKenzie by giving Huntingdon clearance over McKenzie than *vice versa*, for the reason that Huntingdon was the county seat and the theatre at Huntingdon was larger and superior in every respect to the theatre at McKenzie. This was purely a question of business judgment on the part of Paramount, and Moore in his testimony conceded that clearance of either town over the other was simply a matter of trading and paying for the privilege, and that either town which could get it was entitled to clearance over the other." (Moore, R. p. 748).

60. Supplement the first paragraph by adding the following sentence: "There is no evidence that Gorman had any authority from Cherokee, at this or any other time, to make any such representations or to negotiate for the purchase of this theatre."

Supplement the third paragraph by adding immediately preceding the last sentence thereof the following: "The bulk of this $4,000.00 went into a heating system and into a new front for the building, which were permanent improvements, so that Taylor got his money back and also kept the [fol. 332] improvements. Taylor was Ford dealer and in

the real estate business and had operated this theatre only because his lessee had given it up."

61. In the second paragraph eliminate in the second sentence the phrase "to take its product away from Taylor commencing with the 1938-1939 season and". This language is adopted from the Government's brief and is not supported by anything in the record. Supplement by adding at the end of said second paragraph the following:

"The record is silent as to whether Taylor's lessee, Mr. Gutscholk, had complied with his 1937-1938 contract with Paramount or whether Taylor himself, after he took the theatre back, assumed Gutscholk's contract with Paramount; and the record is also silent as to whether Taylor ever had any idea of negotiating for 1938-1939 product. Taylor testified as a witness for plaintiff that he sold out because he was afraid the film companies would raise the price of pictures with two theatres in the town." (Taylor, R. pp. 209-210)

102. In the second sentence eliminate "pursuant to Steuged's instructions". This language is adopted from the Government's brief and is in direct contradiction of Pittman's testimony on direct examination as a witness for plaintiff. Change "impression that Crescent was planning to come into the town" to "impression that some corporation with which Pittman was connected was planning to come into the town"; and add immediately following this sentence the following additional sentence: "Pittman's home was in Greenville and if Rockwood had a theatre in Greenville, Pittman expected to be the manager and Pittman initiated the plan that Rockwood acquire Head's theatre". (Pittman, R. pp. 684-685)

[fol. 333] 103. In the last sentence change "because he realized that he could not compete with Sudekum" to "because he feared that the Empress Theatre could not successfully compete with the Selba Theatre if the latter were under a competent management". (Pittman, R. pp. 678-679)

113. Supplement by adding the following additional paragraph:

"Within three or four years preceding the trial, Rockwood and Cherokee experimentally introduced popcorn sales

and screen advertising in their theatres. During 1939 popcorn machines were put in every theatre, although popcorn sales were made in only seven out of twelve Rockwood towns during the entire year of 1939. Nevertheless, in 1939, popcorn sales and screen advertising accounted for 34.4% of Rockwood's net profit (exclusive of dividends) and in several Rockwood and Cherokee towns there would have been a substantial loss, instead of profit, had it not been for popcorn sales and screen advertising. (Defendants' General Exhibit 216, Stengel, R. pp. 5255-5256 and 5281-5282.) In these small towns, the Saturday business accounted for approximately 40% of all receipts and on Saturday it was almost the invariable custom to show a Western picture which was not produced by any of the distributors alleged in this case to be conspirators (Defendants' General Exhibit 215, Stengel, R. pp. 5267-5273). It would thus be impossible to attribute any definite or even any approximate proportion of the profits of defendant exhibitors to advantageous film deals made with the distributors who are alleged to have conspired with them. Entering into the causes for the profits of defendant exhibitors are many elements of business acumen and good management which are wholly aside from any advantages accruing from film deals. Defendant exhibitors have provided good theatres and good entertainment and have devoted much time and effort in the exploitation of pictures and in giving [fol. 334] the public good entertainment in good and comfortable theatres."

118. Eliminate the entire last paragraph or, in any event, eliminate "Spruce Pine" and "Newport". This paragraph is adopted from the Government's brief and is argumentative and misleading. There is no evidence whatever that the Paramount franchise had any effect on independent competition at Spring Pine or Newport (which are the only two towns mentioned in which Rockwood, Cherokee or Kentucky or any affiliate operates a theatre), and no such issue is properly made in the pleadings and bills of particulars. The theatre at Newport is owned by a corporation which is not a defendant in this case and in which Cherokee owns only a half interest.

119. Eliminate the entire first paragraph or, in any event, eliminate the reference to Smith. This paragraph is adopted from the Government's brief and is argumentative and mis-

leading. There is no evidence that the repeat run clause in the Paramount franchise prevented Tim Smith from buying second run Paramount features in Newport, and (as above pointed out) the theatre at Newport is owned by a corporation which is not a defendant in this case.

In the second paragraph eliminate all but the first sentence. The paragraph is quoted from the Government's brief and the last two sentences are argumentative and misleading. Rockwood operated theatres in small towns, not large enough for two theatres, and the repeat-run clause had two perfectly legal and valid purposes: (1) to enable the exhibitor to eliminate a poor picture and repeat an especially good picture in place of it, which was to the advantage of the theatre-going public; and, (2) to fix in advance the film [fol. 335] rental on such a picture so that the exhibitor would not be required to negotiate with the distributor on terms after the picture had proved to be a box-office attraction.

Conclusions

9. Eliminate Rockwood Amusements, Inc. and Cherokee Amusement Company, Inc., for the reason that there is no finding or evidence justifying a conclusion that said defendants have created or maintained an unreasonable monopoly of the business of operating theatres or that they have combined closed towns with competitive situations in licensing films. The undisputed evidence is that these corporations operate theatres only in very small towns and since all of them are so-called "closed towns", they could not possibly combine closed towns with competitive situations in licensing films. The evidence also is that these two corporations together operate theatres in only 24 towns having an aggregate population of ~~only 54,000~~, according to the 1940 Census.

10. Eliminate Rockwood, Cherokee and Kentucky from this paragraph for the reason that there is no finding or evidence that any independent theatre has been prevented from competing with any of them by reason of any franchise agreement with Paramount, Fox or Warner Bros. The only competition any of said three corporations has had was (a) a few months in the early part of 1938 in Rogersville, Tennessee when Miller competed with Rockwood; (b) about a month in the latter part of 1937 in Central City, Kentucky when Pittman competed with Rockwood;

and (c) a few days in December, 1937 in Spruce Pine, North Carolina when Taylor competed with Cherokee. As to Miller in Rogersville, he had both Fox and Paramount product [fol. 336] when he sold out, and Rogersville was never included in a Warner Bros. franchise until after he had sold out. In the other two situations there was no contention made in the complaint or bills of particular and no evidence that either the defendant exhibitors or the independent competitor had done any negotiating for any product during the short period of competition; and there was no contention or evidence that any franchise had prevented the independent from obtaining product.

11. Eliminate Rockwood and Cherokee, because there is no finding or evidence justifying the conclusion that either of these defendants have combined with each other or with anyone else for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves.

12. Eliminate Rockwood and Cherokee for the reason that there is no finding or evidence justifying the conclusion that said defendants have combined with each other or with anyone else for the purpose or with the effect of eliminating, suppressing or preventing independent competition.

13. Eliminate Rockwood and Cherokee for the reason that there is no finding or evidence justifying the conclusion that they have combined with each other or with Paramount, Fox, Warner, Loews, RKO or United Artists, in licensing films for the purpose or with the effect of maintaining theatre monopolies or preventing independent theatres from competing with them.

17. Eliminate Rockwood for the reason that there is no finding or evidence justifying the conclusion that Rockwood combined with United Artists Corporation to eliminate independent theatre competition in Rogersville, Tennessee, or at Athens, Alabama.

[fol. 337] 19. Eliminate Rockwood and Cherokee (and also Kentucky if Kentucky was intended to be included), for the reason that there is no finding or evidence justifying the conclusion that said defendants have conspired in restraint of trade and commerce with anyone.

20. Eliminate Rockwood and Cherokee (and Kentucky if intended to be included), because there is no finding or evidence justifying the conclusion that said defendants have been guilty of any violation of the Sherman Act warranting the injunctive relief and other relief outlined.

21. Eliminate Rockwood and Cherokee (and Kentucky if intended to be included), because there is no finding or evidence justifying the conclusion that said defendants have been guilty of any violation of the Sherman Act warranting the injunctive relief and other relief outlined. The Court's attention is specifically directed to the fact that this is an equitable and not a criminal proceeding, and any relief granted should be equitable in nature and not penal. That is to say, any relief granted should be for the purpose of preventing a repetition of any unlawful acts and not for the purpose of punishing the parties for unlawful acts found to have been previously committed. To require Rockwood and Cherokee to dispose of the stocks of other corporations owned by them would serve no purpose or benefit to the public, but would amount to confiscation of the property of said defendants and would unjustly deprive the other stockholders in these corporations of the legal and proper benefits of affiliation with Rockwood for which they contracted when these corporations were formed.

[fol. 338] Wherefore, Rockwood, Cherokee and Kentucky respectfully submit that they are entitled to have this suit dismissed against them and each of them in toto; but, if not entitled to such relief that in any event they be eliminated from the provisions to any decree under conclusion No. 21 requiring each corporate exhibitor defendant to divest itself of the ownership of any stock or interest in any corporate defendant or affiliated corporation.

Respectfully submitted, George H. Armistead, Jr., Dick L. Lansden, William Waller, Counsel for Defendants.

Of Counsel: Armistead, Waller, Davis & Lansden, Address, American Trust Building, Nashville, Tennessee.

[fol. 339] IN THE DISTRICT COURT OF THE UNITED STATES

PETITION OF CUMBERLAND AMUSEMENT COMPANY FOR RECONSIDERATION AND MODIFICATION OF FINDINGS AND CONCLUSIONS—Filed March 23, 1943

Comes defendant, Cumberland Amusement Company, and respectfully petitions the Court for a reconsideration of the findings and conclusions filed March 3, 1943, to the extent that they affect this defendant and particularly for relief against the conclusions numbered 11, 17, 20 and 21, to the extent that they are intended to affect this defendant, and in support of this petition defendant, hereinafter referred to as Cumberland, submits the following:

1. Cumberland is referred to only in paragraphs 16, 24, and 51-57, inclusive, of the findings of the Court. Paragraph 16 simply gives the date of organization, the name of the President, Mr. Sudekum, and the towns and their populations in which Cumberland owns and operates theatres. Paragraph 24 refers to the organization of Cumberland in about the same language which is used in the same paragraph in referring to the organization of Strand Enterprises, Inc., which was acquitted by the Court of any wrong-doing. Paragraphs 51-57 refer to Cumberland's construction of a theatre in Rogersville, Tennessee and competition with W. P. Miller in that town, but Cumber- [fol. 340] land sold this theatre more than eighteen months before this suit was filed.

2. Although the Rogersville theatre was sold more than eighteen months before this suit was filed, so that the findings relating to competition in Rogersville could not properly be the basis of the relief granted against Cumberland, it is nevertheless submitted that said findings are in certain respects erroneous and should be modified and supplemented in order that the true picture may be presented:

(a) The undisputed evidence was that Miller had a totally inadequate theatre (it was a converted warehouse without sewerage connection and its heating system was improvised by Miller, who had rigged up a 20 H. P. threshing machine boiler in an outhouse), and Cumberland's theatre was new and up-to-date. Miller had no shortage of product after Cumberland's theatre was built, but affirmatively testified that he

"had plenty of pictures at the price." His only complaint was that when there were two theatres in the town the film companies took advantage of the situation to cause one theatre to bid for pictures against the other, with the result that film prices went up. (Miller, R. 1037.)

(b) As to the alleged discrimination against Miller by United Artists, this distributor followed the usual policy of using a competitive situation as "leverage", that is, it forced Cumberland to buy its product in towns where it did not need the product as a condition to making a deal for Rogersville where Cumberland really needed the pictures. (Miller himself, who operated a theater at Sneedville as well as one at Rogersville, had the same experience, viz., a film company re- [fol. 341] quired him to make a deal for Sneedville as a condition to selling him at Rogersville. (Miller, R. p. 1033)). This proposition is affirmatively recognized by the Court in the fourth paragraph of finding No. 52, but when the Court comes to its conclusions, the wholly inconsistent inference is suggested in conclusion No. 17, that Cumberland exercised pressure or coercion on United Artists to make it discriminate against Miller.

(c) As to the alleged discrimination by Warner Bros. against Miller, finding No. 54 (adopted from the Government's brief) omits any consideration whatever to short subjects. The actual comparison of the film rentals received by Warner Bros. from Miller in 1936-1937 and Cumberland in 1937-1938 was as follows:

	Features	Scores	Shorts	Total
1936-37—Miller	$858.84	$145.00	$184.50	$1188.34
1937-38—Cumberland	975.00	135.00	440.50	1550.50

Clearly, Warner Bros. cannot be said to have been coerced by Cumberland where Cumberland paid so much more for the pictures than Miller had been paying.

(d) The Court has made no finding of fact and there is no evidence of any distributor to eliminate the competition of Miller and there is no finding of fact or evidence of any coercion exercised by Cumberland on any distributor, and there is no evidence that Miller

finally sold his theatre to Rockwood Amusements, Inc. as the result of anything for which Cumberland was responsible.

3. There is no evidence that Cumberland ever bought a theatre and required the seller to agree not to compete. There is no evidence that Cumberland was ever a party to any franchise agreement with any distributor. There is [fol. 342] no evidence contradicting Cowan Oldham's testimony that he (after Hill's retirement) negotiated all film deals for the Company. (Oldham testified to this effect on direct examination as a witness for plaintiff, R. 2386). In these respects Cumberland is in exactly the same attitude as Strand Enterprises, Inc., which was acquitted of all wrong-doing.

Wherefore, Cumberland respectfully submits that it is entitled to exactly the same relief as was granted its co-defendant, Strand Enterprises, Inc., viz., the suit should be dismissed against it in toto, and if Crescent Amusement Company is required to divest itself of the ownership of stock in any other corporation, there should be a specific exception of Cumberland just as in the case of Strand Enterprises, Inc.

Respectfully submitted, George H. Armistead, Jr., Dick L. Lansden, William Waller, Counsel for Defendants.

Of Counsel: Armistead, Waller, Davis & Lansden. Address: American Trust Building, Nashville, Tennessee.

[fol. 343] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENTAL PETITION OF DEFENDANT, ROCKWOOD AMUSEMENT COMPANY, FOR MODIFICATIONS IN FINDINGS AND CONCLUSIONS OF THE COURT FILED MARCH 3, 1943—Filed March 31, 1943

Comes the defendant, Rockwood Amusement Company (hereinafter referred to as Rockwood), and respectfully states that in the petition filed by this defendant and others

on March 1943, there was omitted the following request for a modification in the findings of the Court, which modification said defendant now requests:

57. To the sentence "One of the principal reasons for Miller's willingness to sell his theatre was the difficulty he encountered as well as difficulty he anticipated, in securing suitable pictures for exhibition in his theatre." add (omitting the period in the present sentence "at prices he was accustomed to pay for such pictures."

In this connection, petitioner respectfully refers to the testimony of the said Miller (Rec. p. 1037) as follows:

[fols. 344-350] "Q. Well, if you had the entire product of three major companies and half the product of RKO in addition to these Monogram pictures and other independent pictures, you had plenty of pictures didn't you, Mr. Miller?

A. I had plenty of pictures at the price.

Q. Price was too high?

A. Yes, sir, but I had to buy them, I was up against it in other words when I didn't have competition I could go around and play, I could make it over and come down right you see, make them get down right, and if they didn't I could buy from the other company; after I got competition I had to buy from them, and all my letters and correspondence here shows that I did that I was trying to buy anything that I could, and pay any kind of a price to get pictures to keep my house open.

Q. In other words, when there are two theatres in a town bidding against each other, it means that the price goes up?

A. That is what it done."

Respectfully submitted, D. L. Lansden, Geo. H. Armistead, Jr., William Waller, Counsel for Defendants.

Of Counsel: Armistead, Waller, Davis & Lansden. Address: American Trust Building, Nashville, Tennessee.

[fol. 361] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF DEFENDANT, CRESCENT AMUSEMENT COMPANY, TO AMEND FINDINGS AND MAKE ADDITIONAL FINDINGS—Filed May 27, 1943

A

Comes the defendant, Crescent Amusement Company, (hereinafter referred to as Crescent), and without waiving objections to the findings and conclusions as a whole, or to such portions thereof as are not specifically referred to herein; moves the Court to amend the findings filed on March 3, 1943, and make additional findings in the respects hereinafter stated (the paragraph numbers being taken from the aforesaid findings of the Court):

Findings

39. Eliminate the last two sentences reading as follows:

> "He (Lawing) was unable to secure any other major product (R. 770) nor would any of the distributors sell him a second run; the ostensible ground of refusal was that the town was too small for a second run. But [fol. 362] the Crescent was allowed to repeat pictures which had played Lawing's theatre in Brownsville, a much smaller town." (R. 796-797)

Add the following:

> "There is no satisfactory evidence that Lawing was unable to secure sufficient product or satisfactory product on which to operate in Paris. He made no application for Universal product or for United Artists product at Paris."

(The language sought to be eliminated was adopted from the Government's brief which was a naturally partisan document in which plaintiff's counsel made references to the record for the purpose of giving plaintiff's side of controverted questions. While Mr. Lawing did testify on direct examination, in very general terms, that he was unable to secure any other major product for Paris and that none

of the distributors would sell him a second run, it is elementary that the cross-examination of a witness must be considered in connection with his direct examination and, if the two are in conflict, no weight can be given to either. On cross-examination Mr. Lawing testified as follows (R. pp. 813-815):

"Q. Now, you went to Memphis trying to get second run pictures from other companies, did you not?

A. Yes sir.

Q. Whom did you see that represented Warner Bros. in Memphis about getting second run pictures from Warner Bros.?

A. Mr. Adams, I believe at that time.

Q. Do you remember when it was that you saw Mr. Adams?

A. That I don't, no sir.

[fol. 363] Q. Whom did you see that represented Columbia in Memphis about getting second run Columbia pictures?

A. Mr. Haines and Mr. Rogers.

Q. Did you write to either of those gentlemen?

A. I don't recall writing them, no sir.

Q. Whom did you see that represented Universal about getting Universal second run pictures?

A. I don't think I made any application for Universal pictures in Paris. I understood that they were sold up there possibly on a franchise; I don't recall.

Q. What did the Columbia representative tell you when you made application for second run pictures?

A. They sold me some first run pictures that Mr. Sudekum didn't have under contract up there.

Q. Did they refuse to sell you any second run pictures?

A. I have a very vague memory about that. As a matter of fact, I don't know that I recall definitely about asking for second run Columbia.

Q. Now, which companies did you definitely ask for second run pictures?

A. I believe that would be impossible for me to answer except that I possibly went into all of them and asked them if it would be possible to get second run pictures for Paris and they had all about the same answer; that they either wouldn't care to take a con-

tract or that Paris was too small for second run operation.

Q. You say you possibly thought that. Do you mean from your recollection at this time it is possible that back in 1935 you did those things?

A. Well, it is customary to call on all the companies and make every reasonable effort to get product for [fol. 364] the towns, yes sir.

Q. I say you are basing your testimony about that on what is possible or what was customary and not on any actual or definite recollection?

A. Well, it would be very vague as far as the definite part of it is concerned."

(The language sought to be eliminated is in irreconcilable conflict with Finding No. 154 and Finding No. 172, relating to the distributor defendants.)

44. Eliminate the concluding portion of this finding, reading as follows:

"This could not possibly have been Connor's reason for rejecting Lawing's application, however, because, first, there is nothing to show that Connors ever told anyone Lawing's offer was inadequate, and second, Lawing's offer, as a matter of fact, was as good as, if not better than, the deal Loew's accepted from Crescent. Connors further explained, in justification for his decision overruling Willingham's recommendation, that he knew that Lawing's theatre was not as modern as the new Crescent Theatre, and he felt that Metro could get more money from the new theatre. This was also an afterthought, as there is no suggestion in the voluminous correspondence regarding this situation introduced in evidence by both sides that the relative merits of the theatres entered into his decision, nor [fol. 365] was there any necessity for Connors to speculate about what he could get from the two theatres because he had both offers before him, and by the simple process of comparing the two offers, he would have ascertained that from the standpoint of Loew's, the Lawing deal was as good as, if not better than, the Crescent offer."

(This language is adopted from the Government's brief and is not supported by anything in the record. It is not true that Lawing's offer was "as good as, if not better than, the Crescent offer." The Lawing application called for fifty feature pictures, with the privilege of eliminating five of the pictures. Crescent actually played forty-six of these pictures at a film rental, including score charge, aggregating $1,021.95. The Lawing application on a flat rental basis, assuming the playing of the same forty-six pictures, would have resulted in film rental of $911.50, including score charge. It is true, as contended by plaintiff, that the Lawing application called for the playing of twelve pictures on percentage, but there is no reason to assume that the difference would have been made up. Furthermore, it appears that Crescent's 1935-1936 contract provided Loews additional revenue of $575.00 from trailers, shorts and news reels. In 1934-1935, Lawing had only paid $321.00 for trailers, shorts and news reels. In 1934-1935, Lawing had played forty-one feature pictures at a total film rental of $765.69, so that Loews received a total film rental from Lawing of $1,086.69 for 1934-1935 product as compared with a total of $1,596.95 from Crescent for the 1935-1936 product. There is no indication that Crescent paid Loews any more [fol. 366] film rental than its application for 1935-1936 product called for; and there is absolutely no basis for the finding that Mr. Connors, Loew's sales manager, perjured himself when he testified as to his reasons for overruling Willingham's recommendation that Lawing's offer be accepted, viz., that "Willingham had advised him that Lawing claimed he could not pay as much for the 1935-1936 product as he had previously been paying (referring to Willingham's letter of May 28, 1925 which was introduced as Def. Ex. 51), and that Lawing's application called for less money than he felt Loew's product was worth in Brownsville." Mr. Lawing himself testified on cross-examination as follows (R. pp. 807, 808):

> "Q. With reference to the applications for Metro, did you tell the Metro salesman that you would be unable to make a new contract unless some concessions were made on the old contract?
>
> A. I think that I made some statement like that, yes sir.

Q. Did you also say that even on a new contract you couldn't pay the same film rental as you had previously paid because Mr. Sudekum's opposition had taken some of your business away?

A. I think I made a remark like that, yes sir.

Q. Well, that was true, wasn't it? I mean you weren't able to pay the same prices that you had been paying?

A. No sir, I couldn't have paid it and continued I don't believe."

[fol. 367] Certainly a distributor such as Lowes is entitled to consider short product as well as features in determining which offer to accept; and Mr. Willingham testified, in response to a question on cross-examination as to whether Loews had considerable trouble with Mr. Lawing about dating and playing news reels and other short reels and short subjects: "We always had trouble with him about the news reels and short product." (R. p. 1922)).

45. Eliminate the last paragraph, reading as follows:

"Thus, as far as the disposition of Loew's 1935-1936 product in Brownsville, Tennessee is concerned, the record shows that it was licensed to Crescent although Lawing offered Loew's at least as good a deal as the Crescent deal and was Loew's old customer in Brownsville."

(This language is adopted from the Government's brief and, as demonstrated above, is not supported by anything in the record.)

Add the following:

"Lawing's record for carrying out his contracts was very bad. He admitted on cross-examination that, even before Crescent's theatre was opened, he failed to comply with contracts with more than one distributor."

(This testimony was as follows (R. pp. 805-807):

[fol. 368] "Q. What product did you say you were using in 1934-1935 in Brownsville before the new Crescent theatre was started?

A. I was using some product from practically every company.

Q. Did you have a contract with United Artists?

A. Yes sir.

Q. For the entire output?

A. That I wouldn't be able to remember, whether it was the entire output or not.

Q. Well, did you play those pictures off in accordance with your contract?

A. I don't think that I did, no sir.

Q. Why not?

A. Well, I paid too much money for them in the first place and their exchange was in St. Louis at that time. They didn't have a Memphis office and I don't know that they have now, but the express was excessive on them and I think I paid them about $20,00 for them, for those pictures, average.

Q. And you figure that was too much so you just didn't play them?

A. I played some few of them.

Q. Do you remember when that contract was made?

A. I don't know.

Q. Did you buy any pictures from Universal?

A. During 1934-1935, I don't recall that I did, no sir.

Q. Don't you recall you bought three pictures and didn't play them?

A. From Universal?

Q. Yes.

[fol. 369] A. I really don't know.

Q. What was your experience with Columbia? Did you buy any pictures from Columbia for that season?

A. I believe I did, yes, sir.

Q. Well, did you play them?

A. I couldn't recall about that, sir.

Q. Don't you recall that as a matter of fact there were quite a number of those pictures you didn't play in accordance with the contract?

A. It seems that there was, yes, sir."

Mr. Lawing's record with Loew's was just as bad. Reference has already been made to Mr. Willingham's testimony that Loews always had trouble with Mr. Lawing about getting him to date and play news reels and other short product. (R. p. 1922). On October 25, 1935, about six weeks before Loews closed with Crescent on the 1935-1936 product, Mr. Willingham wrote to Mr. Lawing in re-

gard to his Southland Theatre (Def. Ex. 56, R. pp. 1915-1916) as follows:

"The writer has just reviewed your account and finds it to be in a most deplorable condition. I never realized until now that you are absolutely ignoring our product and not giving us any dates whatever.

"Attached is notice of availability for features and short product and if there is another account in the United States in a worse condition, we would like to know just who it might be.

"We are going to insist that you give us dates in abundance, playing two pictures per week in Brownsville, starting immediately, in order to catch up as you are so far behind this will be the only possible way you [fol. 370] can catch up on your playing arrangement.")

46. Supplement by adding the following:

"There is no evidence that Lawing had trouble getting satisfactory product or sufficient product in Brownsville. There is no evidence that he even applied for either Universal product or United Artists product after Crescent opened its theatre."

(See Findings No. 154 and No. 172).

48. In the first paragraph eliminate:

"In April 1935, Dozier entered into a contract for Paramount's 1935-1936 product which provided that Dozier was to have clearance over Madisonville, but the length of the clearance was to be decided by the N. R. A. Clearance Board at Indianapolis." (Ex. p. 16, R. 887).

In the third paragraph eliminate the words: "although it was in direct conflict with his agreement with Paramount."

(This language is adopted from the Government's brief and is not supported by anything in the record. Indeed, a footnote in the Government's brief correctly states the provision of the contract to be:

"'Run: 1st' 'Clearance: Subject to final Decision of Indianapolis Clearance Board.'"

[fol. 371] Dozier testified that at the time the contract was negotiated, Duff Newman, the Paramount salesman, told

him that Earlington would have clearance over Madisonville, but that the length of that clearance would be fixed by the Indianapolis Clearance Board (R. p. 888). Mr. Dozier's testimony about what was told him by the salesman, Mr. Newman, who was not a witness, is incompetent not only because it varies the terms of a written contract in violation of the best evidence rule, but also because, as is undisputed in the record, film salesmen had no authority to make contracts.)

63. Eliminate the second paragraph, reading as follows:

> "The deal with Sudekum referred to by Lowe was the franchise dated July 28, 1938, as of November 1, 1937. Clause 8 (e) of that franchise gave Crescent the option of playing an additional or repeat run on any picture it played first-run in Hopkinsville and all of the other towns outside Nashville where a first run was licensed. By this option Crescent was able to prevent Anderson from obtaining any second-run feature although it made no commitment to use them itself."

(This language is adopted from the Government's brief and is not supported by anything in the record. The Paramount salesman, Mr. Lowe, certainly did not know on October 11, 1937 that the Paramount franchise dated July 28, 1938 as of November 1, 1937 would contain Clause 8 (e) giving Crescent a repeat run option).

[fol. 372] 70. Eliminate the concluding portion of the first paragraph, reading as follows:

> "One reason Smith was advised that Paramount Pictures were not available to him second-run was because of the repeat-run option in the same franchise. This is clearly indicated by the following portion of Morgan's letter to Unger of November 11, 1938, which was in response to a letter from Unger to Morgan, written after Smith had complained to the Department of Justice, directing Morgan to make some pictures available for Smith. (Ex. 152):
>
> Now as regards the last paragraph of your letter about second runs, following shows the population of each town:
>
> | | |
> |---|---|
> | Morristown | 5,875 |
> | Harriman | 5,000 |
> | Newport | 2,753 |

9—662-664

In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8 of the Crescent Amusement Company franchise, provides he can repeat any feature at a certain given price."

(This language is adopted from the Government's brief and is not supported by anything in the record, and the quotation itself shows that Morgan was undertaking to justify the failure to sell Smith by giving a reason which had not previously entered into the case at all).

[fol. 373] 81. Eliminate the concluding sentence of the last paragraph, reading as follows:

"The negotiation and execution of the rider at this time showed that Crescent intended, if necessary to eliminate Henry, to operate all three theatres, and Paramount was willing to cooperate."

(This language is adopted from the Government's brief and is merely an argument. Defendants are entitled to the presumption that the rider was executed in the ordinary course of business. There was no evidence, documentary or otherwise that Crescent and Paramount had any understanding such as might be inferred from the foregoing language).

100. Eliminate the first paragraph, reading as follows:

"Curry didn't attempt to negotiate with Paramount 'because it was well understood that the Crescent Amusement Company had a first-run franchise and second-run option.' The franchise provides both a first run in Gadsden and a first run in Alabama City with a repeat-run option."

Insert in lieu thereof the following:

"Curry testified that he didn't try to negotiate with Paramount for second-run product because it was well understood that Crescent 'had a first-run franchise and a second-run option, so he didn't even have the heart to go see them.' The fact was that the Dixie Theatre already had a second-run contract with Paramount made by Curry's predecessor covering specified pictures of the 1938-1939 product, and that Crescent had

[fol. 374] a second run contract (not an option) with Paramount making a definite commitment for twenty photoplays of the 1939-1940 product, with only thirty days after first run play date to notify Paramount of its intention to use said picture for second run in one of its three Gadsden theatres. The Dixie theatre thus had full opportunity to purchase the rejected pictures and could always know, within thirty days after first run exhibition in Gadsden, whether the particular picture was available. The pictures selected by Crescent had to be played at the rate of two per month, as available, so that the Dixie theatre was not prejudiced if it desired to play these pictures on third run."

(Dixie's contract with Paramount covering specified pictures of the 1938-1939 product was introduced as Defendants' Exhibit 227; and Crescent's second-run contract covering 1939-1940 product was introduced as Defendants' Exhibit 228. The language sought to be eliminated was adopted from the Government's brief which wholly ignored these two exhibits. In the reply brief p. 59 filed by the Government, it was argued that Crescent's second-run contract had been made "after Fox had expressly called Crescent's attention to the possibility of a lawsuit where an exhibitor used a repeat-run option to keep a competitor from getting a second run." This argument was, of course, an implied concession that Curry's "understanding" about the so-called "second run option" was incorrect).

Eliminate the third paragraph, reading as follows:

"Fox, Loew, Paramount, United Artists and Warner all held the Dixie back of the Ritz, although there was no clearance provision in their contracts with the Ritz which would require them to do so. Their uniformity in holding a superior theatre behind an inferior one may only be explained by the pressure which Sudekum was able to exert on each of these distributors."

[fol. 375] (This language is adopted from the Government's brief and is not supported by anything in the record; so far as United Artists is concerned, it is in conflict with Finding No. 99; and it is in direct conflict with the testimony of Mr. Stengel, an unimpeached witness, who testified (R. p. 4726) that the theatre in East Gadsden was not mentioned in any deal with any distributor.)

Insert in lieu of said paragraph the following:

"The Dixie Theatre paid much smaller film rentals than Crescent paid with respect to the Ritz Theatre at Alabama City, which had been set up as a first-run situation when Alabama City was a separate municipal corporation, by Fox, Loews, Paramount and Warner, as well as by United Artists."

(The Dixie Theatre, which was a suburban and subsequent run situation, was unable to pay first-run prices and naturally the product did not become available for them until the first run deal had been consummated. The actual revenues received by Loew's,—the only distributor who placed in the Dixie Theatre's contract a provision that it should play subsequent to Alabama City,—were as follows (Def. Ex. 230):

	Gadsden, Ala. Princess Theatre 1st run	Alabama City, Ala. Ritz Theatre 2nd run	Gadsden, Ala. Dixie Theatre subsequent run
1938-39 (50 feature pictures)	$4,955.08 (50)	$1,602.35 (50)	$917.56 (41)
1939-40 (49 feature pictures)	2,043.36 (37)	175.00 (2)	358.48 (13)
1940-41 (35 feature pictures to and including 8-22-41)	4,632.41 (35)	1,276.62 (28)	523.40 (23)

(The figures in parenthesis indicate pictures played by each theatre.)

[fol. 376] The reason for failure of the Ritz Theatre, Alabama City, Alabama to play more than a few pictures of the 1939-1940 product was the failure of Crescent and Loew's to get together on terms for that season's product. After the 1940-1941 deal had been made, Crescent contracted for a few of the best pictures of the 1939-1940 product which were then exhibited during the 1940-1941 season.

118. Eliminate the concluding paragraph, reading as follows:

"The effect of the franchises (Ex. p. 24, p. 29, and p. 30), on the independent competition at Dresden, Earlington, Gallatin, McKenzie, Spruce Pine, Union City, Hopkinsville, Gadsden, Morristown, Harriman, Newport and Mt. Pleasant has already been recounted. Morgan, in negotiating it, knew precisely what its effect on these independent accounts would be."

(This language is adopted from the Government's brief and is a mere argument.)

119. Eliminate the first paragraph, reading as follows:

"The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to any opposition theatre, as shown by the experience of Smith, Anderson and Henry when they tried to buy a second-run. As Morgan described its effect in a letter to Unger, his immediate superior, on November 14, 1939 (Ex. 152):

'In any event, the only way we could sell second-run, even if we wanted to in these particular towns, (Harriman, Morristown, and Newport) would be after Sudekum had taken the refusal, because Paragraph E of Article 8 of the Crescent Amusement Company franchise provides he can repeat any feature at a given price.'"

(The language sought to be eliminated was adopted from the Government's brief and is not supported by anything [fol. 377] in the record as has heretofore been demonstrated in connection with Findings 63, 70, and 81.)

In the second paragraph eliminate the following sentence:

"The clause, as modified, still prevents the sale of a second-run to the opposition."

(The language sought to be eliminated is adopted from the Government's brief and is pure argument unsupported by any facts in the record.)

122. Eliminate the three concluding paragraphs, reading as follows:

"But even with one theatre closed and its second-run commitment out of the way, the exhibitors obviously wished to still be in a position to prevent a competitor from getting a second run. The last paragraph giving a repeat-run option where one theatre is closed, was plainly an addition to the rider insisted upon by the exhibitors, as it confers no rights or advantages on the distributor. Unlike the Paramount repeat-run clause, this option was so worded as to make the repeat-run subject to such other runs in the

same town as the distributor might license. The only purpose that this clause could serve was to make it difficult for Warner to license a second-run theatre in opposition to Crescent after Crescent shut one theatre and got rid of its second-run commitment.

"The purpose of the repeat-run option was plainly to replace the second-run commitment as a means of [fol. 378] tying up second-run in the situations where that commitment was subject to elimination upon closing a theatre, as in the situations where no second-run commitment was made, a straight repeat-run privilege was inserted which does not depend on the closing of a theatre to take effect. Thus in Harriman and Morristown, where Crescent was also operating two theatres, but no second-run commitment was made, the repeat-run clause reads as follows:

'KCS. [In the event one theatre closes] * Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee, and in such event the exhibitors commitment to exhibit such features in the lowest rental classification shall be reduced accordingly.'

"The only difference between this and the repeat-run clause previously quoted is in the stricken opening phrase: 'In the event one theatre closes'. In all of the one-theatre situations in which no second run was bought, the same unqualified repeat-run clause as that stated above was used."

* Struck out in copy.

(The language sought to be eliminated is adopted from the Government's brief and is pure argument unsupported by any facts in the record. In towns where there were two theatres, e.g., Lebanon, Tennessee, there was always the possibility that, because of lack of patronage, it would be advisable to close the second theatre; and it was perfectly natural for defendant exhibitors to contract for a reduction in their commitments under such circumstances. The repeat-run provision in the Warner franchise permitted the exhibitor to repeat a picture which turned out to be a

better attraction than previously expected, but without the necessity of negotiating all over again as to the price to be [fol. 379] paid the distributor, and to repeat such picture in lieu of an inferior picture which the exhibitor would otherwise have been required to play. The second-run deals, on the other hand, were definite commitments for a specified number of pictures. There is not even a contention by the Government that the repeat-run clause in the Warner franchise ever prevented any independent exhibitor from getting pictures, or that any independent exhibitor would not have been privileged to exhibit product on second run prior to any such repeat runs by defendant exhibitors.)

127. Eliminate the next to the last paragraph, reading as follows:

> "Even though the independents in the towns where there was then opposition, Earlington, Gadsden, Maryville, Paris and Hartselle, paid Fox more than it received from Sudekum, the total revenue from them added up to only 'about seven or eight thousand dollars.' The Sudekum franchise offered a total rental of better than $120,000.00 for all situations for the three years' product and that being the case, this product was sold away from the independent exhibitors at the 'opposition points', who had bought the 1935-36 product, without giving them any opportunity to negotiate for the next season. Everyone of these independents, who paid more than Sudekum in their individual situations but could not collectively match his total Circuit purchase, was eventually taken over by Crescent or Rockwood before the expiration of the franchise in August, 1939."

(The language sought to be eliminated is adopted from the Government's brief except that the Government, in its brief, put in quotations the words "than we have received from Tony", whereas the Court omitted the quotations and changed "Tony" to "Sudekum". The quotation is from a letter filed as Government's Exhibit 205, being a letter dated March 13, 1936 from the Atlanta District [fol. 380] Manager of Fox to the New York Sales Manager of that Company giving reasons for making a deal toward the end of the season with Crescent for towns in which

Crescent had no opposition. Fox had already sold the opposition in all competitive situations, and was selling Crescent only half of the 1935-1936 product referred to as "K-3 product". The paragraphs in the letter, which are the basis of the argument in the Government's brief, read as follows:

"As you know we have had a great deal of difficulty with the Sudekum Circuit and the procedure in the past has been such that we almost had to take anything that Sudekum wanted to give us. I have been on the verge of splitting with him a time or two, but could not see that I was gaining anything, so always late in the season would take rather unsatisfactory deals.

"However, this year, after repeated efforts to get together with him on any kind of a deal that would show an improvement over anything we received in the past, I closed up and called it a day and attempted to salvage what money I could from a few opposition points, thinking that maybe with Fox out some opposition would open up. He has opposition in the towns of Gadsden and Maryville in the Atlanta territory and in the Memphis territory he has opposition in Paris, Tennessee. In the Indiana territory, they sell a little bit of a town outside of Madisonville, called Earlington, which George Landis advised me he received a very satisfactory contract from for the K-3 product. In Decatur he has opposition in a town called Hartselle, which we have sold, but this is all we could salvage; I imagine the whole thing amounted to about seven or eight thousand dollars.

"Since I have sold away from Tony, he has evidenced some desire to get together with us in the future and while it is too late to sell him in some of his spots this year, we have worked out a deal that I think is excellent. I am sending you a recap of the money that we have received, which includes all of the towns in his circuit, for which he buys direct, (he still owns half interest in the Hill Circuit, but this is a separate Corporation). This shows the gross total of $24,745.50.

"Briefly, the deal is this:—he is to give us $20,000.00 for half of the K-3 product, but deducting from this, the money that he would normally allocate against the towns where we have already sold. In other words,

we only sell him half of the K-3 product, but in view of the fact that we receive more from these towns than we have received from Tony, the deal will probably run up to considerably more than $20,000.00 for the K-3 product.

. . . . . .

[fol. 381] "I would appreciate your giving me your thoughts in the matter, or anything else you might want to add to this, but I would like to get it operating as quickly as possible. These are all very small towns, no opposition and some of them are pretty bad looking propositions insofar as gross returns are concerned, although a few of them are pretty good. I do not think I could ever do any better and I am quite sure that I could not go up there 'cold' and sell him next year's product at $40,000.00".

Although Mr. Ballance was introduced as a Government witness and testified that he wrote this letter, he was not asked to explain it in any way or to verify any statements of fact contained in the letter. Clearly the letter is not a proper basis for a finding that any independent exhibitor paid more than Sudekum in any individual situation.)

Eliminate the concluding paragraph, reading as follows:

"Hendren's letter of February 7, 1936 (Ex. 258), indicates that if he could have gotten the Fox 1936-37 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greenville. For the 1935-1936 feature product in Maryville, he paid $2,456.61 as against $570.00 paid by Crescent for the 1934-35 feature product and $1,080.00 paid by Crescent for the 1936-37 feature product (Ex. 327) in the same town. For the 1935-36 feature product in Greenville he paid $2,589.00 against $1,095.00 paid by Crescent for 1937-38 (Ex. 328)."

(The language sought to be eliminated is a footnote in the Government's brief. Government's Exhibit 258, which is referred to, was a request for 1935-1936 Fox product which was actually sold to Parrott & Hendren. In the [fol. 382] course of this letter Hendren also said that "the present negotiations *might* be discontinued" if Fox would "*immediately*" state that the pictures were available to

them for "an additional year in Greenville". What Hendren may have said to Fox in the course of negotiations for a film deal is not a proper basis for a finding in conflict with Hendren's actual testimony, on direct examination by Government counsel, that the question of product had nothing to do with the deal between Parrott & Hendren and Crescent. (He testified that "that didn't enter into it" (R. 353); and there was no evidence to the contrary.)

133. Eliminate the first two sentences, reading as follows:

> "One obvious purpose of all three franchises was to give Fox, Warner, and Paramount an ostensibly valid legal excuse for discriminating in favor of the Sudekum circuit in licensing its films during the period covered in the same manner that they had discriminated in the past. The Sudekum circuit, by virtue of having built up a preponderance of closed situations, through the persistent elimination of competition, was in a position to deal effectively with such competition as remained or might arise in the future, in making one-year film deals, but franchises offered protection against future changes in those discriminatory practices."

(The language sought to be eliminated is adopted from the Government's brief and is a mere argument which is not supported by any facts in the record. Executives of the three distributors all testified that the initiative for making these franchises came from the distributors, and not from defendant exhibitors; and that their reasons were to insure a continuous outlet for their respective products. A long-term deal is an advantage to the party who makes the correct guess as to the trend, just as in the case of a long-term lease of real estate.)

[fol. 383]

B

Defendant, Crescent Amusement Company, to the extent that it is or may be affected by findings relating more specifically to its co-defendants or any of them, adopts and relies upon all motions and petitions filed by any of said co-defendants in which modifications or amendments of the findings and or conclusions are sought, with the same effect as if fully copied herein.

C

Defendant excepts not only to the findings hereinbefore specifically referred to, but to all findings and parts of findings adopted from the Government's brief and to the conclusions based upon such findings, upon the ground that the method thus used was improper and unfair to defendant exhibitors and did not constitute a weighing of the evidence by the Court. A copy of the Government's said brief is filed herewith as a part of these motions and reference made to same for purposes of comparison. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings.

D

Defendant further excepts to all findings and parts of findings predicated upon unsworn statements, either written or oral, made by employees of distributors and other third persons, upon the ground that such unsworn statements are both heresay and *res inter alios acta*. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings.

[fols. 384-439] E

Defendant further moves the Court to amend the conclusions of law and decree consistently with the amendments to findings and additional findings hereinbefore sought.

William Waller, Geo. H. Armistead, Jr., D. L. Lansden, Address: American Trust Building, Nashville, Tennessee, Counsel for Defendant, The Crescent Amusement Company.

[fol. 440] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTIONS, AND NOTICE THEREOF, OF DEFENDANTS TO STRIKE PORTIONS OF COMPLAINT, ETC.—Filed September 30, 1939

To the Honorable Horace Frierson, Jr., United States District Attorney, Custom House, Nashville, Tenn.

SIR:

Please take notice that the undersigned, McConnico, Armistead, Waller & Davis, attorneys for the moving defendants herein, will bring the following motions on for hearing before this Court in Nashville, Tennessee, on the 6th day of October, 1939, at 9 A. M., of that day, or as soon thereafter as counsel can be heard.

I

The defendants herein, The Crescent Amusement Company (erroneously sued as Crescent Amusement Company, Inc.), Lyric Amusement Company, Inc., Nu-Strand Corporation (erroneously sued as New Strand Company), Cumberland Amusement Company, Strand Enterprises, Inc. (erroneously sued as Strand Enterprise Corporation), Rockwood Amusements, Inc., Cherokee Amusements, Inc. (erroneously sued as Cherokee Amusement Company, Inc.), Kentucky Amusement Co., Inc. (erroneously sued as Kentucky Amusement, Inc.), Anthony Sudekum, R. E. Baulch and Kermit C. Stengel, having united in this motion for the convenience of the Court, will move this Court at the time and place stated above as follows:

To require plaintiff to recast paragraphs 45-55, inclusive, of the complaint so as to alleviate the defects hereinafter pointed out, or, on failure of plaintiff so to do, to strike the said paragraphs and or dismiss the complaint, upon the ground and for the reason that the allegations of said paragraphs, when treated together, are so repugnant, vague and obscure that defendants are unable to determine the theory or theories upon which plaintiff predicates the

averments that defendants have violated Sections 1 and 2 of the Sherman Act, especially in that:

[fol. 441] 1. Under the allegations of paragraphs 45-49, inclusive, plaintiff would be at liberty to show numerous combinations with different parties, with different objects and employing different means, none of which are specifically and definitely averred in the complaint; and under the allegations of paragraphs 50-53, plaintiff would again be at liberty to show numerous combinations with different parties, with different objects and employing different means, none of which are specifically and definitely averred in the complaint;

2. It is alleged in paragraph 48 that the defendant exhibitors combined to "compel" the defendant distributors to grant them exclusive privileges, whereas in paragraphs 51 and 52 it is alleged that the different distributors "followed the policy" of granting said exclusive privileges to said defendants exhibitors; and said statements of plaintiff's claim are not set forth alternately or hypothetically.

3. It can not be ascertained from said paragraphs 45-55 of the complaint whether plaintiff intends to contend, either conjunctively or alternately or hypothetically:

(a) That a monopoly of theatres by the defendant exhibitors has resulted in a monopoly of the supply of feature films by said defendant exhibitors; or

(b) That a monopoly of theatres by the defendant exhibitors has had the effect of unreasonably restraining interstate trade and commerce in films; or

(c) That a monopoly of the supply of feature films by the defendant exhibitors has been accomplished as a means of enabling said defendant exhibitors to monopolize the theatres; or

(d) That the defendant exhibitors and distributors have combined to restrain interstate trade and commerce in films as a means of enabling the defendant exhibitors to monopolize the theatres.

II

Defendants move the Court, in any event, to strike paragraph 54 of the complaint, because the averments thereof are redundant and/or immaterial and impertinent, in that (a) the said paragraph 54 in part repeats the substance of paragraph 49, and (b) the remainder of the said paragraph 54 avers the employment of strictly local means to accomplish a strictly local object, viz., a monopoly of the business of operating motion picture theatres in various towns or [fol. 442] areas, and the matters so averred do not come under the ban of the Sherman Anti-Trust Law.

III

Defendants state that certain allegations and averments of the complaint, which are hereinafter designated, have not been set forth with sufficient definiteness or particularity to enable defendants properly to prepare their responsive pleading or to prepare for trial, and hence defendants move the Court to require of plaintiff, in the respects hereinafter specified, a more definite statement of the complaint or a bill of particulars:

1. As to paragraph 43: Specify the theatres whose operation was taken over and the other theatres which were kept closed, and the time kept closed, and as to each theatre, specify the manner in which control over the licensing of feature pictures was exercised by the defendant exhibitors to enable them to take over the theatre or to keep the theatre closed.

2. As to paragraph 45?

(a) Specify the parties to each combination intended to be alleged, the time and place when each combination was effected, and the agent or agents through whom each combination was effected;

(b) Specify the object or objects of each combination, the means employed to accomplish each object, and the agent or agents who participated, and the manner of such participation, in the employment of each means;

(c) Specify whether the phrase "in the following manner" is intended to modify the verb "combined" or the verbs "restrain" and "monopolize";

(d) Specify the nature and extent of each restraint upon interstate trade and commerce intended to be averred and how the restraint was accomplished; and as to each restraint, specify whether it was itself the object of a combination, or was a means employed in accomplishing another object, and if the latter, specify what the other object was, and in either event, specify the parties to the combination;

(e) Specify the names of the "other towns" referred to.

3. As to paragraph 46:

(a) Specify, as to each of the alleged "agreements to allocate," the towns involved in the agreement, the date of the agreement, the parties to the agreement, whether the agreement was oral or in writing, and if oral, the names of the agents through [fol. 443] whom the agreement was made and the substance thereof, and if in writing, furnish a copy thereof;

(b) Specify the names of any of "said towns" which plaintiff intends to allege were large enough for profitable operation of a competing motion picture theatre or theatres, and as to each such town specify the classes of films which, according to plaintiff's contention, the additional theatre or theatres might profitably exhibit under non-monopolistic conditions;

(c) Specify how the alleged agreements to allocate territory operated unreasonably to restrain interstate trade and commerce in motion picture films, if this was intended to be averred, or how they operated to monopolize the exhibition of motion pictures and operation of motion picture theatres, if this was intended to be averred.

4. As to paragraph 47:

(a) Specify the basis and meaning of the averment that the "purpose" of the exhibitors, in contracting in advance for feature pictures, was to control and monopolize the supply thereof, giving sufficient details to apprise defendant as to what plaintiff in-

tends to show in support of this averment as to the unlawful purpose of contracting in advance for feature pictures;

(b) Specify the feature pictures and the exhibitors referred to by plaintiff in the clause "before such feature pictures, or any of them, have been offered to any other exhibitor in the said towns," if plaintiff intends to show that any particular feature pictures were not offered to any particular exhibitors.

5. As to paragraph 48:

(a) Specify whether the phrase "by said contracts" is intended to modify the verb "combined" or the verb "compelled";

(b) Specify the methods and means used by the exhibitors to "compel" the distributors to grant them the exclusive privileges mentioned, and the times and places when each method or means was used, and the name of the persons representing each party involved;

(c) Specify whether the exclusive privileges referred to were granted in writing or orally, and if they were granted in writing, furnish copies of the documents, and if they were granted orally, specify when and where they were granted and the names of the persons representing each party involved;

[fol. 444] (d) Specify the towns referred to as "said towns" and specify the "other exhibitors" referred to in paragraph 48 (a) and the "competing theatres" referred to in paragraph 48 (b).

6. As to paragraph 49: Specify the "other theatre operators in said Crescent towns" who offered competition which was either restrained, suppressed or eliminated; and the particular manner or manners in which the competition of each of them was restrained, suppressed or eliminated, and the time when each restraint, suppression or elimination was effected.

7. As to paragraph 50:

(a) Specify the parties to each combination intended to be alleged, the time and place when each

combination was effected, and the agent or agents through whom each combination was effected;

(b) Specify the object or objects of each combination, the means employed to accomplish each object, and the agent or agents who participated, and the manner of such participation, in the employment of each means;

(c) Specify whether the phrase "in the following manner" is intended to modify the verb "combined" or the verbs "restrain" and "monopolize";

(d) Specify the nature and extent of each restraint upon interstate trade and commerce intended to be averred, and how the restraint was accomplished; and as to each restraint, specify whether it was itself the object of a combination, or was a means employed in accomplishing another object, and if the latter, specify what the other object was. In either event specify the parties to the combination.

8. As to paragraph 51: Specify the basis and meaning of the averment that the "purpose" of the distributors, in contracting in advance for feature pictures, was to permit the exhibitors to control and monopolize the supply thereof, giving sufficient details to apprise defendant as to what plaintiff intends to show in support of this averment as to the unlawful purpose of contracting in advance for feature pictures, and specifying each and every "other exhibitor in said towns."

9. As to paragraph 52: Specify the "other exhibitors in said towns."

10. As to paragraph 53:

(a) Specify the form and substance of each and every communication from any defendant exhibitor [fol. 445] to any defendant distributor referred to by the phrase "at the instance and request of," giving the time, place and name of agents representing each party;

(b) Specify whether the "agreements" referred to were oral or in writing, and if oral, the names of the agents through whom each agreement was made and

the substance thereof, and if in writing, furnish a copy of each agreement;

(c) Specify the "competing exhibitors" and the "competitors of defendant exhibitors."

11. As to paragraph 54, (unless same is stricken pursuant to another motion of defendants this day filed):

(a) Specify whether it is intended to be averred that the elimination of independent exhibitors was a result of, or a cause of, the alleged control by the exhibitors of the most desirable motion pictures;

(b) Specify the independent exhibitors who were induced to sell their theatres, the agents of the defendant exhibitors who made the threat, when and where each of said threats was made and to whom it was made; and if a threat was implied, specify the acts from which the threat was implied, and if a threat was express, specify the words which were used;

(c) Specify the instances when and where independent exhibitors found it impossible to procure sufficient pictures to keep their theatres in operation, the pictures they tried and failed to procure, and the terms and times of the respective offers made for pictures which any such independent exhibitor tried and failed to procure;

(d) Specify the basis and meaning of the averment that the "purpose" of the defendant exhibitors in giving away prizes and operating theatres at a loss was "driving their competitors out of business"; and specify the theatres alleged to have been operated at a loss and the periods of such operation;

(e) Specify each independent exhibitor driven or forced out of business by the use of any of the alleged tactics, and the particular tactics used by the defendant exhibitors in each instance, and the times and places of the use of such tactics and of the driving or forcing out of business of such independent exhibitor.

(f) Specify the independent exhibitors who will be forced out of business, or are in any danger of

[fol. 446] being forced out of business, if defendant exhibitors are not restrained and enjoined by the court, giving the names and locations of the theatres referred to.

12. As to paragraph 55:

(a) Specify whether it is intended to be averred that the acquisition and operation of numerous theatres by the defendant operators was a result of, or a cause of, the alleged control by defendant exhibitors of the most desirable motion pictures, as previously set forth;

(b) Specify what is meant by the phrase "circuit-buying power"; and, in particular, specify whether plaintiff intends any legal distinction between the buying power of one hypothetical owner of a certain number of theatres and the buying power of several hypothetical owners who in the aggregate own the same number of theatres, but who have combined for the purpose of collective bargaining with the distributors;

(c) Specify which of the various "manners" set forth in the complaint is referred to by plaintiff in the use of the phrase "in the manner herein set forth," and which section of the Sherman Act plaintiff intends to aver was violated by the use of so-called "circuit-buying power."

Defendants further move the Court for an order directing that as to such paragraphs of this motion, or of any items thereof, as to which the plaintiff shall state in its bill of particulars that it has no knowledge or information or incomplete knowledge or information, the plaintiff furnish the moving defendants in its bill of particulars whatever knowledge or information it may have and furnish further particulars within thirty days after it has obtained further knowledge or information, and, in any event, not later than thirty days before trial.

IV

Defendants further move for an order extending the time of the defendants herein to answer the petition, until sixty (60) days after service upon the attorneys for the defend-

ants of a copy of a more definite statement and of the bill of particulars directed to be furnished by the order to be entered upon this motion, or, in the event that this motion for a more definite statement and for a *bill of particulars* be denied in all respects, until sixty (60) days after service upon the solicitors for such defendants of a copy of the order denying such motion with notice of entry thereof.

[fol. 447] V

Defendants further move for an order granting the moving defendants such other and further relief as may be deemed just and proper in the premises.

McConnico, Armistead, Waller & Davis; George H. Armistead, Jr., Attorneys for Moving Defendants. American Trust Building, Nashville, Tennessee.

[fol. 448] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

OPINION ON VARIOUS MOTIONS—Filed February 23, 1940

This case is before the Court upon several separate motions, filed by various defendants for an order requiring plaintiff to furnish a more definite statement and a bill of particulars, and other matters, which will be acted upon separately.

The defendants, Loew's Incorporated, Warner Brothers Pictures, Incorporated, Vitagraph, Incorporated, Paramount Pictures Incorporated, Paramount Film Distributing Corporation, and Twentieth Century Fox Film Corporation, have filed identical motions, and for the purpose of this opinion, these motions will be treated as one.

The defendants, Columbia Pictures Corporation, United Artists Corporation, Universal Pictures Company, Incorporated, and Universal Film Exchanges, Incorporated, have filed a joint motion, as have also the defendants, Crescent Amusement Company, Lyric Amusement Company, New Strand Company, Cumberland Amusement Company, Strand Enterprises, Incorporated, Rockwood Amuse-

ments, Incorporated, Cherokee Amusement Company, Incorporated, Kentucky Amusement Incorporated, Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, hence this matter will be disposed of as if upon three separate motions.

The first two motions hereinabove referred to relating only to requiring plaintiff to furnish a more definite statement and a bill of particulars, will be considered together, and in conjunction with Division III of the third motion. [fol. 449] It is insisted by counsel for the plaintiff that the motions should be overruled, and the defendants required to seek the information desired by serving interrogatories on plaintiff, as provided for in Rule 33. Upon due consideration thereof, the Court is of the opinion that interrogatories as provided for under Rule 33, are not considered as a preliminary step in the formation of pleadings but may be utilized for the purpose of obtaining evidentiary matters, after pleadings have been formulated; and likewise, information sought on evidentiary matters obtainable by interrogatories may not properly be obtained by a bill of particulars. Wisconsin Alumni Research Foundation vs. Vitamen Technologist, Inc., D. C. S. D. California, December 9, 1939.

The Court is therefore of the opinion that the proper method of obtaining a more definite statement of facts not averred with sufficient definiteness or particularity, in the original complaint to enable defendant to properly prepare his responsive pleadings, is by a motion for a more definite statement or for a bill of particulars under Rule 12 (e), and this view has apparently been adopted by a large number of courts throughout the country. To hold otherwise would be placing a limitation upon the function of the new rules, not contemplated in their formulation, and would not be given that liberal construction necessary for their successful application. The motions in question are rather voluminous and contain demands for particulars of numerous items; the Court has considered each item separately, and in the light of what would be necessary for the purpose of answering the complaint. A large number of the particulars demanded are obviously evidentiary in character and should not be granted. The motions for these demands will, therefore, be granted in part and denied in part, and separate orders have been prepared indicating the action

of the Court upon such request. These orders will be filed with this opinion, and will dispose of the two motions referred to in the motion of Loew's Incorporated, et al., and the motion of Columbia Pictures, Corporation, et al.

[fol. 450] The motion of the Crescent Amusement Company, et als., will next be considered. The First Division of the motion seeks to require plaintiff to recast paragraphs 45 to 55 inclusive, for the reason that the allegations of said paragraphs, when treated together, are so repugnant, vague and obscure that defendants are unable to determine the theory or theories upon which plaintiff predicates the averments that defendants have violated Sections 1 and 2 of the Sherman Act. The Court is of opinion that the objection set forth in this Division of the motion will largely be eliminated by the action of the Court in granting the requests for the bill of particulars, and such as are not, the Court does not feel are sufficient to require plaintiff to recast the objectionable paragraphs. This Division of the motion, will, therefore, be denied.

In the Second Division of the motion, defendants, under Rule 12 (f) move to strike paragraph 54 of the complaint, the material part of which is the objection that a part of the paragraph avers the employment of strictly local means to accomplish a strictly local object, that is, a monopoly of the business of operating Motion picture theatres in various towns or areas, and that the matters so averred do not come under the ban of the Sherman Anti-Trust Law. The particular averments in paragraph 54 to which this ground of the motion is directed are as follows:

> "In addition defendant exhibitors have lowered their prices, given away large sums of money as prizes and operated some of their theaters at a loss with the purpose and effect of driving their competitors out of business and giving defendant exhibitors a monopoly in the exhibition of motion pictures in the area in which they operate."

Of course, the lowering of prices, giving away large sums of money as prizes, and operating theaters at a loss are of a purely local nature; it is not averred that these acts were committed by the defendant exhibitors pursuant to a conspiracy entered into with the defendant distributors. While of course, motion pictures shown at local theaters are

shipped in interstate commerce to the exhibitor; yet, after [fol. 451] the film comes to rest at its point of delivery, the showing of the picture and the operation of the theater is purely a local matter, and it is not averred in the complaint that the acts complained of have in any way diminished the shipment of films in interstate commerce, nor have the particular acts resulted in a monopoly of the supply of motion picture films. The monopoly complained of must be such as to restrain or unduly burden interstate commerce. The Court is of opinion that such local acts in themselves, not alleged to have been part of a conspiracy for the purpose of restraining interstate commerce, do not directly restrain and burden interstate commerce, and the Court does not regard the acts alleged as creating a direct and substantial burden on interstate commerce. Blumenstock Brothers Advertising Agency vs. Curtis Publishing Company, 252 U. S. 436; Foster & Kleiser v. Special Site Sign Company, 85 Fed. (2d) 742; Ewing-Von Allmen Dairy Co., Inc., vs. C. & C. Ice Cream Company, Inc., 8089 U. S. C. A. Sixth Circuit, February 15, 1940. Leave to amend not having been asked, the motion of defendant is therefore granted as to that part of paragraph 54 above indicated.

As to Divisions Three and Four, being a request for a bill of particulars, these Divisions are granted in part and denied in part, as indicated in an order filed herewith.

This the 21st day of February, 1940.

Elmer D. Davies, Judge.

[fol. 452] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ON MOTIONS OF CRESCENT AMUSEMENT CO., ET AL.—Filed February 23, 1940

This cause came on to be heard upon motion of the defendants Crescent Amusement Company, Lyric Amusement Company Incorporated, New Strand Corporation, Cumberland Amusement Company, Strand Enterprise Corporation, Rockwood Amusements, Incorporated, Cherokee Amuse-

ment Company, Incorporated, Kentucky Amusement Incorporated, Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, for an order to require plaintiff to recast certain paragraphs in the original, and to strike paragraph 54 thereof, and for a more definite statement and a bill of particulars, with respect to the matters set out in said motion.

Upon consideration thereof it appears to the Court that said motion is proper and should be granted in part. It is therefore ordered, adjudged and decreed by the Court that the several requests made by the said defendants in their motion are hereby either granted or denied, as hereinafter indicated.

I. Denied: II. granted by striking from paragraph 54 of the original complaint the following: "In addition defendant exhibitors have lowered their prices, given away large sums of money as prizes, and operated some of their theatres at a loss with the purpose and effect of driving their competitors out of business, and giving defendant exhibitor a monopoly in the exhibition of motion pictures in the area in which they operate;" III. 1, granted: III. 2. (a), denied for the reason that practically the same mo- [fol. 453] tion was granted on motion of defendant Loew's Incorporated, V, as fully as deemed necessary: III. 2. (b) denied: III. 2, (c) denied: III. 2, (d) denied: III. 2, (e) granted: III. 3, (a) denied for the reason that practically the same motion was granted on motion of defendant Loew's Incorporated VII, as fully as deemed necessary: III. 3, (b) denied: III. 3, (c) denied: III. 4, (a) denied: III. 4, (b) denied: III. 5, (a) denied: III. 5, (b) denied: III. 5, (c) denied for the reason that practically the same motion was granted on motion of defendant Loew's Incorporated VIII, as fully as deemed necessary: III. 5, (d) granted: III. 6, granted; III. 7, (a) denied: III. 7, (b) denied: III. 7, (c) denied: III. 7, (d) denied: III. 8, denied for the reason that practically the same motion was granted on motion of Columbia Pictures Corporation, XXIII, as fully as deemed necessary: III. 9, granted: III. 10, denied for the reason that practically the same motion was granted on motion of defendant Loew's Incorporated, XII: III. 10, (b) denied: III. 10 (c) denied: III. 11, denied: III. 12, denied:

It is further ordered, adjudged and decreed, that the plaintiff, United States of America, shall be allowed forty-

five (45) days from the date of entry of this decree, within which to prepare and file its bill of particulars as hereinabove indicated, and that each defendant shall have forty-five (45) days from the time of filing of said bill of particulars within which to prepare and file its answer to the complaint in this cause.

Elmer D. Davies, Judge.

[fol. 454] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES.

[Title omitted]

BILL OF PARTICULARS—Filed May 22, 1940.

The United States of America, petitioner herein, hereby files the following bill of particulars in response to the motions of the defendants, Crescent Amusement Company, Lyric Amusement Company, Incorporated, New Strand Corporation, Cumberland Amusement Company, Strand Enterprise Corporation, Rockwood Amusements, Incorporated, Cherokee Amusement Company, Incorporated, Kentucky Amusement Incorporated, Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel in accordance with the order of the court entered February 23, 1940. The subheadings listed below, under which said particulars are furnished, are the same subheadings as are set forth in said motions and in the order.

1. Petitioner is unable to furnish at this time a complete list of all theatres which defendant exhibitors have taken over and kept closed during the past five years. Among such instances, however, have been the following:

Time: 1938.
Place: Spruce Pine, North Carolina.
Theatre: Piedmont.
Independent Exhibitor: J. A. Taylor.
Defendant Exhibitor: Cherokee Amusement Company.
Distress. Methods and Manner Employed: Defendant exhibitor constructed competing theatre. Independent exhibitor was forced to sell because of threat that he would be unable to procure sufficient product to operate in the future.

[fol. 455] Time: 1937.

Place: Newport, Tennessee.

Theatre: Winston.

Independent Exhibitor: J. W. Baird.

Defendant Exhibitor: Newport Amusement Company which is affiliated with Crescent Amusement Company through stock ownership.

Distress Methods and Manner Employed: Independent exhibitor was forced to sell fifty per cent interest in his theatre under threat that defendant exhibitors would open competing theatre and deprive him of product.

Time: September 1938.

Place: Rogersville, Tennessee.

Theatre: Palace.

Independent Exhibitor: William P. Miller.

Defendant Exhibitor: Rockwood Amusement Company.

Distress Methods and Manner Employed: Defendant exhibitor built a new theatre, cut prices and began to show double features. Independent exhibitor had difficulty getting desirable pictures and was forced to sell.

Time: 1935.

Place: Coal Creek, now known as Lake City, Tennessee.

Theatre: Name unknown.

Independent Exhibitor: Sam Key.

Defendant Exhibitor: Name unknown.

Distress Methods and Manner Employed: Threat of opening competing theatre and running independent out of business.

[fol. 456] Time: 1937.

Place: Oneida, Tennessee.

Theatre: Name unknown.

Independent Exhibitor: Ed Zumstein.

Defendant Exhibitor: Cherokee Amusement Company.

Distress Methods and Manner Employed: Defendant exhibitor leased theatre from under independent exhibitor and forced him out of business.

Time: June 1939.

Place: Union City, Tennessee.

Theatre: Roxy.

Independent Exhibitor: John D. Henry.

Defendant Exhibitor: Unable to give name of defendant exhibitor, but it was one of the defendant exhibitors named in the complaint operating under the direction and control of defendant Sudekum.

Distress Methods and Manner Employed: Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell.

Time: August 1939.
Place: Earlington, Kentucky.
Theatre: Roxy.
Independent Exhibitor: E. W. Dozier.
Defendant Exhibitor: Rockwood Amusement Company.
Distress Methods and Manner Employed: Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell.

[fol. 457] Time: December 1937.
Place: Central City, Kentucky.
Theatre: Empress.
Independent Exhibitor: F. M. Pittman.
Defendant: Rockwood Amusement Company.
Distress Methods and Manner Employed: Defendant Exhibitor opened competing theatre. Independent exhibitor was unable to compete with the purchasing and booking power of defendant exhibitor chain.

Time: December 1938.
Place: Hopkinsville, Kentucky.
Theatre: Kentucky.
Independent Exhibitor: V. R. Anderson.
Defendant Exhibitor: Anthony Sudekum.
Distress Methods and Manner Employed: Defendant exhibitor engaged in price cutting, had bank nights and family nights, stage shows and the like. Independent exhibitor had trouble getting pictures and was forced to sell.

Time: January 1938.
Place: Providence, Kentucky.
Theatre: Lido.
Independent Exhibitor: Walter Beymer.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods and Manner Employed: Threat by defendant exhibitor to open competing theatre and withhold

product caused bank to call loan on independent's theatre and made it necessary for him to sell.

[fol. 458] Time: September 1938.

Place: Greenville, Kentucky.

Theatre: Palace.

Independent Exhibitor: William G. Head.

Defendant Exhibitor: Name unknown.

Distress Methods and Manner Employed: Threat to construct competing theatre and withhold product.

Time: June 1939.

Place: Copperhill, Tennessee.

Theatre: Cherokee.

Independent Exhibitor: Cherokee Theatre, Incorporated.

Defendant Exhibitor: Name unknown.

Distress Methods and Manner Employed: Threat of opening a competing theatre and running independent exhibitor out of business.

Time: June 1936.

Independent Exhibitor: Hendren and Parrott Amusement Company.

Theatres: Capital and Lyric.

Place: Erwin, Tennessee.

Theatre: Strand.

Place: Mountain City, Tennessee.

Theatre: Gay.

Place: Sweetwater, Tennessee.

Theatre: Grand.

Place: Lenoir City, Tennessee.

Theatre: Cherokee.

Place: La Follette, Tennessee.

Theatre: Capitol.

Place: Oneida, Tennessee.

Theatre: Park.

Place: Maryville, Tennessee.

Theatres: Princess and Palace.

Place: Greenville, Tennessee.

[fol. 459] Distress Methods and Manner Employed: Independent exhibitor forced to sell fifty per cent interest in all its theatres under threat that Crescent Amusement Company would build competing theatres in every town where independent exhibitor operates and run independent out of business.

Time: August 1936.

Place: Guthrie, Kentucky.

Theatre: Lyric.

Independent Exhibitor: John N. Allison.

Defendant Exhibitor: Rockwood Amusement Company.

Distress Methods and Manner Employed: Threat of opening competing theatre and running independent out of business.

Time: 1938.

Place: Lawrenceburg, Tennessee.

Theatre: Princess.

Independent Exhibitors: Mrs. H. L. Thulander, Lewis Rhulander, Helen Rhulander, Mrs. Cowan Oldham.

Defendant Exhibitor: Cumberland Amusement Company.

Distress Methods and Manner Employed: Independent exhibitor sold fifty per cent interest in Princess at Lawrenceburg, Tennessee, under threat that competing theatre would be opened.

Time: April 1939.

Place: McKenzie, Tennessee.

Theatre: McKenzie.

Independent Exhibitor: Y. Douglas Moore.

Defendant Exhibitor: Rockwood Amusement Company.

Distress Methods and Manner Employed: Defendant exhibitor leased a building in the town and threatened to open competing theatre and run independent exhibitor out of business.

[fol. 460] Time: 1940.

Place: Athens, Alabama.

Theatre: Bama.

Independent Exhibitor: M. M. Buchanan.

Defendant Exhibitor: Name unknown.

Distress Methods and Manner Employed: Defendant exhibitor cut prices, gave away prizes and prevented independent from procuring pictures. Independent was forced to sell.

Petitioner is unable to state when any of the theatres listed above were closed or the periods during which they were kept closed.

2(e). The other towns referred to in paragraph 45 of the complaint means every town in Tennessee, Kentucky, Alabama, and Arkansas where an independently owned theatre is being operated.

5(d). The term "said towns" in paragraph 48(a) means the towns where the Crescent defendants operate theatres.

Petitioner is unable at this time to furnish a complete list of such towns. Those that petitioner is able to supply are set forth in paragraphs 1 to 9 of the complaint.

Petitioner is unable to furnish at this time a complete list of "other exhibitors" referred to in paragraph 48(a) and of "competing theatres" referred to in paragraph 48(b). Among them are the following:

William Roth—Gallatin, Tennessee.

Ray Smith—Murfreesboro, Tennessee.

Peerless Enterprises, Inc.—Newport, Morristown, and Harriman, Tennessee.

Parrott and Hendren Amusement Co.—Erwin, Mountain City, Sweetwater, Lenoir City, La Follette, Oneida, Maryville, and Greenville, Tennessee.

John D. Henry, Union City, Tennessee.

Thomas R. Jones and Garland C. Jones—Franklin, Kentucky.

E. W. Dozier—Earlington, Kentucky.

[fol. 461] W. G. Head—Greenville, Kentucky.

Ray Smith—McMinnville, Tennessee.

William P. Miller—Rogersville, Tennessee.

J. A. Taylor—Spruce Pine, North Carolina.

M. M. Buchanan—Athens, Alabama.

6. Petitioner is unable to furnish at this time a complete list of theatre operators whose competition was restrained, suppressed or eliminated. Those petitioner is able to name are set forth in response to paragraph 1 above. In addition thereto are the following:

Peerless Enterprises, Inc. Theatres at Newport, Morristown, and Harriman, Tennessee. Was unable to get sufficient product to operate successfully and was forced to close down.

Ray Smith, Murfreesboro, Tennessee. Was prevented from opening competing theatre because of inability to get product from any of defendant distributors.

9. The "other exhibitors" referred to in paragraph 52 are the same as those set forth under 5(d) above.

Petitioner reserves the right to serve upon the defendants such other and further particulars, with respect to the

matters hereinbefore alleged, as may subsequently come within its knowledge.

Horace Frierson, Jr., United States Attorney.

Thurman Arnold, Assistant Attorney General; Robert E. Sher, Special Assistant to the Attorney General; Allen A. Dobey, Special Assistant to the Attorney General.

[fol. 462] In the United States District Court

[Title omitted]

Order on Motions of Crescent Amusement Co., et al.—August 16, 1940

This case came on to be heard before the Hon. Elmer D. Davies, District Judge, on the 15th day of August, 1940, for hearing upon motion of the Crescent Amusement Company and other defendants to dispose of their motion filed on June 11, 1940, and also to dispose of their supplemental motion filed on this date. Upon consideration of which and after argument of counsel, the Court is of the opinion that Motion No. 1, filed on June 11, 1940, is well taken and accordingly it is ordered by the Court that as to such matters stated in the plaintiff's bill of particulars heretofore filed, that the plaintiff has no knowledge or information or incomplete knowledge or information, plaintiff is ordered to furnish the moving defendants whatever knowledge or information it may hereafter obtain or may have obtained since the filing of its bill of particulars, within thirty days after it has obtained such knowledge or information, and, in any event, not later than thirty days before trial.

[fols. 463-471] The second motion of the defendants filed on June 11, 1940, is hereby overruled and disallowed as is also the motion filed on this date.

Elmer D. Davies, Judge.

O. K. for entry: O. W. Hughes, Assistant U. S. District Attorney; McConnico, Armistead, Waller & Davis, Attorneys for Crescent Amusement Company, et al.

[fol. 472] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SECOND ADDITIONAL BILL OF PARTICULARS—Filed June 6, 1941

The United States of America, petitioner herein, hereby files the following Additional Bill of Particulars in response to the motions of the defendants, Crescent Amusement Company, Lyric Amusement Company, Inc., Nu-Strand Corporation, Cumberland Amusement Company, Strand Enterprises, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, in accordance with the order of the Court entered February 23, 1940. The subheadings listed below, under which said particulars are furnished, are the same subheadings as are set forth in said motions and in the order.

1. In addition to the theatres set forth in petitioner's original Bill of Particulars and petitioner's Additional Bill of Particulars filed herein on May —, 1941, as theatres which defendant exhibitors have taken over or kept closed during the past five years, petitioner lists the following:

Time: June, 1936. Place: Greeneville, Tennessee. Theatre: Palace. Independent Exhibitors: Ausmus and Parrott Amusement Company, Inc. Defendant Exhibitor: Crescent Amusement Company. Distress Methods and Manner Employed: Threat of opening competing theatre in town and running independent exhibitor out of business. Independent exhibitor had trouble getting pictures and was forced to sell.

[fol. 473] Time: September, 1936.

Place: Maryville, Tennessee.

Theatre: Park.

Independent Exhibitor: Ausmus and Parrott Amusement Company, Inc.

Defendant Exhibitor: Crescent Amusement Company.

Distress Methods and Manner Employed: Threat of opening competing theatre in town and running independent exhibitor out of business. Independent exhibitor had trouble getting pictures and was forced to sell.

Time: June, 1936.

Place: Greenville, Tennessee.

Theatre: Princess.

Independent Exhibitors: Ausmus and Parrott Amusement Company, Inc., and Parrott and Hendren Amusement Co., Inc.

Defendant Exhibitor: Crescent Amusement Company.

Distress Methods and Manner Employed: Threat of opening competing theatres in town and running independent exhibitors out of business. Independent exhibitors had trouble getting pictures and were forced to sell.

Time: August, 1936.

Place: LaFollette, Tennessee.

Theatre: Cherokee.

Independent Exhibitor: W. H. Parrott.

Defendant Exhibitors: Crescent Amusement Company, Rockwood Amusements, Inc., and Cherokee Amusements, Inc.

Distress Methods and Manner Employed: Independent exhibitor forced to sell 50 per cent interest in his theatre under threat that Crescent Amusement Company, Rockwood Amusements, Inc. or Cherokee Amusements, Inc. would build a competing theatre in the town where independent exhibitor was operating and run independent exhibitor out of business. Independent exhibitor had trouble getting pictures and was forced to sell.

With respect to the acquisition of certain theatres belonging to Hendren and Parrott Amusement Company by defendant exhibitors, referred to on page 5 of petitioner's original Bill of Particulars, petitioner amends the statement of the acquisition of said theatres as follows:

Time: August, 1936.

Independent Exhibitor: Parrott and Hendren Amusement Co., Inc.

Theatres: Capitol and Lyric.

Place: Erwin, Tennessee.

Theatres: Gay and Enid

Place: Sweetwater, Tennessee.

[fol. 474] Theatre: Grand.

Place: Lenoir City, Tennessee.

Theatres: Capitol and Novelty.

Place: LaFollette, Tennessee.

Defendant Exhibitors: Crescent Amusement Company, Rockwood Amusements, Inc., and Cherokee Amusements, Inc.

Distress Methods and Manner Employed: Independent exhibitor forced to sell 50 per cent interest in all its theatres under threat that Crescent Amusement Company, Rockwood Amusements, Inc., or Cherokee Amusements, Inc., would build competing theatres in every town where independent exhibitor operates and run independent exhibitor out of business. Independent exhibitor had trouble getting pictures and was forced to sell.

2(e). The "other towns" referred to in paragraph 45 of the complaint, in addition to those mentioned in paragraph 2(e) of petitioner's Additional Bill of Particulars, shall include:

Lexington, Tennessee

The term "Crescent towns" appearing in paragraph 45 includes the towns named in the complaint and the towns appearing on page 6 under paragraph 2(e) of petitioner's Additional Bill of Particulars, and also the following:

Lewisburg, Tennessee
Shelbyville, Tennessee

5(d). The term "said towns" in paragraph 48 of the complaint includes all Crescent towns named in the complaint, the Crescent towns named in answering paragraph 2(e) of petitioner's Additional Bill of Particulars filed herein, and the Crescent towns named above in answering paragraph 2(e) of this Additional Bill of Particulars, and any other towns in which defendant exhibitors have theatres, (with the exception of Nashville, Tennessee) and in addition the towns indicated below not otherwise included.

In addition to the "other exhibitors" referred to in paragraph 48(a) of the complaint and the "competing theatres" referred to in paragraph 48(b) of the complaint, [fol. 475] already set forth in petitioner's original Bill of Particulars and in petitioner's Additional Bill of Particulars, petitioner lists the following:

Ausmus and Parrott Amusement Company, Inc., Greeneville and Maryville, Tennessee.

W. H. Parrott, LaFollette, Tennessee.

Pagrott and Hendren Amusement Co., Inc., Erwin, Lenoir City, Sweetwater and Greeneville, Tennessee.

O. W. Hughes, Assistant United States Attorney.
Allen A. Dobey, Special Assistant to the Attorney General.

[fol. 476] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

ADDITIONAL BILL OF PARTICULARS—Filed June 12, 1941

The United States of America, petitioner herein, hereby files the following Additional Bill of Particulars in response to the motions of the defendants, Crescent Amusement Company, Lyric Amusement Company, Inc., Nu-Strand Corporation, Cumberland Amusement Company, Strand Enterprises, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, in accordance with the order of the Court entered February 23, 1940. The subheadings listed below, under which said particulars are furnished, are the same subheadings as are set forth in said motions and in the order.

1. In addition to the theatres set forth in petitioner's original Bill of Particulars as theatres which defendant exhibitors have taken over or kept closed during the past five years, petitioner lists the following:

Time: 1935.
Place: Clarksville, Tennessee.
Theatre: Lillian.
Independent Exhibitor: Goldberg Amusement Co.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods and Manner Employed: Price cutting, giving away prizes. Independent exhibitor realized inability to compete with chain buying power and decided to sell.

Time: 1938.
Place: Columbia, Tennessee.
Theatre: Later the Lyric.

Independent Exhibitor: Bradley & Pigg.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods and Manner Employed: Unknown.

[fol. 477] Time: 1939.
Place: Tompkinsville, Kentucky.
Theatre: Uptown.
Independent Exhibitor: Ira B. Dyer and B. F. Hite.
Defendant Exhibitor: Midstate Theatres, Inc.; affiliated with Cherokee Amusement, Inc. and Rockwood Amusements, Inc. through stock ownership.
Distress Methods and Manner Employed: Threat of driving independent exhibitor out of business.

Time: 1939 or 1940.
Place: Tompkinsville, Kentucky.
Theatre: Name Unknown.
Independant Exhibitor: E. J. Sparks.
Defendant Exhibitor: Midstate Theatres, Inc., affiliated with Cherokee Amusements, Inc. and Rockwood Amusements, Inc. through stock ownership.
Distress Methods and Manner Employed: Unknown.

Time: 1936.
Place: Paris, Tennessee.
Theatre: Gem.
Independent Exhibitor: C. G. Lawing.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods Employed: Unknown.

Time: 1940.
Place: Paris, Tennessee.
Theatre: Princess.
Independent Exhibitor: B. F. Diggs.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods Employed: Unknown.

Time: 1936.
Place: Gadsden, Alabama.
Theatre: Gadsden.
Independent Exhibitor: Jack Crawford.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods Employed: Unknown.

Time: 1936 and 1937.
Place: Huntsville, Alabama.

Theatre: Elks.
Independent Exhibitor: M. B. Esserman.
Defendant Exhibitor: Lyric Amusement Company, Inc.
Distress Methods and Manner Employed: Independent exhibitor was unable to obtain sufficient product to compete against chain and was forced out of business.

Time: 1936.
Place: Manchester, Tennessee.
Theatre: Lyric.
Independent Exhibitor: Dr. A. A. Womack.
Defendant Exhibitor: Rockwood Amusements, Inc.
Distress Methods Employed: Unknown.

Time: 1936.
Place: Rockwood, Tennessee.
Theatre: Lyric.
Independent Exhibitor: Walter Howard.
Defendant Exhibitor: Rockwood Amusements, Inc.
Distress Methods Employed: Unknown.

[fol. 478] Time: 1936.
Place: Tracy City, Tennessee.
Theatre: Dixie.
Independent Exhibitor: Sam Werner, Sr.
Defendant Exhibitor: Rockwood Amusements, Inc.
Distress Methods Employed: Unknown.

Time: 1936.
Theatre: Madlyn.
Place: Lenoir City, Tennessee.
Independent Exhibitor: Deaton Theatre Corporation.
Defendant Exhibitor: Cherokee Amusements, Inc.
Distress Methods and Manner Employed: Independent exhibitor was unable to secure sufficient product to compete with chain and was forced to sell out.

Time: 1938
Place: Crossville, Tennessee.
Theatre: Palace.
Independent Exhibitor: William Garrison.
Defendant Exhibitor: Cumberland Amusement Company.
Distress Methods Employed: Unknown.

Time: 1935.
Place: Crossville, Tennessee.

Theatre: Mecca.
Independent Exhibitor: William Garrison, Hugo Gernt, and Arthur Gernt.
Defendant Exhibitor: Cumberland Amusement Company.
Distress Methods Employed: Unknown.

Time: 1936.
Place: Dayton, Tennessee.
Theatre: Dayton.
Independent Exhibitor: E. M. Williamson.
Defendant Exhibitor: Cumberland Amusement Company.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Franklin, Tennessee.
Theatre: Franklin.
Independent Exhibitor: Mrs. Cynthia Fleming.
Defendant Exhibitor: Cumberland Amusement Company.
Distress Methods Employed: Unknown.

Time: 1935.
Place: Trenton, Tennessee.
Theatre: Strand.
Independent Exhibitor: C. P. Washman.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1935.
Place: Marked Tree, Arkansas.
Theatre: Star.
Independent Exhibitor: Mrs. Harry Leavitt.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1935.
Place: Cleveland, Tennessee.
Theatre: Bohemia and another theatre, name unknown.
Independent Exhibitor: Otis G. Renner and Ruble B. Page.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods and Manner Employed: Price cutting; inability to secure sufficient product and were forced to sell.

[fol. 479] Time: 1936.
Place: Lepanto, Arkansas.
Theatre: Rialto.
Independent Exhibitor: Paul and M. D. Shafer.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Durant, Mississippi.
Theatre: Dixie.
Independent Exhibitor: Odam Brothers.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Louisville, Mississippi.
Theatre: Strand.
Independent Exhibitor: Mr. and Mrs. J. A. West.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Philadelphia, Mississippi.
Theatre: Strand.
Independent Exhibitor: Mr. and Mrs. J. A. West.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Kosciusko, Mississippi.
Theatre: Amuse-U.
Independent Exhibitor: Mr. Maher.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Kosciusko, Mississippi.
Theatre: Strand.
Independent Exhibitor: B. Carey.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1936.
Place: Ripley, Tennessee.
Theatre: Dixie.
Independent Exhibitor: Bill Henderson.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

With respect to the acquisition by the defendant exhibitors of the Cherokee Theatre, Inc. at Copper Hill, Tennessee in June 1939, referred to on page 5 of petitioner's original Bill of Particulars, this theatre was acquired by the Newport Amusement Company, which is affiliated with Cherokee Amusements, Inc. and Rockwood Amusements, Inc., through stock ownership.

[fol. 480] With respect to Newport Amusement Company, mentioned on page 2 of petitioner's original Bill of Particulars, this company is affiliated with Cherokee Amusements, Inc. and Rockwood Amusements, Inc. through stock ownership.

With respect to the acquisition by defendant exhibitors of the Palace Theatre at Rogersville, Tennessee in 1938, referred to on page 2 of petitioner's original Bill of Particulars, this theatre was acquired by Cumberland Amusement Company and later sold by Cumberland Amusement Company to Rockwood Amusements, Inc.

With respect to the acquisition of the theatre at Oneida, Tennessee, as shown on page 3 of petitioner's original Bill of Particulars, the independent exhibitors of this theatre were Ed Zumstein and H. F. Cooper.

With respect to the acquisition by defendant exhibitors of the Roxy Theatre at Union City, Tennessee in June 1939, referred to on page 3 of petitioner's original Bill of Particulars, this theatre was acquired by Crescent Amusement Company.

With respect to the acquisition by defendant exhibitors of the Roxy Theatre at Earlington, Kentucky in August 1939, referred to on page 3 of petitioner's original Bill of Particulars, this theatre was acquired by Crescent Amusement Company.

2 (e) The "other towns" referred to in paragraph 45 of the complaint are:

Livingston, Tennessee.
Dresden, Tennessee.
Sevierville, Tennessee.
Jefferson City, Tennessee.
Woodbury, Tennessee.
Mt. Pleasant, Tennessee.
Portland, Tennessee.
Mountain City, Tennessee.

Russellville, Kentucky.
Cave City, Kentucky.
Scottsville, Kentucky.
Burkesville, Kentucky.
Lebanon, Kentucky.
Bardstown, Kentucky.
Glasgow, Kentucky.

[fol. 481] The term "Crescent towns" appearing in paragraph 45 includes the towns named in the complaint and also the following:

Gallatin, Tennessee.
Harriman, Tennessee.
Newport, Tennessee.
McKenzie, Tennessee.
Copperhill, Tennessee.
Lawrenceburg, Tennessee.
Lake City, also known as Coal Creek, Tennessee.
Covington, Tennessee.
Greenfield, Tennessee.
Martin, Tennessee.
Newbern, Tennessee.
Halls, Tennessee.
Madison, Tennessee.
Central City, Kentucky.
Franklin, Kentucky.
Hickman, Kentucky.
Providence, Kentucky.
Greenville, Kentucky.
Tompkinsville, Kentucky.
Madisonville, Kentucky.
Spruce Pine, North Carolina.
Philadelphia, Mississippi.
Itta Bena, Mississippi.

5 (d) The term "said towns" in paragraph 48 of the complaint includes all Crescent towns named in the complaint, the Crescent towns named above in answering 2 (e), and any other towns in which defendant exhibitors have theatres, (with the exception of Nashville, Tennessee) and in addition the towns indicated below not otherwise included.

In addition to the "other exhibitors" referred to in para-

paragraph 48 (b) already set forth in petitioner's original Bill of Particulars, petitioner lists the following:

M. B. Esserman	Hopkinsville, Kentucky
Huntsville, Alabama	F. L. May
Jack Crawford	Hopkinsville, Kentucky
Gadsden, Alabama	C. P. Taylor
Dixie, Theatre	Hopkinsville, Kentucky
Manager, H. T. Bailey, Jr.	Walter Beymer
Gadsden, Alabama	Providence, Kentucky
Ed Zumstein	John N. Allison
Oneida, Tennessee	Guthrie, Kentucky
[fol. 482] H. F. Cooper	Denton Theatre Corporation
Oneida, Tennessee	Lenoir City, Tennessee
Sam Key	James R. Wilson
Lake City, Tennessee	McMinnville, Tennessee
Y. Douglas Moore	Otis G. Renner
McKenzie, Tennessee	Cleveland, Tennessee
J. W. Baird	Ruble B. Page
Newport, Tennessee	Cleveland, Tennessee
Cherokee Theatres, Inc.	Goldberg Amusement Co.
Copperhill, Tennessee	Clarksville, Tennessee
Manchester, Tennessee	W. S. Moore
Walter Howard	Portland, Tennessee
Rockwood, Tennessee	W. O. Taylor
Sam Werner, Sr.	Dresden, Tennessee
Tracy City, Tennessee	C. G. Lawing
William Garrison	Paris, Tennessee
Crossville, Tennessee	B. F. Diggs
Hugo Gernt	Paris, Tennessee
Crossville, Tennessee	Dr. A. A. Womack
Arthur Gernt	Ira B. Dyer
Crossville, Tennessee	Tompkinsville, Kentucky
[fol. 483] E. M. Williamson	B. F. Hire
Dayton, Tennessee	Tompkinsville, Kentucky
Mrs. Cynthia Fleming	Rhulander Estate Theatre
Franklin, Tennessee	Lawrenceburg, Kentucky
C. P. Washman	Joe Wiley
Trenton, Tennessee	Hickman, Kentucky
Bill Henderson	John D. Henry
Ripley, Tennessee	Hickman, Kentucky
F. M. Pittman	George Long
Central City, Kentucky	Hickman, Kentucky
V. E. Anderson	Mrs. Harry Leavitt

Marked Tree, Arkansas
Paul Shafer
Lepanto, Arkansas
M. D. Shafer
Lepanto, Arkansas
Odam Brothers
Durant, Mississippi
Mr. & Mrs. J. A. West
Louisville, Mississippi

[fol. 484] Mr. and Mrs.
J. A. West
Philadelphia, Mississippi
Mr. Maher
Kosciusko, Mississippi
B. Carey
Kosciusko, Mississippi
Ray Smith
Woodbury, Tennessee

6. In addition to the theatre operators whose competition was restrained, suppressed or eliminated, already referred to in petitioner's original Bill of Particulars, are included all the theatre operators listed in this Additional Bill of Particulars as answering paragraph 1 and paragraph 5(d) and the following:

James R. Wilson, McMinnville, Tennessee: is prevented from securing sufficient product to continue in business.

Ruble B. Page Theatres at Cleveland, Tennessee: was unable to secure sufficient product and forced out of business.

Joe Wiley, Hickman, Kentucky: threat of preventing independent from procuring pictures; independent abandoned construction of theatre.

Dixie Theatre, H. T. Bailey, Jr., Manager, Gadsden, Alabama: independent exhibitor unable to obtain satisfactory product and is having difficult time continuing in business.

Butler P. A. Hine and Hubert Mitchell, Decatur, Alabama: planned new theatre at Decatur; forced to abandon project when Crescent commenced building new theatre at identical location.

O. W. Hughes, Assistant United States Attorney.
Allen A. Dohey, Special Assistant to the Attorney General.

[fol. 485] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

THIRD ADDITIONAL BILL OF PARTICULARS—Filed July 3, 1941

The United States of America, petitioner herein, hereby files the following Additional Bill of Particulars in response

to the motions of the defendants, Crescent Amusement Company, Lyric Amusement Company, Inc., Nu-Strand Corporation, Cumberland Amusement Company, Strand Enterprises, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, in accordance with the order of the Court entered February 23, 1940.

With reference to the particulars named in this Additional Bill of Particulars, petitioner did not learn of these instances until after the thirty days mentioned in the Order of the Court entered February 23, 1940, had expired. With particular reference to the instance appearing in paragraph 1 below and relating to C. G. Lawing, independent at Brownsville, Tennessee, petitioner first learned of this situation on June 16, 1941 and, on June 23, 1941, wrote counsel for defendant exhibitors advising them of said situation. With reference to the town of Middlesboro, Kentucky, men- [fol. 486] tioned in paragraph 2 (e) below, petitioner first learned of this situation on June 20, 1941. With reference to the instance appearing in paragraph 5 (d) below, and paragraph 6 below, relating to S. B. Ford, independent at Lexington, Mississippi, petitioner first learned of this situation on June 22, 1941.

The subheadings listed below, under which said particulars are furnished, are the same subheadings as are set forth in said motions and in the order.

1. In addition to the theatres set forth in petitioner's original Bill of Particulars, petitioner's Additional Bill of Particulars filed herein on May 28, 1941, and petitioner's Second Additional Bill of Particulars filed herein on June 6, 1941, as theatres which defendant exhibitors have taken over or kept closed during the past five years, petitioner lists the following:

Time: 1935 and 1936.
Place: Brownsville, Tennessee.
Theatre: Southland.
Independent Exhibitor: C. G. Lawing.
Defendant Exhibitor: Crescent Amusement Co.
Distress Methods Employed: Kept independent from obtaining sufficient product to continue in business and independent was forced to close.

2 (e). The "other towns" referred to in paragraph 45 of the complaint, in addition to those mentioned in paragraph 2

(e) of petitioner's Additional Bill of Particulars and petitioner's Second Additional Bill of Particulars, shall include:

Middlesboro, Kentucky.

5 (d). In addition to the list of "other exhibitors" referred to in paragraph 48 (a) and of "competing theatres" referred to in paragraph 48 (b), appearing in petitioner's original Bill of Particulars, petitioner's Additional Bill of Particulars, and petitioner's Second Additional Bill of [fols. 487-490] Particulars, petitioner adds the following:

S. B. Ford, Lexington, Mississippi.

6. In addition to the list of theatre operators whose competition was restrained, suppressed, or eliminated, appearing in petitioner's original Bill of Particulars and petitioner's Additional Bill of Particulars, petitioner adds the following:

S. B. Ford, Independent operator of the Star Theatre at Lexington, Mississippi. Competition was restrained on account of not being able to get sufficient product to operate successfully.

O. W. Hughes, Assistant United States Attorney,
Allen A. Dobey, Special Assistant to the Attorney General.

[fol. 491] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

ANSWER OF THE CRESCENT AMUSEMENT COMPANY ET AL. TO SUPPLEMENT TO COMPLAINT—Filed July 31, 1941

The defendants herein, The Crescent Amusement Company, Lyric Amusement Company, Inc., Nu-Strand Corporation, Cumberland Amusement Company, Strand Enterprises, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum, R. E. Baulch and Kermit C. Stengel, having united

in this answer for the convenience of the Court, for answer to the supplement to the complaint filed July 24, 1941, say:

First Defense

1. Defendants refer to and adopt their answer to the original complaint as their answer to the supplement to complaint as fully as if same were copied herein.

Second Defense

1. On November 14, 1940, plaintiff herein, United States of America, filed an amended and supplemental complaint in the District Court of the United States for the Southern District of New York in the case entitled "United States of America, Plaintiff v. Paramount Pictures, Inc., et al., Defendants," Civil Action No. 87-273, in which action each of the distributors referred to herein as "defendant distributors" was a party defendant and in said amended and supplemental complaint made the following allegation, among others:

> [fol. 492] "178. Each defendant distributor, with knowing all the matters and things hereinbefore alleged, for many years last past, has contracted with various theatre circuits throughout the United States, including the affiliated circuits hereinbefore mentioned, to restrain and, pursuant to such contracts, has in fact unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures among the several States of the United States, in violation of Section 1 of the Sherman Act, by entering into licensing agreements with said circuits of theatres which contain provisions calculated to impose on independent exhibitors in competition with such circuit theatres, one or more of the discriminatory restrictions referred to in the lettered subparagraphs of paragraph 149, regardless of whether such license contracts were made pursuant to any prior concerted action, combination or conspiracy between two or more defendants."

2. Paragraph 149 in said amended and supplemental complaint, referred to in paragraph 178, above quoted, referred to (a) Runs, (b) Delivering prints, (c) Clearance, (d) Minimum admission prices, (e) Prohibition of double features on subsequent runs, (f) Selectivity of deals, (g) Designa-

tion of play dates, (h) Forcing of short subjects, news reels, trailers, serials, reissues, westerns and foreigns, (i) Film rentals, (j) Advertising allowances, (k) Score charges, (l) Optional contracts, (m) Contract modifications, (n) Overage and underage, (o) Moveovers, and (p) Overbuying, as means of discrimination most frequently employed by the distributors. A printed copy of said amended and supplemental complaint is filed herewith as Exhibit A to this answer, and reference is made to same for its allegations and prayers in detail.

3. Said amended and supplemental complaint contains prayers, among others, that each contract, combination and conspiracy in restraint of trade and commerce be declared illegal and violative of the Sherman Act, and that the defendants be enjoined and restrained from continuing to carry out the said restraints of interstate trade and commerce. Reference is particularly made to paragraphs (2) and (3) of the "Prayer."

4. Following the filing of said amended and supplemental complaint on November 15, 1940, answers were filed by the corporations who were defendants. True copies of the [fol. 493] answers of such of said defendants as were also defendants in this cause but were subsequently dismissed as defendants are filed herewith collectively as Exhibit B to this answer, and reference is made to them for their contents in full.

5. On November 20, 1940, a consent decree was entered in said above mentioned cause in the District Court of the United States for the Southern District of New York, and a true copy of said consent decree is filed herewith as Exhibit C to this answer, and reference is made to same for its contents in full.

6. Said consent decree contained a section numbered XV as follows:

> "The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940, or to any license entered into pursuant to any such franchise, except that Section VIII hereof shall apply to all such franchises and such licenses between parties bound by this decree other than licenses referred to in Section XVII hereof."

Section VIII relates to arbitration of controversies as to clearance, and Section XVII relates to licensing of pictures by distributors to their affiliated theatres.

7. Prior to June 6, 1940, defendants herein negotiated so-called franchises with certain of the distributor defendants who have been dismissed as defendants herein, and although the legality of franchises of this character was an issue in said case of United States of America v. Paramount Pictures, Inc., et al., in which said consent decree was entered, there was no adjudication that same were illegal, but on the contrary they were expressly exempted from the provisions of the consent decree. Certain of said franchises negotiated by defendants, or some of them, are now in effect, and plaintiff is seeking in this cause an adjudication that same are illegal *per se*, and is seeking an injunction to prevent them from being performed because of their said alleged illegality.

8. Having brought this suit in equity in this Court, sitting as a Court of Equity, plaintiff is bound by equitable [fol. 494] principles and is precluded from taking the inconsistent position that said franchises negotiated prior to June 6, 1940, are illegal.

9. The distributors who are parties to the franchises and other contracts as to which plaintiff seeks an adjudication of illegality are indispensable parties, and since they have been dismissed as defendants, no such relief can be granted.

Wherefore defendants demand judgment dismissing the Supplement to the Complaint as to them, with their costs.

Geo. H. Armistead, Jr., William Waller, Attorneys,
American Trust Building, Nashville, Tennessee.

Of Counsel:

Armistead, Waller, Davis & Lansden, American Trust Building, Nashville, Tennessee.

[fol. 495] EXHIBIT "A" TO ANSWER

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-273

UNITED STATES OF AMERICA, Plaintiff,

vs.

PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION; Loew's, Inc[illegible]ated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation; Warner Bros. Pictures Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation, National Theatres Corporation; Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Inc.; Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc.; United Artists Corporation, Defendants

Amended and Supplemental Complaint

Leave of Court having been first obtained, the United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, hereby amends and supplements the petition filed herein on July 20, 1938, and the bills of particulars filed pursuant thereto, by substituting therefor this amended and supplemental complaint against the following defendants:

Paramount Pictures Inc., Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation; Warner Bros. Pictures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation, National Theatres Corporation; Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Inc.; [fols. 496-504] Universal Corporation, Universal Pictures

Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc.; United Artists Corporation,—defendant corporations, and for its complaint plaintiff alleges, upon information and belief, as follows:

. . . . . .

[fol. 505] IV. *Growth of the Defendants*

A. Paramount [1]

18. Famous Players-Lasky Corporation (now known as Paramount Pictures Inc.) was organized by Mr. Adolph Zukor (Chairman of the Board of Paramount Pictures Inc.) and Mr. Jesse L. Lasky and incorporated on July 19, 1916. The corporate name was changed to Paramount Famous Lasky Corporation on April 1, 1927 and on April 24, 1930 the name was changed to Paramount Publix Corporation.

19. In 1933 Paramount Publix Corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York. In June, 1935, it was reorganized under Section 77B of the Bankruptcy Act under the name of Paramount Pictures Inc.

20. Twelve producing companies were merged with Famous Players-Lasky Corporation in 1917. At the same time the company integrated production and distribution by acquiring a national distribution system through merger with Artcraft Pictures Corporation and Paramount Pictures Corporation. Thereafter the company from time to time acquired interests in other producing and distributing companies.

21. At the present time pictures are produced by the parent company, Paramount Pictures Inc., which is one of the principal producing companies in the industry. It maintains production facilities in Hollywood, California.

[1] The term "Paramount," as hereinafter used, includes all subsidiaries of the parent corporation, Paramount Pictures Inc. The term "subsidiaries" as used throughout this complaint includes all corporations in which the parent owns, directly or indirectly, a percentage of the voting stock sufficiently large to permit the exercise of substantial voting control, even though such percentage is less than 51% of the total voting stock.

and in New York and Long Island, New York. The follow- [fol. 506] ing chart indicates Paramount's relative position in the industry with respect to pictures produced for the seasons mentioned.

Season	Features Produced in Industry	Features Produced by Paramount
1930-31	510	58
1931-32	490	56
1932-33	510	51
1933-34	480	55
1934-35	520	44
1935-36	517	50
1936-37	535	41
1937-38	450	40
1938-39	526	58

22. Paramount Pictures Inc. also produces approximately 45 shorts and 104 news reels each season.

23. Paramount pictures are distributed directly by it and also by its wholly owned subsidiary Paramount Film Distributing Corporation, through exchanges in 33 key cities. During the 1936-37 season Paramount distributed 59 features, 18 more than it produced, and ordinarily distributes each season a substantial number of features produced by others for release by it.

24. In 1919 Paramount entered upon a program of theatre acquisition. In that year it acquired a stock interest in Southern Enterprises, Inc., which operated approximately 135 theatres in the South. In 1920 a stock interest was acquired in New England Theatres, Inc., which operated approximately 50 theatres in the New England states. About 1926, Paramount acquired a stock interest in the Butterfield Theatre Circuit, which operated approximately 70 theatres in Michigan. During the same year a stock interest was acquired in Balaban and Katz Corporation, which operated approximately 50 theatres in Illinois. Theatres were also subsequently acquired in the West and Middle West through the acquisition of various theatres and of stock interests in various corporations operating theatre circuits.

25. The number and location of theatres now operated by Paramount are approximately as follows:

[fol. 507] (a) First-run Metropolitan Theatres:

City	No. of Theatres	City	No. of Theatres
Atlanta, Ga.	4	Memphis, Tenn.	2
Boston, Mass.	4	Minneapolis, Minn.	6
Brooklyn, N. Y.	1	Newark, N. J.	4
Charlotte, N. C.	3	New Haven, Conn.	1
Chicago, Ill.	6	New Orleans, La.	3
Dallas, Tex.	6	New York, N. Y.	1
Des Moines, Ia.	4	Omaha, Neb.	3
Detroit, Mich.	5	Salt Lake City, Utah	6
Houston, Texas	3	St. Paul, Minn.	4
		Total	63

(b) Other theatres operated by Paramount are approximately as follows:

State	No. of Theatres	State	No. of Theatres
Alabama	33	Nebraska	11
Arizona	8	New Hampshire	10
Arkansas	47	New Jersey	2
California	4	New Mexico	7
Colorado	9	New York	24
Connecticut	5	North Carolina	66
Florida	109	North Dakota	10
Georgia	34	Ohio	16
Idaho	9	Oklahoma	6
Illinois	116	Pennsylvania	72
Indiana	8	Rhode Island	3
Iowa	60	South Carolina	23
Kentucky	11	South Dakota	20
Louisiana	17	Tennessee	26
Maine	39	Texas	199
Maryland	1	Utah	15
Massachusetts	78	Vermont	8
Michigan	11	Virginia	17
Minnesota	32	West Virginia	3
Mississippi	35	Wisconsin	5
Missouri	1		
		Total	1,210

26. The parent corporation, Paramount Pictures, Inc. has gross assets of approximately $90,000,000. Its consoli-

dated gross income was in excess of $100,000,000 for the fiscal year ended in 1939.

B. Loew's [1]

27. In about the year 1905, the late Marcus Loew (who, before his death in 1927, was president of Loew's, Incorporated), in association with others, began to operate some [fol. 508] so-called "penny arcades" in New York City and one in Cincinnati. Shortly thereafter, certain of these penny arcades were remodeled so as to permit, in part of the premises, the exhibition of single reel motion pictures, for which an admission price of 5¢ was charged. In 1907 the enterprise acquired its first theatre. It was located in Brooklyn, New York, and was operated with vaudeville and single reel pictures.

28. The motion picture subjects were bought by Mr. Loew from various picture producers and exhibited in the Loew theatres; the custom was to buy one print of each subject. By the year 1910, Mr. Loew and his associates owned stock interests in a number of corporations operating store shows and theatres in New York and elsewhere, all of them showing vaudeville and short-subject pictures.

29. In 1910, Mr. Loew and his associates organized Loew's Consolidated Enterprises, which in 1911, was succeeded by Loew's Theatrical Enterprises.

30. Between 1911 and 1919, Loew's Theatrical Enterprises, through subsidiary corporations, extended its activities in the operation of theatres devoted to motion pictures or a combination of vaudeville and motion pictures. Additional theatres were acquired in New York City and in certain cities other than New York. By 1919, Loew's Theatrical Enterprises had financial interests in approximately 56 theatres.

31. In October 1919, Loew's Incorporated, was organized, and acquired all of the outstanding stock of Loew's Theatrical Enterprises. The extent of the theatre business of Loew's, Incorporated, has increased gradually since 1919.

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[1] The term "Loew's", as hereinafter used, includes all subsidiaries of the parent corporation, Loew's Incorporated.

32. The number and location of the theatres now operated by Loew's is approximately as follows:

[fol. 509] (a) Metropolitan First-run Theatres:

City	No. of Theatres	City	No. of Theatres
Atlanta, Ga.	1	Memphis, Tenn.	1
Baltimore, Md.	1	Newark, N. J.	1
Boston, Mass.	2	New Haven, Conn.	2
Brooklyn, N. Y.	1	New Orleans, La.	1
Cleveland, Ohio	2	New York, N. Y.	2
Denver, Colo.	1	Pittsburgh, Pa.	1
Houston, Texas	1	St. Louis, Mo.	1
Indianapolis, Ind.	1	San Francisco, Calif.	1
Kansas City, Mo.	1	Washington, D. C.	3
		Total	24

(b) Other theatres are located as follows:

State	No. of Theatres	State	No. of Theatres
Connecticut	8	New Jersey	2
Delaware	1	Ohio	5
District of Columbia	1	Pennsylvania	5
Indiana	2	Rhode Island	1
Kentucky	1	Tennessee	1
Maryland	2	Virginia	2
Massachusetts	3		
New York	64	Total	98

33. In 1920, Loew's, Incorporated, entered the field of production and distribution of motion pictures by acquiring the outstanding stock of Metro Pictures Corporation. In 1924, Metro Pictures Corporation merged with Goldwyn Pictures Corporation under the name of Metro-Goldwyn Pictures Corporation. The result of this merger was that Loew's, Incorporated, became the owner of all of the common stock of Metro-Goldwyn Pictures Corporation. At about the time of this merger, Louis B. Mayer Pictures, Inc., contracted to supervise the production of all pictures produced by the merged company, and turned over to Metro-Goldwyn Pictures Corporation certain of the assets of Louis B. Mayer Pictures, Inc. The business of Metro-Goldwyn-Pictures Corporation was subsequently assumed by Metro-

Goldwyn-Mayer Corporation. On December 31, 1937, Metro-Goldwyn-Mayer Corporation ceased to do business and the production activities were taken over by Loew's, Incorporated.

[fol. 510] 34. The following tabulation indicates the feature pictures produced by Loew's as compared with the total number of features produced, for the nine year period ending with the 1938-39 season:

Season	*Features Produced in Industry*	*Features Produced by Loew's*
1930-31	510	43
1931-32	490	40
1932-33	510	37
1933-34	480	44
1934-35	520	42
1935-36	517	43
1936-37	535	40
1937-38	450	41
1938-39	526	51

35. For the eight year period ending with the 1937-38 season, Loew's produced an average of 36 short subjects per year.

36. Loew's product is distributed through exchanges maintained by it in 31 key cities. During the 1936-37 season Loew's distributed 50 features, 10 more than it produced, and ordinarily distributes each season a substantial number of features produced by others for release by it.

37. The parent corporation, Loew's, Incorporated, has gross assets of approximately $150,000,000. During the fiscal year ending in 1939, its gross income was in excess of $100,000,000.

C. Fox[1]

38. Twentieth Century-Fox Film Corporation was incorporated under the name of Fox Film Corporation on February 1, 1915. Fox Film Corporation was voluntarily

[1] The term "Fox," as hereinafter used, includes all subsidiaries of Twentieth Century-Fox Film Corporation and of National Theatres Corporation.

reorganized with the consent of its creditors, and security holders in the summer of 1933. In August 1935, Fox Film Corporation acquired all the assets of Twentieth Century Pictures, Inc., a producing and distributing company, and the name of the company was changed to Twentieth Century-Fox Film Corporation.

[fol. 511] 39. The following chart indicates the feature pictures produced by Fox as compared with the total number of features produced for the nine year period ending with the 1938-39 season:

Season	*Features Produced in Industry*	*Features Produced by Fox*
1930-31	510	48
1931-32	490	46
1932-33	510	41
1933-34	480	46
1934-35	520	40
1935-36	517	52
1936-37	535	52
1937-38	450	49
1938-39	526	56

40. Movietonews, Inc., a wholly owned Fox subsidiary, for the eight year period ending 1937-38, produced an average of 20 shorts and 104 news reels per year.

41. Fox product is distributed directly by Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Distributing Corporation and Twentieth Century-Fox Corporation of Texas, wholly owned subsidiaries, through exchanges in 31 key cities. During the 1936-37 season Fox distributed 65 features, 13 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

42. In August 1925, Fox Film Corporation acquired approximately one-third of the common stock of West Coast Theatres, Inc., a company operating theatres in California and other western states; and, in March 1928, Fox Film Corporation purchased all the common stock of Wesco Corporation (now National Theatres Corporation), a holding company for theatre operating corporations.

43. In 1934, Wesco Corporation readjusted its capital structure by voluntary agreement among its creditors and

stockholders, pursuant to which The Chase National Bank of the City of New York acquired 58% of the stock of Wesco Corporation and Fox Film Corporation retained 42%. At about the same time the Chase Bank acquired a substantial stock interest in Fox Film Corporation and still owns a substantial interest in Twentieth Century-Fox [fol. 512] Film Corporation. The name of Wesco Corporation was thereafter changed to National Theatres Corporation and the Chase Bank still retains 58% of the stock of National Theatres Corporation. National Theatres Corporation operates theatres in the middle and far western parts of the United States through numerous subsidiary operating corporations.

44. In 1937, Twentieth Century-Fox Film Corporation acquired all the common stock of Roxy Theatre, Inc., which owns the Roxy Theatre, a large first-run theatre in New York City.

45. The location and number of theatres now operated by Fox is approximately as follows:

(a) Metropoltian first-run theatres:

City	*No. of Theatres*	*City*	*No. of Theatres*
Denver, Colo.	4	New York City	1
Detroit, Mich.	1	Portland, Ore.	4
Kansas City, Mo.	3	San Francisco, Calif.	4
Los Angeles, Calif.	5	Seattle, Wash.	5
Milwaukee, Wis.	3		
		Total	30

(b) Other theatres are located as follows:

State	*No. of Theatres*	*State*	*No. of Theatres*
Arizona	7	Montana	17
California	196	Nebraska	10
Colorado	32	New Mexico	6
Idaho	9	Oregon	9
Illinois	21	Utah	9
Iowa	6	Washington	23
Kansas	56	Wisconsin	50
Michigan	5	Wyoming	14
Missouri	45		
		Total	508

46. Twentieth Century-Fox Film Corporation has gross assets of approximately $60,000,000. During the fiscal year ended in 1939, its consolidated gross income was approximately $50,000,000.

[fol. 513]

D. Warner [1]

47. Warner Bros. Pictures, Inc., was incorporated in 1923 for the purpose of producing, distributing, and exhibiting motion pictures. At that time, it owned and operated a motion picture studio in Hollywood, but had no theatres.

48. The Warner Company became interested in experimental work in the development of talking pictures, and, in August 1926, the first public performance of talking pictures was presented in the Warner Theatre in New York City.

49. Warner is one of the principal producing companies in the industry and maintains production facilities at Burbank and Hollywood, California, and Brooklyn, New York. The number of features produced by it as compared with the total number of features produced for the nine year period ending with the 1938-39 season is indicated by the following tabulation:

Season	Features Produced in Industry	Features Produced by Warner
1930-31	510	69
1931-32	490	56
1932-33	510	53
1933-34	480	63
1934-35	520	51
1935-36	517	58
1936-37	535	58
1937-38	450	52
1938-39	526	54

50. During the eight year period ending 1937-38 Warner produced an average of 102 short subjects per year.

[1] The term "Warner", as hereinafter used, includes all subsidiaries of the parent corporation, Warner Bros. Pictures, Inc.

51. In 1925 Warner Pictures, Inc, acquired Vitagraph, Inc., which operated 34 exchanges in the principal cities of the United States and Canada, and two other affiliated companies which operated exchanges in foreign countries. Warner product is distributed through Vitagraph, Inc. During the 1936-37 season Vitagraph distributed 60 features, 2 more than it produced, and ordinarily distributes some features each season produced by others for release by it.

[fol. 514] 52. Warner Bros. Pictures, Inc., entered the exhibition field in December 1924, when it acquired a theatre in Youngstown, Ohio. In 1925, it acquired 13 additional theatres in various parts of the United States. In December 1928, the corporation acquired a majority of the stock of Stanley Company of America, which operated, directly or through subsidiaries, 182 theatres and had partial stock interests in theatre companies that owned or leased 51 theatres. The theatres of the Stanley Company of America were located in the Middle Atlantic States and the Distract of Columbia.

53. Subsequently, the company acquired interests in theatres in Missouri, Pennsylvania, Maryland, New Jersey, Ohio, Connecticut, New York, Illinois, Wisconsin, Virginia, and Kentucky.

54. The approximate number and locations of theatres now operated by Warner are as follows:

(a) Metropolitan first-run theatres:

City	No. of Theatres	City	No. of Theatres
Albany, N. Y.	2	Newark, N. J.	2
Baltimore, Md.	1	New Haven, Conn.	1
Brooklyn, N. Y.	1	New York, N. Y.	2
Charlotte, N. C.	1	Oklahoma City, Okla.	7
Cleveland, Ohio	2	Philadelphia, Pa.	8
Los Angeles, Calif.	2	Pittsburgh, Pa.	2
Memphis, Tenn.	1	Washington, D. C.	2
Milwaukee, Wis.	1		
		Total	35

(b) Other theatres are located as follows:

State	No. of Theatres	State	No. of Theatres
California	10	New York	44
Connecticut	34	Ohio	56
Delaware	6	Oklahoma	7
District of Columbia	14	Oregon	2
Illinois	19	Pennsylvania	185
Indiana	3	Virginia	9
Kentucky	8	Washington	3
Maryland	7	West Virginia	11
Massachusetts	16	Wisconsin	18
New Jersey	90		
		Total	522

55. Warner Bros. Pictures, Inc. has gross assets of approximately $150,000,000. During the fiscal year ended 1939 its gross income exceeded $100,000,000.

[fol. 515]

E. RKO[1]

56. Radio-Keith-Orpheum Corporation was incorporated under the laws of the State of Maryland on October 25, 1928. Since its incorporation it has been primarily a holding company for subsidiaries engaged in the production, distribution, and exhibition of motion pictures. Shortly after its organization, Radio-Keith-Orpheum Corporation secured control of its principal exhibition and production companies, Keith-Albee-Orpheum Corporation and FBO Productions, Inc., respectively.

57. Organized on January 28, 1928, as a Delaware corporation, Keith-Albee-Orpheum Corporation acquired, in February of the same year, all of the outstanding stock of B. F. Keith Corporation and approximately 90% of the outstanding stock of Orpheum Circuit, Inc. Subsidiaries of B. F. Keith Corporation owned and operated in various cities in the eastern part of the United States a large number of theatres which, although originally devoted to the performance of vaudeville, were converted and used for the exhibition of motion pictures. Orpheum Circuit, Inc., di-

[1] The term "RKO", as hereinafter used, includes all subsidiaries of Radio-Keith-Orpheum Corporation and Keith-Albee-Orpheum Corporation.

rectly or through subsidiaries, operated theatres throughout the Midwest and Western parts of the United States.

58. In addition to Keith-Albee-Orpheum Corporation and Orpheum Circuit, Inc., Radio-Keith-Orpheum Corporation obtained the controlling interest in numerous other companies engaged in the motion picture exhibition business, the most important being RKO Proctor Corporation and RKO Midwest Corporation. RKO Proctor Corporation operated the Proctor circuit of theatres located in the New York metropolitan district and in up-state New York. RKO Midwest Corporation controlled a group of theatres in Ohio and Michigan.

59. The number and location of theatres now operated by RKO is approximately as follows:

[fol. 516] (a) Metropolitan first-run theatres:

City	No. of Theatres	City	No. of Theatres
Albany, N. Y.	2	Minneapolis, Minn.	1
Boston, Mass.	2	Newark, N. J.	2
Brooklyn, N. Y.	2	New Orleans, La.	1
Chicago, Ill.	1	New York, N. Y.	1
Cincinnati, Ohio	6	Omaha, Neb.	1
Cleveland, Ohio	2	San Francisco, Calif.	1
Denver, Colo.	1	St. Paul, Minn.	2
Des Moines, Iowa	1	Washington, D. C.	1
Los Angeles, Calif.	2		
		Total	29

(b) Other theatres are located as follows:

State	No. of Theatres	State	No. of Theatres
California	1	New Jersey	14
Illinois	2	Ohio	13
Iowa	5	Rhode Island	2
Massachusetts	3	West Virginia	3
Michigan	7		
New York	53	Total	103

60. The name of FBO Productions, Inc., the principal producing company absorbed by Radio-Keith-Orpheum Corporation, was ultimately changed to RKO Radio Pic-

tures, Inc. RKO maintains production facilities in Hollywood and Culver City, California.

61. The number of features produced by RKO during the nine year period ending 1938-39 as compared with the total number of feature pictures produced during that period is indicated by the following chart:

Season	Features Produced in Industry	Features Produced by RKO
1930-31	510	32
1931-32	490	48
1932-33	510	45
1933-34	480	40
1934-35	520	40
1935-36	517	43
1936-37	535	39
1937-38	450	41
1938-39	526	49

62. In January 1931, Radio-Keith-Orpheum Corporation took over, through subsidiaries, the news reel and other production business and facilities of Pathe Exchange, Inc.

63. For the eight-year period ending 1937-38 RKO Radio Pictures, Inc. produced an average of 33 short subjects per [fol. 517] year and the Van Beuren Corporation, a wholly owned subsidiary, produced an average of 48 short subjects per year. During the same period Pathe News, Inc., a wholly owned subsidiary, produced an average of 10 short subjects and 104 news reels per year.

64. RKO product is distributed by RKO Radio Pictures, Inc. through its exchanges located in 32 cities. During the 1936-37 season RKO distributed 47 features, 8 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

65. On January 27, 1933, Radio-Keith-Orpheum Corporation went into an equity receivership and Irving Trust Company was appointed Receiver. On June 8, 1934, Radio-Keith-Orpheum Corporation filed a petition for reorganization under Section 77B of the Bankruptcy Act in the United States District Court for the Southern District of New York. Irving Trust Company was appointed Trustee in reorganization. A plan of reorganization was approved January 12, 1939, confirmed April 11, 1939, and such ap-

proval and confirmation were affirmed by the Circuit Court of Appeals for the Second Circuit on September 8, 1939.

66. The parent corporation has gross assets of approximately $70,000,000. During the fiscal year ended in 1939 its consolidated gross income was about $40,000,000.

F. *Columbia*[1]

67. Columbia Pictures Corporation was incorporated in the State of New York on January 10, 1924. Its organizers and, at that time, sole stockholders were Joe Brandt, Harry Cohn, and Jack Cohn. Commencing on February 4, 1925, with the acquisition of the assets of C. B. C. Film Sales Corporation, Columbia Pictures Corporation bought up exchanges throughout the country for the marketing of its product. By 1929, its distribution system was organized upon a national scale. In 1930, it secured exchanges for the foreign distribution of its film.

[fol. 518] 68. During 1928, Columbia acquired, through merger, Screen Shapshots, Inc., Hall Room Boys Photoplays, Inc., Starland Revue, Inc., all producers of short subjects, and in 1931 secured 50% and, in 1937, the remaining 50% of the capital stock of Screen Gems, Inc., also a producer of short subjects.

69. The following chart shows the number of features produced by Columbia, as compared with the total number of features produced during the nine-year period ending with the 1938-39 season:

Season	Features Produced in Industry	Features Produced by Columbia
1930-31	510	27
1931-32	490	31
1932-33	510	36
1933-34	480	44
1934-35	520	39
1935-36	517	36
1936-37	535	38
1937-38	450	39
1938-39	526	54

[1] The term "Columbia", as hereinafter used, includes all subsidiaries of the parent corporation, Columbia Pictures Corporation.

70. During the eight-year period ending 1937-38, Columbia Pictures Corporation produced an average of 39 short subjects and Screen Gems, Inc., produced an average of 22 short subjects per year.

71. Columbia product is distributed through its 32 exchanges located in key cities. During the 1936-37 season Columbia distributed 51 features, 13 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

72. The parent corporation has gross assets of approximately $15,000,000. During the fiscal year ended in 1939 its gross income was about $20,000,000.

G. *Universal*[1]

73. Universal Pictures Corporation, formerly Universal Film Manufacturing Company, was incorporated in New York, in 1912, and with its subsidiaries, engaged in the production and distribution of motion pictures in the United States and throughout the world.

[fol. 519] 74. Universal Pictures Company, Inc., was formed on January 10, 1925, and at approximately the same time purchased the entire outstanding capital stock of Universal Pictures Corporation. From 1925 to 1936, Universal Pictures Corporation was the production branch of its parent company, Universal Pictures Company, Inc. During such period, motion pictures produced by Universal Pictures Corporation were distributed by Universal Film Exchanges, Inc. and Big U Film Exchange, Inc.

75. In April 1936, Universal Corporation was organized for the chief purpose of acquiring the controlling stock interest of Carl Laemmle and his associates in Universal Pictures Company, Inc., a producer, and Big U Film Exchange, a distributor of motion pictures.

76. The number of features produced by Universal, as compared with the total number of features produced dur-

[1] The term "Universal", as hereinafter used, includes all subsidiaries of the parent corporation, Universal Corporation.

ing the nine-year period ending 1938-39, is indicated by the following tabulation:

Season	Features Produced by Industry	Features Produced by Universal
1930-31	510	22
1931-32	490	32
1932-33	510	28
1933-34	480	38
1934-35	520	39
1935-36	517	27
1936-37	535	40
1937-38	450	45
1938-39	526	45

77. For the eight year period ending with the 1937-38 season, Universal produced an average of 111 short subjects and 104 news reels per year. During the 1936-37 season, Universal distributed 40 features, no more than it produced, but it ordinarily distributes each season some features produced by others for release by it.

78. In January 1926, Universal Pictures Corporation and its president, Carl Laemmle, secured a substantial stock interest in Universal Chain Theatres Corporation, which, through subsidiaries and affiliated companies, operated a [fol. 529] large number of theatres. In 1928, Universal Chain Theatres Corporation and its affiliates operated about 315 theatres in Canada, the District of Columbia, and 20 States of the United States, including the Griffith Amusement Company circuit of 40 theatres in Oklahoma and Texas, and the Schine chain of 90 theatres in New York and Ohio. A substantial number of its theatres were disposed of between 1929 and 1931. It went into receivership in 1933, and its remaining theatres were sold by the receiver.

79. The dissolution of Universal Pictures Corporation in December 1936, was accompanied by a transfer of its assets to Universal Pictures Company, Inc. Since January 1, 1937, Universal Pictures Company, Inc., has been engaged in the production of motion pictures which are distributed in the United States by Big U Film Exchange, Inc., and Universal Film Exchanges, Inc.

80. Universal Pictures Company, Inc., has gross assets of approximately $12,000,000. During the fiscal year ended in 1939, its gross income was about $20,000,000.

B. United Artists[1]

81. United Artists Corporation was organized in 1919, by a group of individuals who had achieved prominence in the production branch of the motion picture industry. The purpose of the corporation was to distribute the features produced by its organizers.

82. Most of the features distributed by United Artists Corporation have been first-class features, although as a general rule it does not release as many pictures per year as the other major companies.

83. The following tabulation indicates the number of United Artists releases as compared with the total number of features produced during the nine year period ending 1938-39:

[fol. 531]

Season	Features Produced in Industry	Features Released by United Artists
1930-31	510	13
1931-32	490	14
1932-33	510	16
1933-34	480	20
1934-35	520	19
1935-36	517	17
1936-37	535	19
1937-38	450	16
1938-39	526	18

84. United Artists now distributes pictures for the following producers among others: Samuel Goldwyn, Charles Chaplin, Mary Pickford, Alexander Korda, and London Film Productions, Ltd., Selznick International, Edward Small, Sol Lesser, Hal Roach, David Loew, Ernest Lubitsch, Walter Wanger, and Richard Rowland.

85. United Artists maintains exchanges in 26 cities.

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[1] The term "United Artists", as hereinafter used, refers to the defendant, United Artists Corporation.

86. The corporation is owned by five stockholders, Charles Chaplin, Samuel Goldwyn, Mary Pickford, the Estate of Douglas Fairbanks and Alexander Korda. It issues no public statement of gross assets or business done but for the fiscal year ended in 1939 its gross income exceeded $10,000,000.

I. *Joint Theatre Interests*

87. Each of the producer-exhibitor defendants is jointly interested financially in one or more theatres with one or more of the other producer-exhibitor defendants, through profit sharing arrangements with respect to particular theatres; through so-called pools where several theatres owned or controlled by two or more are operated as a unit; through direct or indirect ownership of stock in a single theatre operating corporation by two or more of such defendants; or through arrangements where one owns or leases a theatre and the other manages it. Such joint interests include all of the following combinations with respect to one or more theatres: Fox with Loew's, Fox with Paramount, Fox with RKO, Fox with Warner, Loew's with Paramount, Loew's with RKO, Loew's with Warner, Paramount with RKO, Paramount with Warner and RKO with Warner.

[fols. 522-561] 88. There are about 200 theatres in the United States in which such joint interests are held, including a substantial number of metropolitan first-run theatres.

89. In addition to the foregoing joint theatre interests of the producer-exhibitor defendants with each other there are numerous other joint theatre interests where executive employees, or managing agents of one producer-exhibitor defendant have direct or indirect stock interests in a theatre operating corporation in which another producer-exhibitor defendant also owns a direct or indirect stock interest.

[fol. 562] VIII. *Prayer*

Wherefore, plaintiff prays:

(1) That the court issue its preliminary injunction restraining the defendants herein, and each of them, from building, buying, leasing, or otherwise acquiring any additional theatres or any further interest, or interests, in

any additional theatres, either directly or indirectly, through the acquisition thereof by subsidiary or associated corporations or otherwise, until the final decree herein or until the further order of this court.

(2) That each of the contracts, combinations, and conspiracies in restraint of interstate trade and commerce, together with the attempts to monopolize and the monopolization of the same, hereinbefore described, be declared illegal and violative of the Sherman Act.

(3) That the defendants herein, their subsidiaries, and each of them, and each and all of their respective officers and directors, and each and all of the respective agents, servants and employees, and all persons acting or claiming to act on behalf of the defendants, their subsidiaries, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the attempts at monopolization, the monopolies and all restraints of said interstate trade and commerce in the production, distribution, and exhibition of motion pictures described herein, and from entering into and carrying out, [fol. 563] directly or indirectly, expressly or impliedly, any monopolies or restraints of interstate trade and commerce similar to those alleged herein to be illegal.

(4) That a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein.

(5) That the integration of the production and exhibition branches of the industry by the producer-exhibitor defendants herein, and each of them, be declared to be unlawful as an instrumentality of monopoly and restraint upon interstate trade and commerce, and violative of the Sherman Anti-Trust Act.

(6) That the defendants Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Inc., Loew's Incorporated, and Radio-Keith-Orpheum Corporation, and each of them, under the direction and supervision of the court be ordered and directed to divest themselves of all interest and ownership, both direct and in-

direct, either in theatres and theatre holdings or in production and distribution facilities and that they, and each of them, and their respective successors be permanently enjoined from acquiring, directly or indirectly, any other interests in the branch of the industry divested, or in any persons, firms, or corporations which are engaged or may engage in that branch of the industry; said divestiture to be accomplished and carried out upon such terms and conditions as the court may deem proper.

(7) That the defendants Paramount Pictures Inc., Twentieth Century-Fox Film Corporation, National Theatre Corporation, Warner Bros. Pictures, Inc., Warner Bros. [fols. 564-566] Circuit Management Corporation, Loew's Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, R. K. O. Proctor Corporation and R. K. O. Midwest Corporation and each of them, under the direction and supervision of the court be ordered and directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find have been used by one or more of them to unreasonably restrain trade and commerce in motion pictures in violation of Section 1 of the Sherman Act or to monopolize trade and commerce in motion pictures in violation of Section 2 of the Sherman Act.

(8) That the plaintiff have such other and further relief as the court may deem proper.

(9) That the plaintiff recover its costs herein.

United States of America; John T. Cahill, United States Attorney for the Southern District of New York.

Robert H. Jackson, Attorney General. Thurman Arnold, Assistant Attorney General. James V. Hayes, Robert L. Wright, Robert E. Sher, J. Stephen Doyle, Jr., John F. Clagett, James M. Malloy, Special Assistants to the Attorney General. J. Frank Cunningham, Seymour Simon, Special Attorneys.

[fol. 567] EXHIBIT "C" TO COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-273

UNITED STATES OF AMERICA, Plaintiff,

against

PARAMOUNT PICTURES, INC., et al., Defendants

CONSENT DECREE

[fol. 568] The United States of America having filed its Petition herein on July 20, 1938, and its Amended and Supplemental Complaint on November 14, 1940; the defendants: Paramount Pictures Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation[1] having appeared and severally filed their answers to such petition and to such Amended and Supplemental Complaint and having asserted the truth of their answers and their innocence of any viola-[fol. 569] tion of law; and no testimony having been taken, but each of the consenting defendants having consented to the entry of this decree without any findings of fact, upon condition that neither such consent, nor this decree itself, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being (1) an admission or adjudication that the allegations of the Petition or of the Amended and Supplemental Complaint, or any of them, are or is true, or that such defendants, or any one or more of them, have or has violated or are or is violating any statute or law, or (2) evidence that such allegations, or any of them, are or is true, or

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[1] The above named defendants are referred to hereinafter as the consenting defendants.

that such defendants, or any one or more of them, have or has violated any statute or law, or (3) an admission or adjudication that the doing of any of the acts or things hereinafter enjoined or the failure to do any of the acts or things hereinafter directed to be done would constitute a violation of any statute or law, and upon the further conditions hereinafter set forth; and the United States of America, by its counsel, having consented to the entry of this decree and to each and every provision thereof upon such conditions, and having moved the Court for the entry of this decree;

Therefore, it is ordered, adjudged and decreed as follows:

I

The Court has jurisdiction of the parties hereto; and for the purposes of this decree and of proceedings for the enforcement thereof, and for no other purpose, the Court has jurisdiction of the subject matter hereof and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies".

The Petitioner not having offered any proof of its allegations that defendants have violated the antitrust laws, and defendants having denied each and every such allegation, this Court has not determined or adjudicated and by this decree does not determine or adjudicate, and this is not [fol. 570] a decree to the effect that any of said defendants has violated or is now violating any of such laws, or any other statute; and this decree relates solely to future conduct herein below specified and is not based upon any finding, determination, or adjudication that any right or statute has yet been or is now being violated.

II

Each consenting defendant, its successors, officers, directors, agents and employees, and all persons and corporations acting under, through, or for it, hereby is and are enjoined from doing the acts prohibited by this decree, and is and are directed to do the acts thereby required.

III

No consenting defendant engaged in the distribution of motion pictures (hereinafter referred to as a distributor

defendant) shall license or offer for license [1] a feature motion picture [2] (hereinafter sometimes referred to as a feature) for public exhibition within the United States of America at which an admission fee is to be charged, until the feature has been trade shown [3] within the exchange dis- [fol. 571] trict [4] in which the public exhibition is to be held. Every trade showing shall be preceded by a notice, published in a trade publication [5] having general circulation among exhibitors [6] in such exchange district, which shall state the title of the picture and the date and the time when and the place or places where it will be trade shown.

IV

(a) No distributor defendant shall offer for license or shall license more than five features in a single group. In offering its features for license to an exhibitor a distributor may change the combinations of features in groups as it may from time to time determine, and may license or offer

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[1] License means (as a verb) to make an agreement, or (as a noun) an agreement, by which a distributor grants the right to exhibit a motion picture in any theatre engaged in the exhibition of motion pictures for profit.

[2] A feature motion picture is a motion picture approximately 5,000 feet, or more, in length.

[3] A trade showing is an exhibition of a feature at a theatre or projection room for the benefit of exhibitors generally.

[4] Each distributor defendant shall file with the Department of Justice a map of each of its exchange districts, showing the territorial limits thereof. Changes in the territorial limits of an exchange district shall be made only after two weeks' notice to the Department of Justice. References in this Section and in Sections V, IX and XVIII hereof to exchange districts are to exchange districts of each distributor defendant, as constituted from time to time.

[5] Trade publication means a daily or weekly newspaper or magazine which is devoted primarily to news concerning the motion picture industry.

[6] Exhibitor means any individual, partnership, unincorporated association or corporation engaged in the public exhibition of motion pictures in a theatre or theatres for profit.

for license as many groups of features as it may from time to time determine, provided that the license or offer for license of one group of features shall not be conditioned upon the licensing of another feature or group of features.

(b) No distributor defendant shall require an exhibitor to license short subjects, newsreels, trailers, or serials (hereinafter collectively referred to as shorts) as a condition of licensing features. No distributor defendant shall require an exhibitor to license reissues, westerns,[1] or foreigns[2] (hereinafter collectively referred to as foreigns) as a condition of licensing other features.

[fol. 572] Where a license has been entered into, controversies arising upon a complaint by an exhibitor that the licensing to him of one group of features was conditioned by the distributor upon the licensing of another feature or group of features or the licensing of shorts or foreigns shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds thereof, not later than two days after receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application or applications for such features, shorts or foreigns. The power[3] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of such features was so conditioned; and, if the finding be in the affirmative, (2) an award cancelling the license for (or to the extent that it may relate to) such other feature or group of features, or such shorts or foreigns.

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[1] Westerns are those western pictures which are not of the usual character and type of, and are inexpensively produced as compared with, the distributor's general line of features.

[2] Foreigns are features produced outside of the United States except such as are produced in the English language by the distributor or a subsidiary or affiliate thereof.

[3] When, in any arbitration under this decree, the finding of the arbitrator shall be that the complainant has not sustained his complaint, the arbitrator shall enter an award dismissing the complaint.

Where no license has been entered into, controversies arising upon a complaint by an exhibitor that a distributor defendant has offered for license to him more than five features in a single group or that the offer of a license to him of one group of features was conditioned upon the licensing of another feature or group of features, or the licensing of short or foreigns, shall be subject to arbitration. An exhibitor shall have no right to assert any claim that an offer so to license such features was so made or conditioned unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds therefor not later than five days after the exhibitor claims the alleged offer was made. The power [4] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the offer to license such features was so made or conditioned; and, if the finding be [fol. 573] in the affirmative, (2) an award imposing upon the distributor making such offer a penalty in an amount not to exceed five hundred dollars ($500.00). Such penalty shall be payable into the arbitration fund referred to in subdivision 8 of Section XXII hereof.

V

No license for features to be exhibited in theatres located in one exchange district [1] shall include theatres located in another exchange district, nor shall the licensing of features for exhibition in theatres located in one exchange district be conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district.

Controversies arising upon a complaint by an exhibitor thereby affected that the licensing by a distributor defendant of features for exhibition in theatres located in one exchange district was conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district shall be subject to arbitration. The power [2] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of features for exhibition

[4] See footnote 3 to this Section.

[1] See footnote 4 to Section III.

[2] See footnote 3 to Section IV.

in theatres located in one exchange district was so conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district; and, if the finding be in the affirmative, (2) an award imposing upon the distributor defendant so licensing features a penalty in an amount not to exceed five hundred dollars ($500.00), payable into the arbitration fund referred to in subdivison 8 of Section XXII hereof.

[fol. 574] VI

No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run (to be designated by the distributor) upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms to such exhibitor for said theatre will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising upon a complaint by an exhibitor that, contrary to the provisions of this Section, a distributor defendant has refused so to license its pictures shall be subject to arbitration. The power[1] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not, contrary to the provisions of this Section, the distributor has refused to license its pictures to the complainant for exhibition in said theatre; and, if the finding be in the affirmative, (2) an award directing the distributor to offer its pictures for license to the complainant for exhibition in said theatre on a run to be designated by the distributor and upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section. The burden of showing that granting a run on any terms to the complainant will have the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located shall be upon the distributor.

Any distributor defendant affected by such an award may institute a further arbitration proceeding to be relieved therefrom on the ground that since the making of the award

[1] See footnote 3 to Section IV.

the granting of a run in compliance therewith has had the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located, and, in the event that the arbitrator finds that [fol. 575] the granting of a run in compliance with the award has had the effect of reducing the distributor's total film revenue in said area, he shall vacate the award.[1]

VII

Controversies arising upon the complaint of an exhibitor that a feature licensed to him by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality served by such theatre on moral, religious or racial grounds shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless written notice of his election to cancel such feature, together with a statement of his reasons therefor, shall have been mailed to the distributor defendant at its Home Office not later than ten days after the receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application for such feature. In such event the license in so far as it relates to the exhibition of such feature in the theatre specified in the notice shall be deemed cancelled unless within five days after receipt of such notice, the distributor shall have mailed to the exhibitor a notice in writing of its denial of such claim and of its intention to arbitrate the controversy. The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the feature is generally offensive in the locality served by the exhibitor's theatre on moral, religious or racial grounds; and, if the finding be in the affirmative, (2) an award cancelling the license in so far as it relates to the exhibition of such feature in said theatre.

VIII

Controversies arising upon the complaint of an exhibitor [fol. 576] that the clearance[1] applicable to his theatre is

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[1] See footnote 3 to Section IV.

[1] Clearance means the period of time, fixed by agreement between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres.

unreasonable shall be subject to arbitration under the following provisions:

It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures.

In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area wherein the theatres involved are located;

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenue derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres.

The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to [fol. 577] whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. Subject to the provisions of Section XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license

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[2] See footnote 3 to Section IV.

entered into pursuant to such franchise between such distributor defendant and any other party bound by this decree.

Any distributor defendant or any exhibitor affected by such an award may institute a further arbitration proceeding for a modification thereof upon the ground that, since the making of the award the conditions with respect to the theatres involved therein have so changed as to warrant modification, and, in the event that the arbitrator finds that there has been such change,[2] he shall make a redetermination of the maximum clearance.

Nothing contained in this Section shall be deemed to restrict, and no award made in any arbitration under this Section shall restrict, the exhibitor's right to license for any theatre any run which he is able to negotiate with any distributor, nor the distributor's right to license for any theatre any run which it desires to grant.

Nothing contained in this Section and no award hereafter entered in any arbitration in accordance with its provisions shall apply to licensing the exhibition of any special feature,[3] provided such special feature is licensed under an exhibition contract applicable only thereto, or to the right of a distributor defendant to include in such contract and [fol. 578] to make a part thereof such special terms and conditions, including such special clearance provision or provisions, as such distributor shall fix, establish and enforce for and in connection with the exhibition of such special feature.

IX.

In booking prints for exhibition by exhibitors competing on the same run in the same exchange district,[1] a distributor defendant shall not withhold delivery of prints available in its exchange from one exhibitor in order to give a competing exhibitor a prior playing date not provided for in his license. It is recognized that distributors must be permitted discretion in the ordinary course of booking and distributing films in an exchange district when too few prints are available in the exchange for the playing date desired

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[2] See footnote 3 to Section IV.

[3] For the purposes of this Section, a special feature means a feature which for a period of time is exhibited at generally advanced first-run admission prices.

by two or more theatres. In such cases this Section shall have no application.

Violations of this Section shall be subject to arbitration and, if the arbitrator finds[2] that the distributor complained against has pursued a policy of withholding available prints from the complaining exhibitor in violation of this Section, he shall enter an award directing the distributor to discontinue such policy.

X.

A. Controversies arising upon a complaint by an independent exhibitor[1] that a distributor defendant has arbi- [fol. 579] license its features for exhibition on the run requested by said exhibitor in one of said exhibitor's theatres which was in existence or which replaced[2] a theatre in existence at the date of this decree shall be subject to arbitration.

B. In any such arbitration no award shall be made against a distributor defendant unless the arbitrator shall first find the following facts:

(1). The complainant is an independent exhibitor and the theatre operated by him and specified in his complaint was in existence at the date of the decree or replaced such a theatre; and

(2) Such refusal of the distributor to license its features for exhibition in the complainant's theatre on the run re-

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[1] See footnote 4 to Section III.

[2] See footnote 3 to Section IV.

[1] An independent exhibitor, as used in this Section, is one wholly independent of any circuit of more than five theatres and not affiliated either by stock ownership, common ownership; common buying or otherwise with a circuit of more than five theatres and whose licenses are not negotiated by a buying combine or common buying agent negotiating for more than five theatres.

[2] A theatre shall not be deemed to have replaced such an existing theatre unless erected in the same neighborhood as one which was destroyed or permanently abandoned as a theatre, for the purpose of succeeding to its patronage, and with a seating capacity not more than 25 per cent. greater than that of the theatre replaced.

quested by the complainant continued during a period of not less than three successive months; and

(3) The distributor during such period has licensed the features requested by the complainant on the run requested by him to a theatre (sometimes hereinafter referred to as a circuit theatre) which was in competition with the theatre specified in the complaint and which was a component of a circuit of not less than 15 theatres or which was affiliated either by stock ownership, common ownership, common buying or otherwise with a circuit of not less than 15 theatres or the licenses for which were negotiated by a buying combine or common buying agent negotiating for not less than 15 theatres; and

(4) The complainant's theatre has not available to it features sufficient in nature and quantity to enable it to operate on the run requested by the complaint; and

[fol. 580] (5) (a) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or

(b) Subsequent to July 20, 1940 and during the two consecutive motion picture seasons[3] immediately preceding the filing of the complaint, the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint and during such period exhibited on such run substantially all the features released during such period by the distributor complained against; or

(c) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant demanded in writing[4] features for the theatre specified in his complaint from the distributor complained against on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clear-

[3] A motion picture season means the period from September 1 of one year to August 31 of the next year.

[4] Demands in writing shall be deemed to include complaints in writing to the Department of Justice.

ance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; or

(d) The complainant operated the theatre specified in his complaint for at least one year prior to the entry of this decree, and subsequent to July 20, 1935, and prior to July 20, 1940 a prior operator of said theatre had demanded in writing [5] features from the distributor complained against on the same run as or on an earlier run than [fol. 581] that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clearance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; and

(6) Such refusal to license the exhibition of said features in the complainant's theatre specified in his complaint was in fact because the theatre licensed to exhibit them on the run requested by the complainant was a circuit theatre.

C. In determining whether the exhibitor's complaint is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed: the terms, if any, offered in respect of each of the two competing theatres; the seating capacity of each of said theatres; the capacity of each for producing revenue for the distributor; the character, appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each served; the competitive conditions in the area in which they are located;

[5] See footnote 4 to this Section.

their comparative suitability[6] for exhibition of the distributor's features on the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated and the policy under which the complainant proposes to operate his said theatre [fol. 582] if he obtains the run requested; the financial responsibility of the exhibitor operating each of said theatres; and the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom.

D. If in any such arbitration the arbitrator finds[7] for the complainant, he may enter an award against the distributor which shall not affect the license to exhibit any feature then under license to the circuit theatre but which shall prohibit such distributor from thereafter licensing its features for exhibition either in the circuit theatre specified in the complaint on the run requested by the complainant, or in the complainant's theatre specified in the complaint, on such run, otherwise than by a separate contract or agreement which shall not be a part of any contract or agreement for the licensing of features for exhibition in any other theatre or conditioned upon the licensing of features for exhibition in any other theatre.

E. After a final award in favor of a complaining exhibitor has been made under this Section, such exhibitor may institute a further arbitration proceeding (to be held before the arbitrator who entered the original award, if available) upon the ground that such award has not been complied with in good faith by the distributor against which it was entered. If in any such proceeding the arbitrator shall find[7] that the distributor has not complied in good faith with the original award, the arbitrator may award damages

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[6] In considering this factor in situations where the exhibitor customarily exhibits features in two or more theatres on the same run in the same situation as a unit by contracting for groups of features on an "or" basis (i.e. for exhibition at one of two or more specified theatres) all of such theatres may be considered collectively as a unit.

[7] See footnote 3 to Section IV.

to the exhibitor for loss resulting from the distributor's failure to comply with the original award but any such award of damages shall be purely compensatory.

Any further arbitration proceeding for an award of damages for violation of the original award must be commenced [fol. 583] within sixty days after such violation has occurred, by filing a statement specifying the facts constituting each alleged violation for which damages are sought and the exhibitor's alleged damages resulting from each such alleged violation. No award of damages shall be made in any such proceeding for any violation of the original award not occurring within said sixty day period, but prior violations may, in any such proceeding, be considered by the arbitrator as evidence bearing upon the question of the distributor's good faith.

XI

(1) For a period of three years after the entry of the decree herein each of the consenting defendants will notify [1] the Department of Justice immediately of any legally binding commitment for the acquisition by it of any additional theatre or theatres.

(2) During such period each such defendant will also report to the Department of Justice on or before the tenth day of each month the changes in its theatre position, if any, that have occurred during the preceding month, as follows, together with a statement of the reasons for such changes:

(a) Theatres contracted to be built or under construction;

(b) Theatres lost or disposed of;

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[1] The notification and report shall include such commitments and changes as may have been made by corporations not parties to this decree which are controlled by such defendant. They shall also include such commitments or changes as may have been made by corporations in which such defendant owns a financial interest but which it does not control, if such defendant has received knowledge of such commitments or changes. Each defendant will request such corporations to notify it immediately of any such commitment or change.

(c) Theatres acquired;

(d) Interests in theatres acquired, with a statement of the nature and extent of such interests.

(3) If upon receipt of such information the Department of Justice requests any such defendant to furnish further information with respect to any of the above transactions in which it is involved, such defendant will make a reasonable effort to supply such information promptly.

[fol. 584] (4) No information furnished under subdivision (1), (2) or (3) hereof shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

(5) For a period of three years following the entry of this decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business. Proceedings based on a violation of this subdivision (5) shall be only by application to the Court for injunctive relief against the consenting defendant complained against, which shall be limited to restraining the acquisition, or ordering the divestiture, of the theatres or interests therein, if any, about to be acquired, or acquired, in violation of this Section.

XII

(a) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, requiring each of them to trade show its features before licensing the same for exhibition, Section III of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(b) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corpora-

tion, Universal Corporation and Columbia Pictures Cor-
[fol. 585] poration, limiting the number of features which may be licensed in a single group, subdivision (a) of Section IV of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(c) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions requiring each of them to trade show its features before licensing the same for exhibition, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with Section III of this decree and to comply with said provisions of such decree against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject said defendant or defendants to such provisions of such other decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of Section III of this decree.

(d) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions limiting the number of features which may be licensed in a single group, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with subdivision (a) of Section IV of this decree and to comply with said provisions of such decree
[fol. 586] against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject such defendant or defendants to said provisions of such other

decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of subdivision (a) of Section IV of this decree.

(e) If, prior to June 1, 1942, (1) a decree containing the provisions referred to in subdivision (c) hereof, or (2) a decree containing the provisions referred to in subdivision (d) hereof, or (3) a decree containing the provisions referred to in both of said subdivisions, shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, but an appeal therefrom has been taken or any of said provisions have not become operative and of full force and effect, then the operation of the provisions dealing with the same subject matter contained in Section III or subdivision (a) of Section IV of this decree shall be suspended and shall be of no binding force and effect upon any consenting defendant except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to said date and subsequent to August 31, 1941, unless and until such decree shall become final and such provisions shall be in full force and effect against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation. After such decree shall have become final, any consenting defendant may at any time exercise its right of election provided for in subdivisions (c) and (d) of this Section.

(f) If, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall require the trade showing of features before licensing the same for [fol. 587] exhibition, each of the consenting defendants shall be relieved from further compliance with Section III of this decree, and if, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall limit the number of features that may be licensed in a single group, each of the consenting defendants shall be relieved from further compliance with subdivision (a) of Section IV of this decree. In either of such events any consenting defendant may at any time make application to this Court, of which notice shall be served upon Peti-

tioner and all other consenting defendants, for an order relieving the consenting defendants, and each of them, from further compliance with Section III or subdivision (a) of Section IV of this decree, or both, as the case may be, and vacating the same, and thereupon this Court shall make and enter such an order.

(g) At any time after September 1, 1943, any consenting defendant may move to vacate the then effective provisions of Section III and subdivision (a) of Section IV of this decree by filing an application under oath stating that during any consecutive twelve months period preceding the filing of such application either (1) distributors of motion picture films have licensed 25 per cent or more of the features released for exhibition in the United States otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree [1] or (2) 12½ per cent or more of the total gross income from licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, has been derived from pictures licensed otherwise than in accordance with the then effective provisions of the Section III and subdivision (a) of Section IV of this decree. [1]

[fol. 588] Petitioner and all other consenting defendants shall be served with notice of the filing of such application.

Upon such application the Court shall enter an order relieving the defendants from further compliance with the provisions of Section III and subdivision (a) of Section IV of this decree, unless within sixty (60) days after service of such application Petitioner shall establish to the satisfaction of the Court that during said twelve months period less than 12½ per cent of the total gross income from licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, had been derived from pictures licensed otherwise than in accordance with the then effective provisions of Sec-

[1] Or with corresponding then effective provisions of a decree against the defendants, United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, referred to in subdivisions (c) and (d) of this Section.

tion III and subdivision (a) of Section IV of this decree.[2]

(h) At any time after September 1, 1942 any consenting defendant may apply to the Court to vacate the provisions of Section III and subdivision (a) of Section IV of this decree, or the provisions of either of such Sections, and upon such application, the Court shall enter an order relieving the consenting defendants from further compliance with such provisions, upon such defendant showing to the satisfaction of the Court that, subsequent to said date and by reason of the competition of persons not selling exclusively in accordance with said provisions of said Sections, or of either of them,[2] compliance by the applicant defendant with such provisions of said Sections, or of either of them, has substantially and adversely affected the applicant defendant's business.

XIII

Nothing contained in this decree shall apply to operations or activities of any consenting defendant outside of [fol. 589] the continental United States[1] or to operations or activities of any consenting defendant within the continental United States in so far as they relate to the distribution or exhibition of motion pictures outside of the continental United States.

XIV

Nothing contained in this decree shall be construed to limit or affect the right of any distributor defendant, prior to the general release of a motion picture, to road show such picture or to license or otherwise arrange for the road showing[3] of such picture upon such terms and conditions as may be fixed by the distributor.

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[2] See footnote 1 to this Section.

[1] Section XIII. The continental United States as used herein means the territory within the boundaries of the forty-eight states and the District of Columbia.

[3] Section XIV. Road showing is an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at an admission price of not less than one dollar.

XV

The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940, or to any license entered into pursuant to any such franchise, except that Section VIII hereof shall apply to all such franchises and such licenses between parties bound by this decree other than licenses referred to in Section XVII hereof.

XVI

No consenting defendant and no officer, director, agent or employee of any such defendant, shall be deemed to have violated any provision of this decree if the arbitration of disputes or controversies arising relative to the subject matter thereof is herein provided for, unless such de- [fol. 590] fendant has refused to arbitrate such a dispute or controversy in the manner and under the conditions specified in this decree and in the Rules of Arbitration and Appeals which are filed herewith, as amended from time to time, or has failed or refused to abide by and perform the final award [1] made and entered in such an arbitration proceeding.

XVII

Nothing contained in this decree shall be construed to limit, impair or restrict in any way whatsoever the right of each distributor defendant [1] to license the exhibition, or

[1] Section XVI. For the purposes of this Section on the final award in any arbitration proceeding under Section X of this decree shall be only a final award for damages as therein provided.

[1] Section XVII. For the purpose of this Section (1) defendant RKO Radio Pictures, Inc., or its successors, shall be deemed to have the same interests in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Radio-Keith-Orpheum Crporation, or its successors, directly or indirectly, has; and (2) defendant Vitagraph, Inc., or its successors, shall be deemed to have the same interest in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Warner Brothers Pictures, Inc. or its successors, directly or indirectly, has.

in any way to arrange or provide for an exhibition in such manner, upon such terms and subject to such conditions as may be satisfactory to it, of any or of all of the motion pictures which it may at any time distribute (1) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which it directly or indirectly, by stock ownership or otherwise, owns a financial interest at the time of the entry of this decree and also at the time of such license, and (2) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which such distributor defendant acquires after the date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 per cent and (3) in any theatre in the ownership, lease, [fol. 591] management, or operation, or in the proceeds or profits from the management or operation, of which a company in which such defendant owned not less than 42 per cent of the common stock at the date of the decree and at the time of such license,[2] acquires after the date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 per cent.

XVIII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any con-

[2] In the case of the distributor defendant Twentieth Century-Fox Film Corporation, or its successors, the defendant National Theatres Corporation, or its successors, shall be deemed to be such a company if said distributor defendant owned not less than 42 per cent of its common stock at the date of the decree and not less than 35 per cent of its common stock at the time of such license, provided not less than 42 per cent of its common stock is owned by Twentieth Century-Fox Film Corporation, or its successors, and by present or future officers or directors of National Theatres Corporation, or its successors.

senting defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for the company may be present. Without in any way limiting the rights granted in the foregoing [fol. 592] provisions of this Section, each of the distributor defendants shall keep at its principal office current records, which shall be accessible for the purpose aforesaid, showing—

(1) The dates when and the places where each of its features is trade shown, the names of the trade publications wherein notice of each trade showing was published, and the dates of publication; the name and location (by town and exchange district [1]) of each theatre in which each feature is licensed for exhibition, and the date of license thereof;

(2) As to each license entered into by it, the date thereof and the names and location (by town and exchange district [1]) of the theatres involved, the names of the parties thereto and of the distributor's sales representative who negotiated the license, and the names of the features licensed for exhibition;

(3) All arbitration awards rendered against the distributor with a statement showing what the distributor has done to comply therewith.

Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

[1] See footnote 4 to Section III.

XIX

Except as otherwise expressly and specifically provided in this decree, nothing herein shall be construed to limit the [fol. 593] right of any distributor defendant to select its own customers, to bargain with them in accordance with law, or to negotiate with or to license to or to accept any offer from any exhibitor to license its motion pictures or any number thereof upon such terms and conditions as it deems advisable or to its best interests.

XX

The provisions of Section III, of subdivision (a) of Section IV, of Section V and of Section X of this decree shall have application only with respect to features released in the United States after August 31, 1941.

XXI

Petitioner, by its counsel, has represented to the Court that the public interest requires that the provisions of this decree shall operate for a trial period of three years from the date of entry hereof. Petitioner has further represented to the Court, and each of the consenting defendants has consented to the entry of this decree upon the condition, that Petitioner will not for a period of three years after the entry of this decree, either in this action or any other action or proceeding against any such defendant seek either the relief or any thereof prayed in paragraphs (4), (5) and (6) of Section VIII of the Petition filed herein July 20, 1938, or in paragraphs (5), (6) and (7) of Section VIII of the Amended and Supplemental Complaint filed herein November 14, 1940, or otherwise seek to divorce the production or distribution of motion pictures from their exhibition; or to dissolve any such defendant or any corporation in which any such defendant has, directly or indirectly, a substantial stock interest and which is engaged in the exhibition of motion pictures or holds directly or indirectly a substantial stock interest in any corporation so [fol. 594] engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interest or any thereof, direct or indirect, in motion picture theatres in which it had an interest at the date of the entry of this decree.

XXII

1. The method and conditions of and the procedure for the arbitration of claims and controversies hereinbefore provided for in this decree, as well as the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, in an action entitled "United States of America, Petitioner, against Balaban & Katz Corporation, et al., Defendants", modifying a consent decree entered in said action on April 6, 1932 and the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Southern District of California, Central Division, in an action entitled "United States of America, Plaintiff, vs. West Coast Theatres, Incorporated, et al., Defendants", modifying a consent decree entered in said action on August 21, 1930, shall be as specified in this Section and in the Rules of Arbitration and Appeals which are provided for hereinafter.

2. An arbitration system for the arbitration of claims and controversies referred to in this decree shall be administered by an impartial Administrator.

The Administrator shall establish and maintain an Arbitration Tribunal in each city in the United States in which three or more of the distributor defendants shall maintain exchanges.

[fol. 595] The Administrator shall establish and maintain a panel of not less than ten arbitrators for each Arbitration Tribunal and shall establish and maintain suitable offices and personnel, including a clerk, for each Arbitration Tribunal and for the Appeal Board provided for hereinafter. The Administrator shall have the power to appoint and remove members of the panels and personnel.

3. No person shall be appointed a member of any panel of arbitrators who has any financial interest in, or has or has had any connection with, the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre as landlord, lessor, or otherwise.

4. The American Arbitration Association is appointed Administrator of the arbitration system under this decree,

and is authorized and directed to perform the duties and functions of such Administrator until further order of the Court.

Any successor to the American Arbitration Association as Administrator shall be appointed by the Court on the joint application and recommendation of the Petitioner and of a majority of the distributor defendants, except that if the Petitioner and a majority of the distributor defendants fail to join in making such application and recommendation the successor Administrator shall be appointed by the Court.

5. There shall be a Budget Committee consisting of three members, one of whom shall be appointed by the Administrator, one of whom shall be appointed by the distributor defendants, and one of whom shall be the Chairman of the Appeal Board. The Budget Committee shall budget the cost of the maintenance and operation of the arbitration system. Such budget for the first twelve months of the operation of the arbitration system shall not exceed four hundred ninety thousand dollars ($490,000.00) except with the consent of a majority of the distributor defendants. [fol. 596] The budget for each succeeding twelve months period shall not exceed four hundred sixty-five thousand dollars ($465,000.00), except with the consent of a majority of the distributor defendants, provided, however, that the Court may, on the application of the Petitioner, and for good cause shown, order an increase in the budget for any year in such amount, not exceeding fifty thousand dollars ($50,000.00), as it may find necessary for the effective operation of the arbitration system.

6. Each arbitrator shall be selected and each arbitration proceeding shall be conducted in the manner prescribed by the Rules of Arbitration and Appeals which are filed herewith and are hereby approved. Such Rules may be amended or added to from time to time by the Administrator with the approval of a majority of the Appeal Board upon notice to the Petitioner and to the distributor defendants of such proposed amendments or additions and an opportunity for a hearing thereon. No amendment of or addition to such Rules shall change the qualifications of arbitrators as set forth in Rule II of such Rules or deny to any exhibitor or distributor defendant the right

to intervene as a party in any proceeding by which it may be affected or deny to any party to any arbitration proceeding the right to receive notice of all proceedings therein; to participate in the selection of arbitrators; to challenge the qualifications of arbitrators; to be represented by counsel or otherwise; to secure the production of witnesses and of evidence; to examine and cross-examine all witnesses; and to appeal to the Appeal Board from any adverse award. The Rules may provide for the arbitration of claims and controversies between distributor defendants and exhibitors other than claims or controversies referred to in subdivision 1 of this Section which by agreement between the parties thereto shall be submitted to the tribunals.

7. There shall be an Appeal Board which shall have jurisdiction to determine appeals from awards made by the [fol. 597] Arbitration Tribunals. It shall consist of three members appointed by the Court, each of whom shall be a person of known impartiality and distinction. Each such member shall be appointed for a term of three years and shall serve during such terms unless he shall be removed by order of the Court or shall resign. Each member of the Appeal Board shall be eligible for reappointment.

If any member of the Appeal Board is disqualified from passing upon any appeal, or is temporarily unable because of illness, absence or other cause to act as a member of the Appeal Board, the Court may on application of one or more members of the Appeal Board appoint another person of known impartiality and distinction to act as a temporary member of the Appeal Board in place of the member so disqualified or unable to act. The compensation of such temporary member shall be fixed by the Court.

One member of the Appeal Board shall be designated by the Court as the Chairman of the Board.

The members of the Appeal Board shall be compensated on an annual basis. The Chairman of the Board shall be paid twenty thousand dollars ($20,000.00) per annum, and each of the other members of the Board shall be paid seventeen thousand five hundred dollars ($17,500.00) per annum.

The Appeal Board shall have its offices in New York, New York.

8. The expenses of the arbitration system shall be paid out of a fund administered by the Administrator. Such

fund shall be established and maintained: by filing fees provided for by the Rules of Arbitration and Appeals; by penalties imposed in accordance with the provisions of Section IV and V of this decree, and by such additional amounts, to be paid by the distributor defendants, as may be determined by the Budget Committee from time to time to be necessary. Such amounts shall be assessed by the [fol. 598] Administrator to and shall be paid by the several distributor defendants in amounts proportionate to their respective gross receipts from licenses for the exhibition of motion pictures in the United States. The proportionate gross receipts of such defendants during the 1939-40 motion picture season shall be used in determining the amount to be paid by each such defendant for the expenses of establishing the arbitration system and of maintaining it during the first twelve months of its operation. Thereafter the gross receipts for the motion picture season ending on the August 31st immediately preceding the start of the particular twelve months period shall be used in determining such amounts.

Each distributor defendant shall inform the Administrator promptly after the end of each motion picture season of its total gross receipts during such motion picture season from licenses for the exhibition of motion pictures in the United States. Such information shall be treated by the Administrator as confidential and shall not be divulged except as required by law.

9. Any person who has the right to institute an arbitration proceeding under any provision of this decree or of any other decree referred to in subdivision 1 of this Section may institute and prosecute such proceeding in the manner and subject to the conditions specified in the Rules of Arbitration and Appeals, upon the condition that such person file with the Clerk of the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Administrator, which shall provide in substance that such complaint submits the controversy to arbitration and undertakes to abide by and to comply fully with whatever final award may be entered therein.

Any exhibitor or distributor who intervenes as a party in any arbitration proceeding as provided in the Rules of Arbitration and Appeals, shall file with the Clerk of [fol. 599] the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Ad-

ministrator, which shall provide, in substance, that such intervenor submits to the arbitration and undertakes to abide by and to accept whatever final award may be entered therein.

Representatives of the Department of Justice, duly authorized in writing, shall be permitted reasonable access during regular office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the Appeal Board, of the Arbitration Tribunal, and of the Administrator, which relate to the arbitration system and to the arbitration of claims and controversies under this decree.

XXIII

Jurisdiction of this cause is retained for the purpose of:

(a) Enabling any of the parties to this decree to apply to the Court at any time for such orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of violations thereof;

(b) Enabling any of the parties to this decree to apply to the Court at any time for a modification of this decree in order to conform it to any Act of Congress enacted after the entry of this decree;

(c) Enabling any consenting defendant to make application to the Court referred to in any provision of this decree;

(d) Enabling any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of this decree for any modification thereof;

(e) Enabling any consenting defendant to apply to the Court at any time more than three years after the date [fol. 600] of the entry of this decree, to vacate this decree, or any modification thereof, or to vacate or modify any provision thereof; on the ground that under the economic or competitive conditions existing at the time of such application, this decree or any modification thereof, or any provision thereof, is inappropriate or unnecessary, or

oppressive or unduly burdensome, regardless of whether or not such economic or competitive conditions are new or unforeseen. The right of each consenting defendant to make any such application and to obtain such relief is expressly reserved by them and is hereby expressly granted.

Whenever obligations or prohibitions are imposed upon the defendants by the laws of any State or by rules or regulations made pursuant thereto, with which the defendants by law must comply, the Court, upon application of the defendants, or any of them, shall from time to time enter orders relieving the defendants from compliance with any requirement of this decree in conflict with such laws, rules or regulations, and the right of the defendants to make such applications and to obtain such relief is expressly granted.

Any application by any party to this decree under the provisions of this Section shall be made in open court upon notice to all of the other parties to this decree, and each such party, upon such application, shall have the right and privilege of requiring the production of witnesses upon whose testimony such application is sought or opposed, and of examining and cross-examining such witnesses in accordance with the rules of the Court.

Dated November 20th, 1940.

(S.) Henry W. Goddard, United States District Judge.

[Vol. 601] We hereby consent to the entry of the foregoing decree.

For the plaintiff:

(S.) John T. Cahill, United States Attorney.

(S.) Thurman Arnold, Assistant Attorney General; James V. Hayes, Robert E. Sher, Robert L. Wright, A. H. Feller, Special Assistants to the Attorney General.

For the defendants:

Paramount Pictures Inc., Paramount Film Distributing Corporation, by (S.) Thomas D. Thacher, Simpson Thacher & Bartlett, 120 Broadway, New York, N. Y., Their Attorneys; Loew's, Incorporated, by (S.) John W. Davis, Esq., 15 Broad

Street, New York, N. Y., (S.) J. Robert Rubin, Esq., 1540 Broadway, New York, N. Y., Its Attorneys; Radio-Keith-Orpheum Corporation, RKO [fol. 602] Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, by (S:) William J. Donovan, Esq., Donovan, Leisure, Newton & Lumbard, 2 Wall Street, New York, N. Y., William Mallard, Esq., 1270 Sixth Avenue, New York, N. Y., Ralstone R. Irvine, Esq., 2 Wall Street, New York, N. Y., Otto C. Doering, Jr. Esq., 2 Wall Street, New York, N. Y., Their Attorneys; Keith-Albee-Orpheum Corporation, by (S.) Monroe Goldwater, Esq., Goldwater & Flynn, 60 East 42nd Street, Its Attorneys; Warner Bros. Pictures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation, by (S.) Joseph M. Proskauer, 11 Broadway, New York, N. Y., Robert W. Perkins, Esq., 321 West 44th Street, New York, N. Y., Their Attorneys; Twentieth Century-Fox Film [fol. 603] Corporation, National Theatres Corporation, by (S.) Richard E. Dwight, Esq., Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, N. Y., Their Attorneys.

(Filed November 20, 1940.)

[fol. 604] In the District Court of the United States

[Title omitted]

[File endorsement omitted.]

Request to Stipulate—Filed July 9, 1941

To the Honorable O. W. Hughes, Attorney for Plaintiff, Custom House, Nashville, Tennessee.

Sir:

Please take notice that Anthony Sudekum, R. E. Baulch and Kermit C. Stengel, and the corporate exhibitor defendants, hereby request the plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit at the service of this request, for the purposes of the above entitled

action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. All of the defendant exhibitors are affiliated, directly or indirectly, through stock ownership, family connection or otherwise, with the defendant, Anthony Sudekum, who is President of the defendant, The Crescent Amusement Company, which has been engaged in the business of operating fendant exhibitors. Mr. Sudekum has had a longer and motion picture theatres longer than any of the other dewider experience in the motion picture business than any of the other individual defendants or officers of corporate defendant exhibitors. During the period covered by this suit, the other individual defendants and officers of corporate defendant exhibitors have from time to time conferred with Mr. Sudekum and asked his advise in regard to all sorts of [fol. 605] matters affecting their respective operations, including the operation of theatres, the exploitation of pictures, and the making of contracts with film companies, including the defendant distributors and the distributors who were formerly defendants in the case but as to whom the suit was subsequently dismissed. Mr. Sudekum has, however, actually carried on negotiations for film contracts with said distributors only on behalf of The Crescent Amusement Company, Nu-Strand Corporation from 1934 until it ceased operating theatres in 1938, and, since the death of Mr. C. A. Crute in April, 1939, for the Lyric Amusement Company, Inc. In a relatively few instances, as compared with the number of contracts negotiated, where one of the other defendant exhibitors and a distributor have reached a deadlock in negotiations for a contract, Mr. Sudekum has, on the request of the defendant exhibitor or the distributor—more frequently the distributor, intervened and assisted in breaking the deadlock by offering suggestions to the defendant exhibitor or the distributor, or both, but in no such instance has he actually consummated the deal. There may have been some rare instance where he did consummate such a deal but he would testify he does not recall any. In a few instances where a special subject has been offered by a distributor, Mr. Sudekum has, at the request of the distributor's salesman and, because of time element, telephoned the film buyers for other defendant exhibitors in other towns and advised them of the terms of

the deal and secured their approval, after which he completed the transaction.

2. The defendant, Kermit C. Stengel, has negotiated all film contracts on behalf of Rockwood Amusements, Inc., since the latter's incorporation, except that prior to 1938, when Mr. Stengel was learning the amusement business, these contracts were negotiated with the active assistance of Mr. Sudekum. Mr. Stengel has usually sat in with Mr. Sudekum in the latter's negotiation of film contracts in behalf of The Crescent Amusement Company and Lyric [fol. 606] Amusement Company, Inc., and has taken part in said negotiations. Mr. Stengel has negotiated all contracts on behalf of Kentucky Amusement Co., Inc. and Lawrenceburg Theatres, Inc. since these two corporations were incorporated. Prior to 1938 Mr. Earle Hendren negotiated the contracts for Cherokee Amusements, Inc., and Mr. J. W. Baird for Newport Amusements, Inc., but from and after 1938 Mr. Stengel has negotiated the contracts for said two corporations. Mr. Stengel has usually negotiated for all these corporations at one sitting as to towns served from the same Exchange, or in case of dealing with the District Manager for several Exchanges; and these negotiations have usually been conducted in Mr. Stengel's office in Nashville, Tennessee, either after or before the negotiations on behalf of The Crescent Amusement Company and Lyric Amusement Company, Inc. have been conducted in Mr. Sudekum's office, which is in the same building. The defendant, Louis Rosenbaum, during the entire period covered by this suit has negotiated the film contracts for Muscle Shoals Theatres (including Muscle Shoals Theatres, Inc., before the corporation was dissolved). Mr. Cowan Oldham has negotiated the film contracts for Cumberland Amusement Company since May 10, 1939, when Mr. H. T. Hill sold his interest in the corporation. Mr. Hill formerly negotiated the contracts for Cumberland Amusement Company. Mr. G. W. Haynes has negotiated contracts for Strand Enterprises, Inc. during the entire period covered by this suit.

3. (a) The Crescent Amusement Company operates theatres in towns scattered throughout the entire State of Tennessee, as well as a few theatres in Alabama and Kentucky, but mainly in larger towns. Crescent's affiliate,

Lyric Amusement Company, Inc., operates theatres only in Huntsville, Alabama.

[fol. 607] The theatres operated by Crescent's affiliates, Strand Enterprises, Inc., and Cumberland Amusement Company, and by Rockwood Amusements, Inc., and the latter's affiliates, Cherokee Amusements, Inc., Newport Amusements, Inc., Kentucky Amusements, Inc., and Lawrenceburg Theatres, Inc., are mainly in smaller towns. Kentucky Amusements, Inc., operates only one theatre, which is in Elizabethtown, Ky. None of the defendant exhibitors operates a theatre in the same town in which another of the defendant exhibitors operates a theatre. Nu-Strand Corporation formerly operated theatres in Kingsport, Tennessee, but in 1938 leased them to another concern and since then has not been an operating company.

(b) Strand Enterprises, Inc., operates theatres in West Tennessee, Eastern Arkansas, Northern Mississippi and Western Kentucky. The Crescent Amusement Company operates theatres in Paris, Union City and Dyersburg, Tennessee, and Princeton, Kentucky, which towns are in the same territory. Rockwood Amusements, Inc., operates theatres in McKenzie and Huntington, Tennessee, which towns are also in the same territory.

(c) Cumberland Amusement Company operates theatres in Middle Tennessee and in the Cumberand Mountain section of Tennessee. The Crescent Amusement Company operates theatres in Cleveland, Murfreesboro, Columbia and Lebanon, Tennessee, which are in the same territory. Rockwood Amusements, Inc., operates theatres in Tracy City, Manchester, Rockwood and Cowan, Tennessee, which towns are in the same territory. Newport Amusements, Inc., operates theatres in Copper Hill, Tennessee, which is in the same territory.

(d) Cherokee Amusements, Inc., operates theatres in East Tennessee and Western North Carolina. The Crescent Amusement Company operates theatres in Maryville, Greeneville, Harriman and Morristown, Tennessee, which are in the same territory. Rockwood Amusements, Inc., operates theatres in Clinton, Lake City and Rogersville, [fol. 608] Tennessee, which are in the same territory. Newport Amusements, Inc., operates theatres in Newport, Tennessee, which is in the same territory. Nu-Strand Corpora-

tion has an interest in theatres in Kingsport, Tennessee, which is in the same territory.

(e) Muscle Shoals Theatres operates theatres in Northern Alabama. The Crescent Amusement Company operates theatres in Decatur and Gadsden, which are also in Northern Alabama, and Lyric Amusements, Inc., operates theatres in Huntsville, Alabama, which is in the same territory. Lawrenceburg Theatres, Inc., operates a theatre in Lawrenceburg, Tennessee, which is not far from the Alabama towns in which Muscle Shoals Theatres operates theatres.

4. (a) The following tabulation is approximately correct as to the features released in the United States market during the years 1934-1939, inclusive. "Major Companies" refers to the following eight companies: Columbia, Fox, MGM, Paramount, United Artists, Universal, Warner and RKO:

	1939	1938	1937	1936	1935	1934
Total Releases	761	769	778	735	766	662
Major Companies	388	362	408	362	356	361
Independent Companies	373	407	370	373	410	301
Major Companies	388	362	408	362	356	361
U. S. Produced	367	346	393	348	340	350
Imported	21	16	15	14	16	11
Independent Companies	373	407	370	373	410	301
U. S. Produced	116	109	145	174	185	130
Imported	257	298	225	199	225	171
U. S. Produced	483	455	538	522	525	480
Major Companies	367	346	393	348	340	350
Independent Companies	116	109	145	174	185	130
Imported	278	314	240	213	241	182
Major Companies	21	16	15	14	16	11
Independent Companies	257	298	225	199	225	171

[fol. 669] (b) The following tabulation correctly states the number of features released by the Major Companies during the years 1934-1939, inclusive:

	1934	1935	1936	1937	1938	1939
Columbia	43	49	52	52	53	55
Fox	52	52	57	51	56	59
MGM	43	47	45	51	46	50
Paramount	55	63	68	61	50	58
RKO	46	40	39	53	43	49
United Artists	20	19	17	25	16	18
Universal	44	37	28	37	46	46
Warner	58	49	56	68	52	53

(c) No one of the eight Major Companies during the period covered by this suit has distributed more than 15%

of the feature pictures exhibited in the territory in which the defendant exhibitors have operated theatres, and no one distributor has done more than 20% of the business from the standpoint of film rental collected in said territory during said period. The eight major distributors, during the period from August, 1934, to August, 1939, collectively released more than ninety per cent of the first class pictures exhibited by the defendant exhibitors, and said distributors have collectively released more than seventy-five per cent of all feature pictures exhibited in the towns in which the defendant exhibitors have operated theatres.

Geo. H. Armistead, Jr., Attorney for Defendants, The Crescent Amusement Company et al. Of Counsel: Armistead, Waller, Davis & Lansden.

[fol. 610] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

PLAINTIFF'S RESPONSE TO REQUEST TO STIPULATE—Filed July 21, 1941

To: Armistead, Waller, Davis & Lansden, Attorneys for Defendants, American Trust Building, Nashville, Tennessee.

SIRS:

Plaintiff herein makes the following response to the request heretofore *served on plaintiff on July 12, 1941*, by counsel for the defendants, Crescent Amusement Company, et al, pursuant to Rule 36 of the Federal Rules of Civil Procedure:

1. Plaintiff admits the first three sentences of paragraph one of defendants' request. Plaintiff neither admits nor denies the remainder of paragraph one of defendants' request, for the reason that matters set forth therein are peculiarly within the knowledge of the defendents, and for the further reason that plaintiff believes the evidence will show that Mr. Sudekum exercised a greater degree of control over the film buying of the defendant exhibitors than that set forth therein.

2. Plaintiff denies the first sentence of paragraph two of defendant's request. Plaintiff admits the second and third sentences of paragraph two of defendants' request. Plaintiff denies the fourth and fifth sentences of paragraph two of defendants' request. Plaintiff admits the remainder of paragraph two of defendants' request with the express reservation that the contracts referred to therein were not [fol. 611] negotiated without the active advice and assistance of the defendants, Sudekum and Stengel.

3 (a) Plaintiff admits paragraph 3 (a) of defendants' request.

(b) Plaintiff admits paragraph 3 (b) of defendants' request, with the exception of the two clauses therein which read as follows: "which towns are in the same territory." Plaintiff does not admit said clauses for the reason that same are argumentative and for the reason that the locations of the various towns involved speak for themselves.

(c) Plaintiff admits paragraph 3 (c) of defendants' request, with the exception of the three clauses therein which read as follows: "which towns are in the same territory." Plaintiff does not admit said clauses for the reason that same are argumentative and for the reason that the locations of the various towns involved speak for themselves.

(d) Plaintiff admits paragraph 3 (d) of defendants' request, with the exception of the four clauses therein which read as follows: "which towns are in the same territory." Plaintiff does not admit said clauses for the reason that same are argumentative and for the reason that the locations of the various towns involved speak for themselves.

(e) Plaintiff admits paragraph 3 (e) of defendants' request, with the exception of the clauses "which is in the same territory" and "which is not far from the Alabama towns in which Muscle Shoals Theatres operates theatres." Plaintiff does not admit said clauses for the reason that same are argumentative and that the locations of the towns involved speak for themselves.

4 (a) Plaintiff admits paragraph 4 (a) of defendants' request.

[fol. 612] (b) Plaintiff admits paragraph 4 (b) of defendants' request.

(c) Plaintiff neither admits nor denies the first sentence of paragraph 4 (c) of defendants' request for the reason that plaintiff does not have sufficient knowledge upon which to admit or deny said sentence. Plaintiff admits the second sentence of paragraph 4 (c) of defendants' request.

Robert L. Wright, Attorney for Plaintiff.

STATE OF TENNESSEE,
County of Davidson, ss:

Robert L. Wright, being duly sworn, deposes and says: I have read the foregoing statement. The facts stated therein are true to the best of my knowledge, information and belief.

Robert L. Wright. Sworn to before me this 21st day of July, 1941, Nashville, Tennessee. Brandon Lewis, Dep. Clerk.

[fol. 613] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No. 54—Civil

UNITED STATES OF AMERICA, Plaintiff

vs

CRESCENT AMUSEMENT CO., ET ALS, Defendants

Portions of Plaintiff's Evidence—Filed January 12, 1944

[fol. 614] Mr. Wright: We wish to call Mr. Earl Hendren now. We are calling him as an adverse witness under Rule 43. He is secretary-treasurer of Cherokee Amusements.

Thereupon EARL HENDREN, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Hendren?
A. I beg your pardon.

Q. Where do you live?
A. Erwin, Tennessee.
Q. What is your occupation?
A. In the theatre business.
Q. You are secretary-treasurer of the Cherokee Amusements, Inc.?
A. Yes sir.
Q. A defendant in this suit?
A. Yes sir.
Q. How long have you held that position?
A. About four and a half years.
Q. You were served with subpoenaes in this case, were you not?
A. Yes sir.
Q. Did you bring those with you.
A. Yes sir.
(Handing papers to counsel).

[fol. 615] The Court:
He asked you if you brought your subpoena with you.
A. No sir.

The Court:

Well, he wouldn't have the subpoena. He might have been served over the telephone.

Mr. Wright:

Q. You were served with two subpoenaes, were you not, one directed to the Cherokee Amusements, Inc. and another to you individually?
A. Yes sir.
Q. And is this folder that you have just handed me, does that contain the documents that you have produced in response to the subpoena?
A. Yes sir.

[fol. 616] Mr. Armistead: May it please the Court, I don't want to object to counsel for the plaintiff inspecting the documents that this witness has produced here in compliance with the subpoena duces tecum all right, but this looks like it is a search and seizure. They have been brought here and they want to look through them.

The Court: He can look through the documents and ask him what each one is.

Mr. Armistead: Yes, sir, but I do object to his looking through the files in a searching inspection; We object to that.

The Court: (To witness)

Q. Is there anything in there that would be in any way privileged? I don't know whether you know whether or not it would be; but would there be anything in there that might tend to incriminate either you or any officer of your company in any criminal offense?

[fol. 617] A. No, sir.

The Court: What is the objection, Mr. Armistead, to this line of proof.

Mr. Armistead: We object to bringing these files down here and going through them to see what they want.

The Court: Your can reach the same result by going through the file and asking what each document is?

Mr. Armistead: We don't want to take up the time for them to do that.

The Court: I overrule that objection. All right, hand the file to him and let him say what each document is.

Mr. Armistead: No, may it please the Court, we wont impose that burden on the Court.

The Court: Well, that is the only way I know how to do [fol. 618] it. It is just with you; if you make the objection I will order that done.

Mr. Armistead: Well, I will withdraw my objection, if your Honor please.

The Court: All right.

Mr. Wright: Q. When did you first enter the theatre business, Mr. Hendren?

A. About 1920.

Q. And where was that?

A. At La Follette, Tennessee.

Q. What town?

A. At La Follette, Tennessee.

Q. Have you continued to operate theaters until and through the year 1934?

A. Yes, sir.

Q. And where were you operating in 1934?

A. Greeneville, Tennessee.

Q. And what other locations?

A. At Sweetwater, Lenoir City, La Follette and Erwin, Tennessee.

Q. Were you operating at Maryville?

A. Not in 1934.

[fol. 619] Q. Were these theaters you describe being operated by you on leases?

Q. Yes, the buildings were under lease.

Q. You did not own any of the theater buildings?

A. No, sir.

Q. Were you leasing these theaters yourself or in partnership with any one?

A. It was a partnership.

Q. And who was your partner?

A. You are referring to 1934?

Q. Yes?

A. I don't recall whether that was the year that I was in partnership.

Q. Well, were you in partnership at about that time in the operation of theaters at those locations you have specified with Mr. Fred Gorman, were you, or not?

A. Yes, in Greeneville, Lenoir City and Sweetwater.

Q. And were you in partnership with any one else at the other locations that you have named?

A. Well, no—Well, part of the year I was a partner with Mr. Parrott and part of the year with Mr. Gorman.

Q. During the year 1934, did Mr. Gorman sell out his partnership interest to you?

A. Yes, sir.

Q. Do you remember when that was?

[fol. 620] A. Did you say when?

Q. Yes.

A. It was in February.

Q. You think it was that early in 1934?

A. Yes, sir.

Q. Couldn't it have been August, 1934?

A. No.

Q. And when did you first meet Mr. Sudekum?

A. I believe it was in 1934.

Q. What was the occasion for that meeting?

A. I believe I met him here in his office.

Q. Well, how did you happen to come over here to see him?

A. Well, we heard that he was going to build a theater in Greeneville, and we came over to see if it was true.

Q. You and Mr. Gorman came over?
A. Yes, sir.
Q. You saw him here in Nashville?
A. Yes, sir.
Q. And when was it, can you fix the approximate date?
A. It was in the early part of 1934, I guess.
Q. Well, were you still in partnership with Mr. Gorman?
A. Yes.
Q. And the conversation occurred in Mr. Sudekum's office?
A. Yes.
[fol. 621] Q. Was any one else present?
A. No.
Q. Can you recall what was said?
A. Well, part of the conversation.
Q. What can you recall?
Q. Well, I asked Mr. Sudekum if he was contemplating a theater in Greeneville, and he said he had an option on one there, that is, on the building, to remodel; and I also asked him if he thought the town was large enough for two theaters, and he said he did; and I asked him how much expense he had gone to in order to get the option, what was the cost of it up to that date, and he said it was negligible, wasn't much, and I asked him if he would take a cash consideration to not come in the town; he said he would not, he didn't do business that way, and he was more or less offended by the suggestion; he said it sounded like a bribe of some kind; he didn't do business that way, it wouldn't be fair to us and it wouldn't be fair to him.
Q. How large was Greeneville at that time?
A. Well, I think it was listed at about 7,000.
Q. In 1934?
A. Yes, sir.
Q. You are about a couple of thousand wrong about that, aren't you?
A. I could be, but I think it was that.
[fol. 622] Q. You were operating two theaters there, were you not?
A. Yes, sir.
Q. Is that all the conversation you had with Mr. Sudekum then?
A. Well, practically all the business conversation.
Q. Then, did Mr. Sudekum open a theater in Greeneville?

A. Yes, sir.

Q. When was that?

A. That was in the latter part of 1934.

Q. Before he opened his theater there, what film product had you been using at your theaters?

A. Well, just about all of them—all of the distributors.

Q. Well, can you name them? What were the principal ones?

A. I beg your pardon?

Q. What were the principal ones?

A. Fox, R. K. O. Paramount.

Q. Any others that are described as defendant distributors in this case?

A. Well, immediately prior to his opening a theater there I believe those were the principal major companies.

Q. Well, did you use the product of any other major company?

A. We did, yes, in time.

[fol. 623] Q. What others did you use from time to time?

A. Metro, Vitagraph, United Artists—Well, just all of them.

Q. Now, what was the policy you were operating those two theaters at Greeneville on?

A. You mean the program policy?

Q. Yes, how many changes a week?

Q. We were making three.

Q. At each theater?

A. No, at one theater, the Princess was making three; and the Palace was making one.

[fol. 624] Q. You were using three at the Princess and two a week at the Palace?

A. One a week at the Palace.

Q. Was it open all the week?

A. No, it was open on Friday and Saturday.

Q. Now after Mr. Sudekum opened his theater at Greenville, did you have any difficulty in obtaining suitable major product for your theaters?

A. No.

Q. When was the next time you talked to Mr. Sudekum?

A. I just do not recall, probably a year or so after he opened the theater in Greenville.

Q. And what led to this conversation?

The Court:

—. How did you happen to have this talk with him?

A. We came to Nashville to see him.

Mr. Wright:

Q. When you say we, who are you referring to now?

A. Mr. Parrott and I.

Q. Mr. Parrott had become your partner, after Mr. Gorman sold out?

A. Yes, sir.

Q. Did you talk to Mr. Sudekum in his office?

A. Yes, sir.

Q. Who else was present?

[fol. 625] A. No one.

Q. What was said then?

A. Well we told him we would like to work out some kind of deal with him to enter partnership with him, or something of that kind.

Q. What did he say?

A. Well he asked us what we had in mind as to price and so on, and we told him. He said that seemed to be rather high, and asked us to reconsider it and figure it, just the best we could do, and let him know.

Q. What was the price you quoted him?

A. I do not recall.

Q. Why was it that you made an offer to him to sell out?

A. Well we just heard that he was a good man to be with and he was a good theater operator and experienced, he could probably help us in various ways.

Q. In what ways did you think he could help you?

A. Well he was a good business man, he knew the business, knew the cooperation, operating policy, he just knew how to run the theaters.

Q. Did you think he could give you any help in procuring films?

A. We didn't know, we didn't need any films, that didn't enter into it.

Q. You can operate a theater without films, can you?

[fol. 626] A. Sir?

Q. Can you operate a theater profitably without films?

Mr. Armistead: May it please the Court, we object to that.

Mr. Wright: The witness has made an obvious mistake if he said he could operate a theater without films.

The Court: He meant he could get the films, he said he could get the films. When he said he didn't need any films, he meant he was getting plenty of films.

Mr. Wright:

Q. It is true, is it not, that the better films you can get, the more successfully you can operate a theater, isn't that right?

A. As a rule that is so, but lots of times you can operate a theater without the best films, if you know how to exploit them, and have an attractive house.

Q. Was that all the conversation you had with Mr. Sudekum then?

A. That is all I recall.

Q. When was the next time that you saw him?

A. Well that was about a month later.

Q. Where did you see him then?

A. He came over to Greenville.

[fol. 627] Q. Did you see him at your theater or his?

A. Saw him at his theater first, and I asked him to come up to our theater, and he did.

Q. Who was present then?

A. Mr. Stengle.

Q. Besides Mr. Sudekum and yourself?

A. Yes, sir.

Q. Any one else?

A. No, sir.

Q. What was said then?

A. Well we told him we would like for him to look our proposition over and make us a price on it, and he did.

Q. Did you accept it?

A. Yes.

Q. What was the price?

A. Twenty-five thousand dollars.

Q. That was for what theaters?

A. That was for Greenville, Maryville, and fifty per cent in Lenoir City, Lafollette and Irwin.

Q. That is, to sell outright the theaters at Greenville and Maryville and a half interest in the six you had in the other four towns; is that right?

The Court: To sell outright the theaters in Greenville [fol. 628] and Maryville, and a fifty per cent interest in the six shows he had in the other four towns.

Mr. Wright:

Q. Six shows in four other towns?

A. That is right.

Q. At that time you offered them to acquire for a consideration the theater at Maryville, as well as Greenville?

A. Yes, sir.

Q. When was that?

A. That was in 1934.

Q. How long before this conversation with Mr. Sudekum you just referred to?

A. You mean the last conversation we had with him?

Q. The one you have just been talking about when he made you this offer and you accepted it?

A. We were at the house in Maryville, about two years before.

Q. The date of this conversation you have just been telling me about, was in 1935, was it not?

A. 1936.

Q. 1936—and then you went into Maryville in 1934?

A. Yes.

Q. What time of the year?

A. In the fall.

[fol. 629] Q. And did you have a partner in that operation?

A. Well there wasn't in the operation, I was just working for it, Mr. Parrott was the man that went in there.

Q. What were you doing in connection with the operation?

A. Booking and buying pictures.

Q. You had no other interest in the theater?

A. Not at the time, the house was opened after.

Q. You subsequently acquired an interest in it?

A. Yes.

Q. When was that?

A. That was in either the latter part of 1935, or early part of 1936.

Q. And what was your interest?

A. Twenty-five per cent.

Q. And you bought that from Mr. Parrott?

A. Yes, sir.

Q. How much did you pay him for it?

A. I do not recall, but I bought twenty-five percent interest in that house and the twenty-five per cent interest in the rest of the theaters at the same time.

Q. I understood you to say that you were already operating the other theaters at that time?

A. I was under an operating lease arrangement.

Q. Did Mr. Parrott own those theaters you were operating, owned or leased?

A. Yes.

[fol. 630] A. Yes.

Q. You then acquired an interest in the theater buildings?

A. No, just the equipment.

Q. Then this twenty-five per cent interest that you purchased was the twenty-five per cent interest in the lease and equipment and so forth at Maryville, and in what other theaters?

A. Greenville, La Follette, Lenoir City, and Sweetwater. Mr. Parrott and I owned the theaters at Irwin, and the theatres in La Follette and Sweetwater.

Q. How many theaters were there in La Follete and Sweetwater?

Q. There were two in Sweetwater and two in La Follette.

Q. They were involved in the deal?

A. Yes.

Q. What did you pay for that twenty-five per cent interest?

Mr. Armistead: I do not see where that is material in this case.

The Court: I do not undertake to know what he has in mind, I think he is entitled to ask this question of an adverse witness, how does it affect this lawsuit, what he paid for it?

[fol. 631] Mr. Wright: We are trying to establish the sale that was made to Mr. Sudekum of his interest in these theaters, the deal that was closed was made at a sacrifice or less than the real worth of the theaters, or more, we are entitled to establish this sale.

Mr. Armistead: I still submit, may it please the court, it would be immaterial, what Sudekum paid for the interest; he could give it to him, if he wanted to.

Mr. Wright: That is precisely what we expect to show, that the half interest in the Cherokee Company was virtually given.

Mr. Waller: Of course that would involve what was the real value of the theaters, and if we go into that, we may have an endless proceeding.

The Court: How does all this tend to monopolize interstate commerce between the states?

Mr. Wright: May it please the Court, we have alleged here that Mr. Sudekum and these other defendants have done many things for the purpose of monopolizing the [fol. 632] exhibition of films in this area, and we have alleged his acquisition of theaters.

The Court: What has that got to do with monopolizing interstate commerce, suppose he got every theater in Tennessee, if it didn't affect the movement of Interstate Commerce.

[fol. 633] Mr. Wright: We have alleged here that Mr. Sudekum and these other defendants combined together for the purpose of monopolizing the exhibition of films in this area and one of the means that we alleged that was used was by coercive theater acquisition.

The Court: What has that got to do with interstate commerce? Suppose they owned every theater in the State of Tennessee, if it didn't affect interstate commerce, the Government would not be interested in it.

Mr. Wright: I think it affects it very materially, by monopolizing the business of licensing films to put in those theaters. The minute you suppress or destroy competition in the licensing of films you certainly are directly affecting interstate commerce and I don't think that is any question about the jurisdiction of the Court in a proceeding of that kind and the Sherman Act plainly applied to any sort of monopolistic activity which affects the licensing of films in interstate commerce. I think that is true beyond question.

The Court: Well, the statute says monopolizing trade or commerce among the several states. Is it the Government's theory that the purpose of acquiring these theaters was to monopolize the licensing of films in interstate commerce [fol. 634] between the states?

Mr. Wright: That was plainly one of the purposes. Whenever anyone acquires one of these closed theaters, the first thing he does is to free himself from competing with anybody else in the licensing of films and the business of licensing films is an interstate business.

The Court: Well, don't you think that possibly you have the cart before the horse. Don't you think the first proof in this case should be that it affects trade and commerce among the states in the shipment of films? Then show how

it was done. But here you are spending quite a good deal of time in showing that he had a monopoly which only affects intrastate.

Mr. Wright: That is the monopoly that we are attacking in the case.

The Court: A monopoly of the exhibition of moving pictures, I take it, would not be any violation of the Sherman Act, except incidentally, as affecting trade and commerce among the states in the shipment of films.

Mr. Wright: On that point, I can only say that we disagree with you. Our position is that the monopolization of [fol. 635] the control of theaters in any substantial section of the country, has the effect of eliminating and suppressing competition in the licensing of films and that thereby the Sherman Act is violated.

The Court: That is the only way it could affect trade and commerce, would be in the shipment of films and the licensing of films?

Mr. Wright: Yes, but that is sufficient, that is all that the Act requires.

The Court: Don't you think the first thing for you to do is to show that there was a monopoly in the licensing of films. We may spend two or three weeks here proving that they had a monopoly in the exhibition of pictures, and yet not prove a monopoly in the licensing of films.

Mr. Wright: That is the only way, that is the way a violation occurs, by acquiring a monopoly in the control and ownership of theaters. That is the only way in which an exhibitor can acquire a monopoly in the licensing of films.

Mr. Dobey: May it please the Court, if the defendants monopolized the exhibition of pictures in any manner in these towns where they operate, they finally monopolize the licensing of films in interstate commerce in that area and [fol. 636] in one of our anti trust cases, the Supreme Court said they must be responsible for the necessary consequences of their acts and we submit that the necessary consequences of their monopolization of the exhibition of films in any area in this territory, is the monopolization of the licensing of films in interstate commerce. Of course, the fact that it is a buying monopoly instead of a selling monopoly is absolutely immaterial because the Act says it is a violation if it results in an interference with trade and commerce in interstate commerce, and the licensing of films

is trade and commerce in interstate commerce between the states.

Mr. Frolich: May I point out that in this case, the Government is accusing Mr. Sudekum of having a monopoly down here because he owns a number of theaters. Mr. Wright has given you a theory just the opposite of the theory of the Government in the cases of the 5 major companies who were allowed to hold 2500 or 3,000 theaters, a great many more than Mr. Sudekum owns, and if that is his theory, I would like for him to state why the Government did not stop the 5 major companies from owning 3,000 theaters.

[fol. 637] The Court: I see I shouldn't have started this. Do you contend that because a man owns one picture show in two or three small towns where there are no other theaters, he is interfering with trade and commerce between the states?

Mr. Dobey: The fact that a man owns the only theater in the town, and that he has a monopoly of licensing films for that one theater in that community is not a violation of the Sherman Act. The question is, is it an unreasonable monopoly?

The Court: Isn't that a question of intent?

Mr. Dobey: It is a question of intent, as well as the manner in which the monopoly was acquired and the circumstances leading up to the acquisition of the monopoly. And on the question of reasonableness, of course, the method in which the monopoly was acquired is material, whether he acquired it by threats, or by intimidation, or by coercion.

The Court: The point I was making, it is an apparent monopoly.

Mr. Dobey: As we go about in these particular towns where we have closed towns, we have to consider the monopoly as we go along.

The Court: If you prove a man bought a 25 per cent interest in a business, and what he paid for it or to show that [fol. 638] he was forced out, unless that interfered with trade and commerce in some way, I don't see how it is a violation of the Act.

Mr. Dobey: It might affect trade and commerce because the closed one goes out of business and the remaining exhibitor has a monopoly in licensing films in that community by forcing the man out of business by coercion. The

method by which the monopoly was acquired and whether the monopoly is unreasonable, which is a violation of the Sherman Act.

The Court: All right, proceed.

Mr. Wright: Read the question.

The Court: The question was, how much he paid for this 25 per cent interest in those theaters?

A. $18,750.00.

The Court: Let me ask a question right there. Were they the theaters that you sold, two of them to Mr. Sudekum, and six others, a 50 per cent interest in.

A. Yes sir.

Mr. Wright:

Q. Isn't that contrary to what you testified? I thought you said the 25 per cent interest you acquired was limited to the theaters at Maryville, and Greenville, and Sweet-[fol. 639] water, that you had bought a half interest in some of the other theaters?

A. In one more, in Erwin, Tennessee, I had a half interest there.

Q. Just which were the theaters that you paid the $18,750.00 for 25 per cent interest in?

A. There was two theaters; one in Sweetwater, one in Lenoir City, two in La Follette, two in Greenville, and one in Maryville.

Q. And at that time you already had a half interest in the two at Erwin?

A. Yes.

Q. Now, in the deal that was made for the taking over of the theaters at Maryville and Greenville, by Mr. Sudekum, what part of the money that was paid for them did you receive?

A. Well, I don't know just how that was handled. We paid most of it out in debts. I don't recall just how it was divided.

Q. I am not asking you how it was paid out by you, I want to know how much you got, whether it was in the form of a discharge of debts for you or any other consideration?

The Court: What proportion of the $18,750.00?

A. Well, I don't recall. Parrott & Hendren Amusement Company, the Ausmns & Hendren Amusement Company,

they were interlocked, in a way that the money had to be divided; I just don't recall what the share of each party was.

Q. Have you got any record to show what each share was?

[fol. 640] A. No. I have not.

Q. Was Mr. Gorman keeping the books for you at that time?

A. Yes, sir.

Q. Do you think he would know what your share was?

A. No sir, Mr. Gorman didn't handle that transaction.

Q. Now, the Cherokee Amusements Inc., of which you are Secretary and Treasurer, was organized for the purpose of taking title to the theaters that you have mentioned, at Edwin, La Follette, Lenoir City, Sweetwater, isn't that correct.

A. Yes.

Q. The capital of that corporation was $50,000.00, was it not?

A. Yes, sir,

Q. 500 shares of $100.00 each?

A. Yes, sir.

Q. How were those shares issued?

A. Issued 25 shares to W. H. Parrish, 49 shares to K. C. Stengel, 1 share to Mrs. Stengel and 25 shares to myself,—I mean 125 shares.

Q. What was the consideration that was put into the corporation in consideration for those shares?

A. I don't recall.

Q. Have you got any record that would show that?

A. I don't believe we have.

Q. Can you find out?

[fol. 641] A. I could investigate it, yes.

Q. Will you do that?

A. Yes, sir.

Q. Do you have any idea whether, or what you may have contributed to the corporation for the shares that were issued to you?

A. Well, I owned 25 per cent interest in it, in the old corporation.

Q: Yes, but the three of the theaters in the old Parrott & Hendren Amusement Company had already been transferred to the Crescent Amusement Company, had they not?

A. Yes, sir.

Q. So that those didn't come into the Cherokee Amusement Company?

A. No.

Q. Do you remember what you did put into the Cherokee Amusement Company?

A. We put the assets of Lenoir City, Sweetwater, La Follette and Erwin.

Q. When you say "we", you are referring to you and Mr. Parrott?

A. Yes, sir.

Q. What did Mr. Stengel put in for the stock that was issued to him?

A. The stock that was issued to him was $25,000.00 that we received in consideration for that stock.

[fol. 642] Q. That $25,000.00 that you are referring to now, who paid that?

A. That is the $25,000.00 we received at the time we sold the 50 per cent interest in the theaters to Mr. Stengel, Greenville, and Maryville theaters, to Mr. Sudekum.

Q. Well, $17,500.00 of that $25,000.00 was paid for the theaters at Maryville and Greenville, that went into the Crescent Amusement Company, did it not?

A. I don't know. All I know, we received $25,000.00. How that was divided up between Mr. Sudekum and Mr. Stengel's companies, I don't know.

[fol. 643] Q. Do you know that that was all that they paid both for the theatre at Greenville and the one at Maryville that went to the Crescent Amusement Company?

A. All we got was $25,000.00.

Q. And the fifty per cent interest of stock that was issued Mr. Stengel? And that $25,000.00 was paid by Mr. Sudekum, was it not?

Mr. Armistead: May it please the Court, I haven't objected to the last few or numerous questions but I respectfully submit that this is absolutely immaterial and I object to any further questions about this. Now, we do admit that the Crescent Amusement Company has a number of affiliates and that Mr. Sudekum is the head of the Crescent Amusement Company. We submitted a stipulation to counsel

which, I think, will save all sorts of time. I am objecting to any further questions about the consideration that he received or who paid it and how it was paid for.

Objection overruled.

Mr. Wright: Will you read the question?

(Question read as follows: And that $25,000.00 was paid by Mr. Sudekum, was it not?)

A. I don't recall who paid the money. We got a check. I believe Mr. Sudekum's name was on the check, or one of them.

[fol. 644] Q. Wasn't part of that $25,000.00 paid over a period of time?

A. Yes, sir.

Q. $7500.00, wasn't it?

A. I don't know but there was some sum paid in thirty and sixty days, I believe.

Q. Wasn't it longer than that?

A. No.

Q. Wasn't there $7500.00 that was paid over a period of a year or two?

A. No.

Q. At the time you made the arrangement to sell the theatres to Mr. Sudekum and organize Cherokee Amusements, Inc., did you make any arrangement with Mr. Sudekum to pay him a salary or any income from the Cherokee operations?

A. Yes, sir.

Q. What was that arrangement?

A. Well, it was an arrangement where we paid him a salary for his advice, suggestions, counsel and things of that kind.

Q. That was part of the deal for taking over the theatres?

A. No, that wasn't the consideration. That was arrived at later.

Q. When was that arrived at?

A. Oh, I guess two months after that deal was made.

Q. You mean about two months after your theatres were [fol. 645] transferred to Crescent—that was in about June, 1936, wasn't it?

A. No, I think it was in August.

Q. And the Cherokee Amusements, Inc., was organized in October, 1936, was it not?

A. No, in August.

Q. Well, the arrangement that you made with Mr. Sudekum was made prior to the time of the incorporation of Cherokee Amusements, wasn't it?

A. Yes.

Q. Who made that arrangement?

A. The arrangement for Mr. Sudekum's——

Q. ——compensation?

A. Well, Mr. Parrott and I discussed it and the directors of the company met and passed it.

Q. Who suggested it?

A. Well, I believe I did.

Q. Had you previously discussed it with Mr. Sudekum?

A. No, I don't recall.

Q. You and Mr. Parrott just decided you wanted to give him some additional money on the deal?

A. We wanted to pay him for his services.

Q. And what services was it you wanted to pay him for?

A. Well, wanted to pay him for counsel, advice—we wanted to have the benefit of his experience and suggestions [fol. 646] and so on.

Q. Suggestions with respect to what?

A. Well, suggestions as to the best operation of the theatres, exploitation, policy and so on.

Q. Did you expect to get any assistance from him in connection with the purchase of films?

A. No.

Q. You had an understanding with him that he would have nothing to do with film buys?

A. No, we didn't have any special understanding about it.

Q. Isn't that one way in which Mr. Sudekum would be of very substantial assistance to the Cherokee Company?

A. No.

Q. He couldn't give you any help at all in licensing films?

A. Well, he never has.

Q. His experience in licensing films was of no value to you, is that right?

A. Well, we were getting films at reasonable prices.

Q. You got them at much more reasonable prices after Cherokee Amusements, Inc., was organized, didn't you?

A. No, I don't believe we did.

Q. You had been buying films for those theatres that were involved in this Cherokee deal prior to the time the corporation was organized, hadn't you?

[fol. 647] A. Yes.

Q. And after it was organized who then bought the films for the same theatres?

A. I did.

Q. For how long?

A. Oh, I guess it was about eighteen months or two years.

Q. That would be true for the year 1938?

A. No, I believe it was true, probably true for the year 1937; probably up until the middle of 1938. I am not sure about that.

Q. Well, if Mr. Stengel, if it appears that Mr. Stengel had testified he took over the buying in 1937 that is probably correct, isn't it?

A. That is probably so, yes, sir.

Q. And did he receive any compensation from the Cherokee Company?

A. No, sir.

Q. He became an officer in the organization?

A. Yes, sir.

Q. What were his duties with the company?

A. He was vice president.

Q. Did he do anything else besides license films?

A. Not until he took over the buying.

Q. Well, after he took over the buying did he do anything else?

[fol. 648] A. He later took over the bookkeeping.

Q. When was that?

A. That was in the fall of 1938.

Q. How much was this compensation you arranged to pay Mr. Sudekum when the corporation was organized?

A. I believe it was right after the organization—I believe it was $50.00 a week.

Q. As a matter of fact, it was $200.00, wasn't it?

A. $200.00 a week?

Q. Yes.

A. No.

Q. You say positively you never paid Mr. Sudekum $200.00 a week?

A. We didn't at the time you are speaking of.

Q. Well, when was it that you did?

A. I think we started that in 1940.

Q. It could have been a year or two earlier, couldn't it?

A. It could have been but I don't recall whether it was or not.

Q. Who disbursed the payments to Mr. Sudekum?

A. Mr. Gorman.

Q. He was the auditor of the Cherokee Amusement Company?

A. He was the bookkeeper.

Q. His memory on that question would be better than yours, would it not?

[fol. 649] The Court: Well, the books would be better.

Mr. Wright:

Q. Have you got the books that show what was paid to him?

A. No, I don't have any books with me.

Q. Well, you have got—have you got any; any in existence?

A. Yes, we have books.

Q. Can you produce those?

A. Yes, sir.

Mr. Armistead: Just a minute. We object to the production of those books. That is the internal affairs of this corporation. It doesn't throw any light whatsoever on the issue involved in this case, what they paid Sudekum or what they paid any officer or what they paid any employe.

The Court: Well, what is the purpose of the testimony, Mr. Wright?

Mr. Wright: The purpose of the testimony is to show that the deal that was made here was in order to get the benefit of Mr. Sudekum's film-buying power. That is why he received $200.00 a week, and Mr. Stengel took over the film-buying duties.

[fol. 650] The Court: The film-buying power was the Crescent Amusement Company, and not Mr. Sudekum personally, was it not?

Mr. Wright: Well, I don't think there is a great deal of difference between them as the company was operated. We have charged here that Mr. Sudekum, Mr. Stengel, Crescent Amusement Company and the Rockwood Company combined with each other for the purpose of monopolizing films, and we allege that they were able to do so by combining the film-buying power of each other into one circuit, which circuit, we say, has film-buying power so large and has used it in such a way as to be illegal itself under the Sherman Act.

The Court: What is that so I might understand what is the Government's theory on that? In what way did they use it that is illegal? Getting the films at a lower price?

Mr. Wright: To not only receive discriminatory treatment as between theatres which they operate and local independent operators. That involves not only films. It also involves clearance, discrimination and every known form of discrimination and actually taking films away from inde- [fol. 651] pendent competitors in order to put them out of business. The basis on which they are able to do that is the fundamental power that they have which enables them to control all of these situations that they have and to expand into others as they have been able to do, and eliminate competition from the fact that they have built up a pattern of theatre control by which they can control the film supply in those situations.

The Court: All right. I overrule the objection.

We will have a short recess at this time.

(Recess).

[fol. 652] Resumption after Recess.

The Court: Mr. Wright, did I understand you to say that Mr. Stengel made the film purchases for the Cherokee Amusement Company after Mr. Hendren ceased in that capacity?

Mr. Wright: Yes.

The Court: Then, if Mr. Stengel made the purchases, how would evidence of what Mr. Sudekum drew from the corporation as salary be competent if he didn't make the purchases?

Mr. Wright: I think that might be inferred from the way the deal was handled, that the payments made to Sudekum were actually made in return for *for* Mr. Stengel's services in helping in the film deal.

The Court: How is that? I didn't get that.

Mr. Wright: I think it could be inferred from the manner in which the deal was handled that the payments made to Sudekum were actually being made in return for Mr. [fol. 653] Stengel's services for helping in the film deal: you will remember there was evidence way back with reference to both the Crescent Company and the Rockwood Company.

The Court: What about the Cherokee?

Mr. Wright: Cherokee, and all of Cherokee's subsidiaries; and we propose to show that this company, which had ostensible independence, actually was combined with the Crescent Company and all its affiliates for the purpose of securing film control and of all the situations where they operated.

The Court: Well, granting what you say is true: granting that Mr. Sudekum did make film purchases in connection with Mr. Stengel for the Cherokee Company: what difference does it make how much he got out of it?

Mr Wright: The purpose of showing how much he got was to actually show the cost of this acquisition was nil, that he got more salary than he actually put into the Cherokee Company.

[fol. 654] The Court: Do you propose to show, to prove, that Mr. Sudekum individually was the purchaser of an interest in the Cherokee Company, Cherokee Amusement Company, or that that interest was purchased by the Crescent Company?

Mr. Wright: We do not think it is material whether it was held by the Crescent Company or Mr. Sudekum.

The Court: It might be very material if if were two distinct interests.

Mr. Wright: The interest that was given to Mr. Stengel, we expect to show, was held for Mr. Sudekum, or the Crescent Amusement Company; I do not think we are in position to show which as between those two.

The Court: I don't quite understand you; I am sorry.

Mr. Wright: I say the purpose of our proof is to show that the transfer of the half interest to Mr. Stengel was in reality for the benefit of either Mr. Sudekum or the Crescent Company; he put up the money, and that Mr. [fol. 655] Stengel was merely acting as a dummy for that proposition.

The Court: Was the stock in Mr. Sudekum's name?

Mr. Wright: Yes, sir.

The Court: Who do you contend put up the money?

Mr. Wright: Mr. Sudekum.

I asked him; he doesn't seem to know. I don't know whether Mr. Sudekum or the Crescent Amusement Company did. We expect to show one or the other did.

[fol. 656] The Court: I do not see that it is very material about the salary paid Mr. Sudekum.

Mr. Wright: I think it fits very completely into the picture as a whole, that there was an attempt made to trade with the Rockwood Company for licensing films, had nothing to do with Mr. Sudekum.

The Court: And you are not speaking about the Rockwood Company. We are speaking about the Cherokee.

Mr. Wright: The Cherokee too.

The Court: Who does the Government contend bought the films for Cherokee?

Mr. Wright: The films were collectively negotiated for by the companies in which Mr. Sudekum was interested—the Crescent, Rockwood, Cherokee, the whole group, not only the companies that were subsidiaries of Rockwood, but the company they had charge of the companies owned ostensibly with Rockwood; what their relations were, we [fol. 657] have alleged they combined together for this purpose, and it is denied by the answers and the stipulations offered show, they say Rockwood Company is owned by Mr. Stengle and Mr. Sudekum, and Mr. Stengel is Mr. Sudekum's son-in-law, that they were the licensing as much or more than that.

The Court: I understood you to say that Mr. Stengel bought the films for the Cherokee Amusement Company, and that the stock belonged to them, and Mr. Sudekum was paid two hundred dollars a month for his ability to buy the films.

Mr. Wright: That actually what they were getting, Stengel had only been in the film business for a period of about one year, and his ability was nothing compared to Mr. Hendren, but what they were buying and what they got in having Mr. Sudekum assume the film buying was that they were getting Mr. Stengel ostensibly to do the buying, but they were to get the Crescent's and Mr. Sudekum's buying power. I think, if the Court please, if I may ask him a few more questions.

The Court: All right.

Mr. Wright:

[fol. 658] Q. Why did Mr. Hendren turn over the negotiations to Mr. Stengel?

A. I didn't have time to handle it, we were building a theater over in Spruce Pine, I didn't have time to look after that and other business and buy the films.

Q. As a matter of fact, he assumed that quite a while before you built the theater in Spruce Pine, did he not?

A. No, we started to build that theater along in the middle of 1937, may be a little earlier.

Q. You say you started building the theater at Spruce Pine the middle of 1937?

A. Yes.

Q. Didn't you open it in the fall of 1938?

A. No.

Q. You had always found time to do the film buying for the circuit before that, hadn't you, or you had also done the acquiring of some films?

A. I had found or taken the time to do it but had to leave other things suffering.

Q. How much experience had you had in buying films?

A. I have been buying films for quite a number of years.

Q. How much experience did Mr. Stengel have?

A. Oh I don't know.

[fol. 659] Q. Didn't you have any idea at the time you turned the film buying over to him, whether he knew anything about it or not?

A. He evidently knew something about it, I don't know the number of years he had bought films.

Q. As a mater of fact, he had been in the film business only two years, hadn't he?

A. I don't know.

Q. Didn't you know that at the time he assumed the buying of films?

A. No, sir.

Q. When was it you first met him?

A. We met him when he came over to Greenville with Mr. Sudekum.

Q. When was that?

A. Well that was about the middle of 1936.

Q. When was the decision made to have Mr. Stengel take over the film buying?

A. I do not remember the exact date.

Q. Who did you discuss it with before you decided?

A. I discussed it with Mr. Stengel.

Q. Anybody else?

A. Mr. Parrott.

Q. You discussed it with Mr. Sudekum?

A. No.

[fol. 660] Q. Now, during this period you were paying Mr. Sudekum a salary, what if any discussion did you have with him about the business?

A. Well we discussed ways and means of improving our theaters and booking pictures, presenting the programs, exploiting them, changing the program per week, various things in connection with the operation.

Q. Did you also discuss the licensing of films for the circuit?

A. No, sir.

Q. How is it and why was it you discussed everything but that?

A. I had been able to take care of that satisfactorily up until Mr. Stengel took it over.

Q. That is the date Mr. Sudekum was receiving the salary was after Mr. Stengel took it over, was it not?

A. Yes.

Q. And why was it you discussed everything about the business with Mr. Sudekum except the licensing of the films?

A. I discussed with him occasionally, I hardly ever saw Mr. Sudekum, I talked to him on the telephone, and we discussed the merits of the films, and so forth, but nothing but just as to what we should buy and what we should show.

[fol. 661] Q. How often did you talk to him on the telephone?

A. Every time I needed any information, needed any help myself.

Q. And that was information about how many changes a week to make?

A. Well there is a whole lot of things: equipment, seats and machines.

Q. Did you ever talk to him about acquiring theaters?

A. Yes, I have discussed that with him.

Q. Did you talk to him in connection with acquiring the interest in the Newport Amusement Company?

A. Yes, sir.

Q. What if anything did you have to do with that?

A. Well I didn't have—Well I helped negotiate the deal.

Q. Who else negotiated it with you?

A. Mr. Parrott.

Q. Did you discuss it with Mr. Sudekum?

A. Sir?

Q. Did you discuss it with Mr. Sudekum?

A. Yes, sir.

Q. As a matter of fact he approved it before he made it, did he not?

Q. He approved—how was that?

Q. He approved the terms of the deal did he not, before [fol. 662] it was made?

A. After some discussion, yes, he said he thought it would be all right.

Q. How did you happen to buy the other theater or interest in that theater at Newport?

A. Well Mr. Baird was wanting, he knew we were getting along pretty well, and he wanted to make a deal with us.

Q. He came to see you first?

A. I am not sure about that.

Q. When was the first time you talked to him?

A. I believe it was in 1937.

Q. Whereabouts?

A. He called Mr. Parrott and asked if we could meet him in Knoxville.

Q. Did you meet him there?

A. Yes, sir.

Q. Was anybody else present?

A. No.

Q. What was the conversation you had there?

A. Well we just talked about the theater business and the advisability of getting together, and he said he would like to work out something with us, and I discussed it, and we all discussed it pro and con, and finally arrived at a price and made the deal.

[fol. 663] Q. Was anything said to him about you coming in there with an opposition theater, if you did not make a deal with him?

A. I do not recall.

Q. Do you recall whether you had investigated putting a theater in there, in Newport, in opposition?

A. No, nothing that I recall.

Q. And discussed it at that time with him?

A. No.

Q. The Newport Amusement Company was formed to take over the theater that you owned, was it not?

A. Yes.

Q. And that had a capital of ten thousand dollars?

A. Yes, sir.

Q. After the stock was issued to him, how much of the other stock was issued, how was the other half of the stock issued?

A. To Cherokee Amusement Company.

Q. And then who took over the film buying for Newport?

A. No one, Mr. Baird continued to buy.

Q. How long?

A. He is still buying part of those films, Mr. Stengel I think handles some of the contracts.

Q. Mr. Stengel handles the more important ones, does he not?

A. They are all important.

Q. He handles most of them, does he not?

[fol. 664] A. Yes.

Q. And does he receive any compensation for that?

A. Yes.

Q. And you received compensation for the Newport too?

A. Yes, sir.

Q. And Mr. Parrott also?

A. Yes, sir.

Q. What services do you and Mr. Parrott render?

A. Well, we are officers of the company.

Q. What office do you hold?

A. I am vice-president.

Q. What is Mr. Parrott—

A. I beg your pardon, I am secretary and Treasurer. Mr. Parrott is vice-president.

Q. What do you do for the Newport Company?

A. Well, we, Mr. Baird, Mr. Parrott and I get together and discuss business, visit with each other on business.

Q. Do you recall what the consideration that was paid by Cherokee for the half interest in Newport?

A. Five thousand dollars.

Q. How much of that was paid in cash?

A. Cash?

Q. At the time of the sale?

Q. Yes.

[fol. 665] A. It was put up by the company.

Q. It was put up by the company?

A. Yes.

Q. And you are quite sure it was not spread out over a period of time?

A. No.

[fol. 666] Q. Have you got a record which shows that?

A. I think we should have.

Q. In the subpoena that was served on you, you were asked to produce all records which related to the acquisition of any theafers in that town by your Company, were you not?

A. Yes.

Mr. Waller: That is a corporation, Newport Amusement Company. I understand it is not an acquisition of a theater, but it is acquisition of an interest in a corporation.

Mr. Armistead: I think, further, evidence has been furnished heretofore to the Government, that those records were kept in the Nashville Office of the Crescent Amusement Company and we haven't got them.

Mr. Wright:

Q. Is that right, Mr. Stengel has got those records?

A. Yes.

Q. How long has he been keeping them?

A. Ever since the Fall of 1938.

Q. Why were they turned over to him then?

A. Well, we thought that he could handle them better, keep a better record.

Q. Now, as a matter of fact, you, Mr. Parrott and Mr. Stengel received more than the $5,000.00 you paid for the half interest in the Newport Amusement Company during [fol. 667] the first year of its operation, didn't you, in the form of salary?

Mr. Armistead: We object to that on the ground that it is immaterial.

The Court: Objection sustained.

Mr. Wright: If the Court please, I think we are entitled to show that in acquiring these theaters that it was practically at no cost to them, whether they had someone to give them the stock or agreed to pay for the stock, they took it all back in salaries.

The Court: Suppose they had lost money, it wouldn't be a different proposition just because they happened to make a good trade; I don't see anything wrong with that.

Mr. Wright: I think we are entitled to show just how good this trade was that they made.

The Court: Sustain the objection.

Mr. Wright: After all, these defendants are the people who are on trial here and some of the complaining witnesses, by Counsel for the Defense, were permitted to show how good the business was and how much money they made, and it seems to me that we are clearly entitled to show these deals we have alleged have been coercive, and to show exactly what benefits received by the parties that we allege combined together to make these acquisitions.

And, if we can't show that——

[fol. 668] The Court: It might have been received for many different reasons.

Mr. Wright: That is a matter to be inferred from the testimony, from all the evidence that goes in the record. I don't know how we can make a case of combination and conspiracy between the various groups of exhibitor defendants in the case unless we are allowed to develop fully the relations between them and what they got out of the acquisitions that we have alleged to have been made coercively.

The Court: I have ruled.

Mr. Wright:

Q. Do you know whether, after Mr. Stengel took over the film buying for the Cherokee Company and the subsidiaries, whether the film costs of the theaters that were operated by them went down?

A. I don't recall that they did.

Q. Do you know whether they did *not* not?

A. I am not positive one way or the other.

Q. Wasn't that one of the things that you were interested in as a partner in that business?

A. We were interested in low film rentals; we were mostly interested in them buying the films and get the burden off of me.

Q. That has a good deal to do with the success or failure of the operations, doesn't it?

[fol. 669] A. The price of films?

Q. The price of films.

A. Yes.

Q. And particularly the percentage of the gross business that you take in that you had to disburse in film cost, isn't that right?

A. Yes sir.

Q. Don't you know, as a matter of fact, that after Mr. Stengel took over the film buying that the percentage of gross which went into films was substantially reduced?

A. It probably was but I never have taken a check, I don't know.

Q. And if it appears from other evidence that it was, can you give us any explanation of that fact?

A. No, unless he is a better bargainor than I was.

Q. What would make him a better bargainor?

A. Well, patience with those film salesmen.

Q. Wouldn't the fact that he was able to negotiate at the same time for a group of 60 or 70 theaters instead of 6, have something to do with it?

A. I don't know anything except about Cherokee.

Q. You have been in the film business long enough to know the answer to that question, haven't you?

A. No, I wouldn't say that 60 theaters did better than one.

Q. When you used to operate theaters and buy the films for them, how did you buy? Did you buy them all at once? [fol. 670] A. No, we bought selective contracts, and bought them with cancellation provision, just anyway that we wanted them.

Q. I am not referring to all the films of a particular Company, I am referring to all of the towns in which you operated; you generally made——

A. Yes, as a rule.

Q. In the cities where you had—Maryville and Greenville were the only ones, those towns, in which you had competition?

A. We had competition in Lenoir City.

Q. When was that?

A. That was in 1934-1935, and 1936.

Q. During the 1934-1935 season, the only competition you had was in Greenville and Maryville, was it not?

A. In 1936, did you say?

Q. 1934-1935 season, film season?

A. No, we had it in Lenoir City.

Q. Did you have it during that year?

A. I believe it developed in 1935 and went into 1936.

Q. At the time you were buying films for the 1934-1935 season for all of your situations, the only two in which

there was competition, were Greenville, and Maryville, isn't that right?

A. Yes sir.

Q. Do you recall telling any of the film offices that unless you could get the films in Greenville and Maryville, where you needed them, you were not going to buy their films in the four closed situations that you controlled?

[fol. 671] A. Yes sir.

Q. And that is the customary manner in which you negotiated for films for one group of theaters, where you have any competitor and some closed situations?

Mr. Waller: I object. The witness said he only knew about Cherokee, and he is asking him the general custom.

The Court: What is the customary manner of negotiating for them in a group, is that what you mean?

Mr. Waller: That was not the question he asked. He asked him if it wasn't customary for a man that was buying films to tell the film office if he didn't sell him films in the town where he had opposition he wouldn't buy them anywhere. He is asking this witness the general custom in the industry.

Mr. Wright: He has been in the business a long time.

The Court: Do you know anything about that?

A. That was my method, I don't know what the others were.

The Court: I guess they all made the best trade they could.

Mr. Wright:

Q. As a matter of fact, in the Greenville situation, some of the films, which you had been accustomed to buy before Mr. Sudekum and the Crescent opened the theater in Greenville, were sold away from you, to the Crescent house, weren't they?

A. They bought them, yes.

[fol. 672] Q. That you had been frequently buying?

A. May be some before I had been buying.

Q. What companies are those that you refer to?

A. I don't know. I don't remember whose I was using; Metro—I believe and Vitagraph.

Q. United Artists?

A. I don't recall whether I used United Artists or not.

Q. Do you remember whether you were given an opportunity to negotiate for the purchase or the licensing of films from those companies for use in your theaters in Lenoir City and Greenville before they were sold away from you to the Crescent House there?

A. Yes.

Q. You were?

A. Yes sir.

Q. You didn't want to buy those films?

A. Had all I needed.

Q. Did you ever make any complaint or statement to any salesman of any film company that they had sold away from you at Greenville to the Crescent?

A. Yes sir.

Q. Were those statements untrue that you made?

A. I made those statements in order to force them down in price in other towns, I wanted to make them think that just because they didn't sell us for all the towns, I wasn't going to buy them unless they made me a good price in other towns.

[fol. 673] Q. Statements that they were selling away from you is something that you can't very well bluff about, isn't it? It is either true or it *is* isn't true is that right?

A. That is right. But I made the statement to the salesmen for the reason to lead them off and to think if they didn't sell me for all the towns I wouldn't buy them for any town, when I would get them the way I wanted them——

Q. If they had been selling them away from you, how would your telling them that they had sold away from you cause them to believe that they had?

Mr. Waller: I think the term "selling away" ought to be defined.

The Court: Well, that is argument anyway.

Mr. Waller: In other words, it is just a question of whether this man was a regular customer or whether he had bought films that year. He said some companies from whom he had bought films in the past years may have sold the Crescent Amusement Company.

Mr. Raftery: I am going to object to the form of the last question unless he makes it in understandable English. I don't know what it means.

[fol. 674] Question read by the reporter.

Mr. Raftery: I renew the objection after that.

The Court: Suppose you reframe your question.

By Mr. Wright:

Q. Did you negotiate with the representative of the Vitagraph Company for the exhibition of his 1934-1935 feature pictures for exhibition in your theater at Greenville, in your theater?

A. No.

Mr. Raftery: I think it is on us to explain that Vitagraph—this is the first time it has been mentioned in the trial—is the selling agent for one of the Big Five, Warner Brothers.

Mr. Wright: That is correct. We pointed that out in the trial brief that we filed.

The Court: I haven't had time to read it. Go ahead.

By Mr. Wright:

Q. Did you try to negotiate with them?

A. I don't recall that I did.

Q. Do you recall whether you made application for their films that year?

[fol. 675] A. I may have but I don't recall whether I did or not.

Q. Well, who were those salesmen you talked to and told they were selling away from you?

A. I think Mr. Bryan was the Warner Brothers salesman.

By the Court:

Q. What do you mean by selling away from you? I don't quite understand that myself.

A. I suppose he means that they don't sell me and they sell Mr. Sudekum.

Mr. Raftery: That is a new term that came into the industry since these lawsuits started.

Mr. Wright: Nothing new in them.

Mr. Raftery: The contracts have expired. Let's assume that I run a theater and the contract with Warner Bros. is that I play fifty-two pictures and I finish with them. The following year Warner Brothers may decide to

sell Mr. Mitchell. I have no right to their pictures. I have no contract; I have nothing, so the Government——

The Court: Just didn't renew the contract?

Mr. Raftery: That is all, and the Government calls that selling away.

[fol. 676] By Mr. Wright:

Q. The term "selling away" is one that is used in the trade, is it not?

A. They use a lot of terms in the trade.

Q. And it has been in the trade ever since you can remember?

A. I beg your pardon.

Q. I say, the term has been in the trade ever since you can remember?

A. I have heard it, yes.

Q. Does the term mean what Mr. Raftery stated it meant or does it mean what you said it meant?

A. It means what Mr. Raftery said.

Q. Maybe we had better let Mr. Raftery testify for us. Now, who else was it you talked to about it?

The Court: All you have to do is to give him an opportunity. (Laughter.)

By Mr. Wright:

Q. What other film representatives did you tell the same story to?

A. I don't recall whether I told it to anybody; I may have.

Q. United Artists' salesmen?

A. I believe I did tell it to the United Artists' salesman to get rid of him.

Q. And who was it you talked to?

[fol. 677] A. I believe it was Clarence Eisman.

Q. He was a salesman out of the Atlanta Exchange?

A. Yes sir.

Q. When did you talk to him?

A. I don't know; during that period.

Q. Didn't you tell him you wanted to buy United Artists' films for that season, 1934-1935 for Greenville?

A. I don't feel like answering questions I don't know exactly how to state.

Q. Well, a minute ago you were very anxious to tell me what you said, how you tried to get rid of them. If you don't remember, just say so and if you do, I would like to have your best recollection.

A. I don't remember what I said to them, but I remember trying to get rid of them.

Q. Do you remember saying to him ever at any time he had sold United Artists pictures away from you to Cresent for Greenville?

A. No.

Q. Did you talk to any salesman from Metro about a product for Greenville for the 1935-1936 season?

A. I don't remember.

Q. You don't remember whether you did or not?

A. No.

Q. Do you remember any negotiations at all with Metro [fol. 678] at that time?

A. I don't recall whether I did or not.

Q. What were Mr. Fred Gorman's duties with Cherokee besides keeping the books?

A. That was all—managing the theatre at Erwin.

Q. Anything else? Did he work on any theater acquisitions?

A. He assisted in them.

Q. What kind of assistance did he render?

A. Well, he would inform me at various times of theatres he heard could be bought and I would tell him to investigate it and see if they wanted to sell and he would usually do that and make report, contact the people and talk about it.

Q. Any instructions that he had with reference to theatre acquisitions came from you, is that right?

A. I occasionally gave him instructions. He used his own initiative a whole lot.

Q. Well, you were the only one in the Cherokee Company who gave him instructions in connection with theatre acquisitions, were you not?

A. Yes.

Q. Did you give him any specific instructions in connection with those acquisitions?

A. There is no specific instructions as to acquiring a theatre.

Q. Just told him to use his own judgment?

[fol. 679] A. Yes, sir.

Q. And any offers that were made by him were always subject to your approval, were they not?

A. Yes sir.

Q. You participated in the negotiations for the acquisition of the theatre at Spruce Pine, N. C. yourself, did you not?

A. Yes sir.

Q. After you made that acquisition what did you do with the equipment there?

A. We put it in storage and then moved it to various theatres where we needed it.

Q. Did you need the equipment particularly?

A. Yes sir.

Q. That equipment?

A. Needed equipment and that is equipment.

Q. When you made the purchase of the theatre why was it that you inserted a provision in the sales agreement that the seller would not compete with you for a period of ten years in the county?

A. Well, that is a practice that is used in a lot of businesses so I just inserted that clause.

Q. Do you always put that in all agreements that you make each time you take over a theatre?

A. No, I believe that is the only one.

[fol. 680] Q. You put the same provision in your agreement for the take-over at Copperhill, did you not?

Mr. Waller: I think that was Newport Amusements there.

A. Newport Amusements took over Copperhill.

By Mr. Wright:

Q. You were present at the time the final deal was made, weren't you?

A. I don't recall just what is in that lease.

Q. Was there any special reason why you took the agreement at Spruce Pine and didn't elsewhere?

A. No, special reason for the clause that got in there.

Q. You think it crept in by mistake?

A. No. We have different attorneys to draw up contracts and that was probably his way of drawing them. He thought that would be appropriate.

Q. Well, the principal thing you did that for at Spruce Pine was the assurance of freedom from competition, wasn't it?

A. No.

Q. You weren't interested in getting assurance of not having any competition there?

A. We'd rather not have a competitor but we didn't buy it for that reason.

Q. You can make a great deal more money in any situa- [fol. 681] tion if you don't have a competitor there, isn't that a fact?

A. Yes.

Q. If you don't have anybody to compete with you in licensing films for the situation you can license them cheaper, can you not?

A. That don't have a whole lot to do with it.

Q. You don't think it does?

A. No.

Q. What does determine the price you pay for films?

A. Bargaining.

Q. But the fact that you are the only bargainor on the buying side then when the bargain is made——

A. I wouldn't think so.

Q. In your experience of operating a circuit of theatres for Parrott & Hendren before you organized the Cherokee did you find that films in the closed situations cost you more than or less than those in competitive situations?

A. They were about the same. They didn't increase any. Our film rentals didn't increase.

Q. The percentage of gross you pay out in film rental is about the same in a closed situation as it is in a competitive situation?

A. It depends on the situation. I don't know just how you would answer that.

Q. Have you had enough experience to know that it costs [fol. 682] you more in a competitive situation?

A. They try to get more in any situation.

Q. But they can get more in a competitive situation, can't they?

A. No.

Q. Why not?

A. I wouldn't think so.

Q. Why not?

A. Well, it depends on the man that is buying the film, as to the amount he will agree to pay and if he doesn't agree to what they want him to pay, then he gets them for what

he wants to—now, that is usually true where there is competition.

Q. Well, it is true that if there is another operator to take the film, if the distributor gets his films exhibited there, whether that first one will take them or not, is that right?

A. No, I don't think that is right. It all depends on the man that is buying the film, his ability to pay and his bargaining.

Q. What gives that man buying or bargaining power?

A. Well, we call it a line of talk, one thing.

Q. Just a question of the best line of talk, gets the cheapest film, is that right?

[fol. 683] A. That has a lot to do with it.

Q. A man who has got one theatre and has got a line of talk can buy films just as cheaply as the man who has a hundred, is that right?

A. Yes. A line of talk—don't depend altogether on that but that helps him.

Q. What is that?

A. A line of talk don't govern the whole thing but the line of talk helps. Bargainors in independent houses can buy films if he knows how to buy, can bargain just — cheap as his competitor.

Q. Now, would that answer be the same if an analysis of rentals that were paid for films in situations involved in this case show that the cost of film to a circuit was substantially less than that of independents in comparable situations?

Mr. Waller: That is objected to. There is no such thing as a comparable situation.

The Court: The whole matter is very interesting but it seems to be a matter of argument.

Mr. Wright: I beg your pardon?

The Court: I say, the whole thing is very interesting but it seems to me to be a matter of argument.

[fol. 684] Mr. Wright: I won't pursue it any further then.

Q. Isn't it a fact that you can operate more profitably without competition than you can with competition?

A. Yes sir.

Mr. Waller: He has answered that affirmatively twice and I object to it as repetition.

By Mr. Wright:

Q. Don't you try, as a matter of policy, to acquire just as many non-competitive theatre situations as you can?

A. No.

Q. Why not?

A. We don't try to acquire any theatre.

Q. People try to sell them to you, is that right?

A. That is right.

Q. Well now, you are interested in buying situations where you can be assured you won't have competition, are you?

A. Well, where there is no competition it is more inviting.

Q. Is Mr. Fred Gorman still working for the Cherokee Company?

A. No.

Q. When did he leave?

A. He left in the winter of 1938.

Q. Do you know why he left?

A. Yes.

[fol. 685] Why was it?

A. Well, we didn't need him any longer.

Q. You discharged him?

A. Well, we wouldn't call it discharged, we asked him to resign.

The Court:

Q. And stopped his pay?

A. Yes sir.

By Mr. Wright:

Q. You hadn't needed him since June of 1938 when you sent the books into Nashville to Mr. Stengel, had you?

A. Well, we didn't need him for some time.

Q. Why had you kept him working for you?

A. Well, he was interested in acquiring some theatres of his own. He wanted to get out and branch out, he said, and be independent, and he was going to do that and just never did do it.

Q. When you asked him to resign did you tell him any reason for your decision?

A. Yes sir, there was a reason. Business wasn't so good at that time and Mr. Stengel was doing the bookkeeping

down in Nashville and he didn't have any duties other than looking after the theatre and the directors thought that it would be better if I went up to Erwin and took over the management of the theatre and do my booking and other duties there.

Q. Wasn't there another reason you asked him to resign?

A. No sir.

[fol. 686] Q. Isn't it a fact one of the reasons you asked him to resign was you had a theater at Hickman Kentucky that Mr. Sudekum was interested in?

A. No, sir.

Q. Did you ever discuss his resignation with Mr. Sudekum?

A. I think we did after he left.

Q. What was the discussion about that after he left?

A. Well, we told Mr. Sudekum that we were going to save the company some money, and that I was going up to Irvine, Kentucky and take over the theater there; and Mr. Sudekum said, Use your own judgment.

Q. That was before, wasn't it?

A. It was either before or after; I don't remember when it was.

Q. Did anybody ever tell you that he had been trying to buy a theater at Hickman, Kentucky?

A. I heard about a year after he left that he was.

Q. Who did you hear that from?

A. I don't recall; I believe it was Mr. Stengel.

Q. Did he say anything else about it?

A. That is all.

Q. Did you discuss the possibility of buying a theater there with him?

[fol. 687] A. At Hickman, Kentucky?

Q. Yes?

A. No, sir.

Q. Did you discuss with him the possibility of going into the theater business at any other location?

A. Yes, sir.

Q. What location?

A. Any location he wanted; he was after several, he had several in mind.

Q. What else did he tell you he had in mind?

A. He had Irvine, Kentucky, Copper Hill, Tennessee, and about 23 in Virginia, and one out in Kansas, and just all over the country he was investigating.

Q. What did he tell you about Copper Hill, Tennessee?

A. He said they wanted too much money.

Q. As a matter of fact, he investigated the theater there for the Cherokee Company, didn't he?

A. Prior to his own personal investigation he did.

Q. Did you tell him that the Cherokee Company wasn't interested in a theater there?

A. We wasn't interested at that time; Cherokee wasn't interested.

Q. Did you tell him that afterward?

A. Yes, I think we did; I am sure we did.

[fol. 688] Q. You are quite sure, are you, that either Mr. Sudekum or Mr. Stengel had spoken to you about Mr. Gorman's activities in connection with Hickman before he was discharged?

A. No, sir, I never heard of it until after he left.

Q. I would like to have this letter, dated October 9, 1936, from Fred Gorman to Mr. Hendren marked as Government's Exhibit No. 28, for indentification. (So marked by the Clerk) I will hand you Government Exhibit No. 28, for indentification, and ask you if that is one of the documents you produced in response to the subpoena served upon you?

A. Yes, sir.

Q. And that matter was written and received by you on or about the date it bears, October 9, 1936?

A. Yes, sir.

Q. Do you recognize the signature as that of Fred Gorman?

Mr. Armistead: May I inquire at this time for what purpose the plaintiff is offering or intends to offer this letter?

Mr. Wright: To show that Mr. Hendren was wholly familiar with what Mr. Gorman was doing in the theatre acquisition.

[fol. 689] Mr. Armistead: He has already answered that he talked with Mr. Gorman about the efforts to acquire theaters.

Mr. Wright: I call your Honor's attention to the second to the last paragraph.

The Court: All right. I overule the objection.

Mr. Armistead: I would like to make this further observation or objection: It will be all right if a photostat is made of that letter; that is our letter, and we want to keep the original.

The Court: Yes.

Mr. Wright:

Q. Mr. Hendren, did you read the two subpoenas that were served upon you?

A. Yes, sir.

Q. I will call your attetnion to this paragraph one, which refers to "All memoranda, correspondence, and other written communications, whether inter-office or otherwise, with the exception of availability notices and notices of selection of play dates, written or received during the period between Januar- 1, 1934, and December 31, 1940, which [fol. 690] relate to the negotiation or performance of contracts for the exhibition of feature pictures released by the major film distributors" and which they have named in the subpoena, "in the following named towsn:" including the towns of Maryville, Tennessee, Greeneville, Tennessee, and the othe- towns in which you operated theaters. Now, did you make a search of your files to see if you could find any such correspondence or communications?

A. Yes, sir.

Q. And you were unable to find any?

A. Other than what I brought.

Q. The folder which you handed me contained no documents of that description; do you find anything in there that you could point out to me that answers the description contained in paragraph one?

A. I don't know; there are other designations mentioned in what I brought.

Q. Yes, but is there any data in there that answers the description in paragraph one?

A. No, I don't know that there is.

[fol. 691] Q. During this period that is specified in the subpoena, you had a considerable amount of correspondence with the major film distributors with reference to the subject matter there specified, did you not?

A. You mean did we receive correspondence from them?

Q. You sent and received?

A. Yes.

Q. What was done with that correspondence?

A. None of the correspondence pertained to that particular paragraph.

Q. I expect you misunderstood my previous question; I said isn't it a fact that you did have a considerable amount of correspondence with the major film distributors which related to their negotiations, confirmations of contracts with reference to pictures released by them in the towns in which you operated?

A. Yes.

Q. Which were sent and received during the period of January 1, 1934, to December 31, 1940?

A. We have had them; we did not keep those files.

Q. How long do you keep them?

A. Well some of it we do not keep them either, we destroy them when it comes in, others we might keep thirty or sixty days, average up about six months.

Q. What do you keep thirty or sixty days?

[fol. 692] A. Confirmations and things of that kind.

Q. Leave off the confirmations, those are expressly excluded from the paragraph. Anything else?

A. No, that is about all we get, all the rest of the correspondence.

Q. All the rest of the correspondence you destroy all that as you write it, or as you receive it?

A. No, if we get a letter from a booker asking to supply dates, or tell us where we are delinquent in some pictures, there is no use filing that away, and we pitch it in the waste basket.

Q. I am referring now to the correspondence asked for in the subpoena relating to the negotiations of contracts which excludes those, how about those letters you write, do you destroy those as they are written?

A. No, we keep them about six months, sometimes longer, sometimes a shorter period.

Q. There are none that you have kept longer than six months, is that right?

A. No.

Q. And would you answer the same, would your answer be the same with respect to documents called for in the paragraph two of the subpoena?

A. What is that?

[fol. 693] Q. All memoranda, correspondence or other written communications, whether inter-office or otherwise,

relating to clearance granted in favor of or against theaters located in any of the towns listed below, during one or more of the motion picture seasons, from January 1, 1934, to December 31, 1940, which relate to a refusal to negotiate for licensing of feature pictures, where the major film distributors are listed in paragraph one?

[fol. 694] A. That other answer applied to that, too.

Q. Would the same answer apply to Paragraph of the subpoena as follows:

> "3. "All memoranda, correspondence, and other written communications written to or received from the major film distributors or the defendant exhibitors during the period between January 1, 1934, and December 31, 1940, relating to admission price charged by theaters located in towns listed in Paragraph 1 hereof".

A. Yes sir, the same thing applies. I don't think we ever got any letters like that.

Q. Would the same answer apply to paragraph of the subpoena af follows:

> "4. "All memoranda, correspondence, and other written communications, whether interoffice or otherwise, written or received during the period between January 1, 1934 and December 31, 1940, relating to the purchase or leasing of theaters in the following towns:"

which includes Spruce Pine, North Carolina, Erwin, Tennessee, LaFollette, Tennessee, Maryville, Tennessee, Newport, Tennessee. You had something to do with the acquisition of those theaters in all of those towns; did you not?

A. Yes.

Q. Did you have the correspondence or memoranda which related to the purchase or leasing of theaters in all of them?

[fol. 695] A. You have got it there, that is all there was.

Q. The only one of the documents that you have produced related to Spruce Pine, North Carolina, isn't that correct?

A. That is the only one that I know of.

Q. Did you make a search for the others?

A. That is the only file we had.

Q. Do you ordinarily, did you have correspondence or memoranda of the other acquisitions?

Mr. Waller: The record already shows that the other acquisitions were already made before the subpoena and before the formation of the company.

Mr. Wright: It doesn't show anything of the sort, the subpoena is for January 1, 1934.

The Court: All right, adjourn court until 1:30.

(Recess 12:30 to 1:30 P. M.)

[fol. 696] Afternoon Session

The Court: Mr. Raftery, I have been thinking about your objection that was made yesterday on the question of agency, and possibly the Court was a little gratuituous in popping off on some of the matters. Of course, you stated the law correctly generally relative to the question of agency. However, I think that your remarks or objections would probably be more applicable if this were a case where the suit was against one of the distributing companies on a contract; I think there would be a difference in a case of that kind, and particularly in this case on account of the fact that the contract was accepted by the distributor, R. K. O.—No, Paramount. I think from the answer that the statements made by the salesman were within the apparent scope of his authority, and particularly when ratified by the branch office manager at Memphis. I just want to call that to your attention for the record, inasmuch as I made some statements that possibly might be misconstrued.

Mr. Raftery: Another reason, of course, Judge, in making [fol. 697] the objection was the absence of the Big Five from this lawsuit; and it seems that most of these gratuituous statements of salesmen, or you might say sales talk—I forget the exact language the witness used—the man who could talk the most was the best buyer or best seller; we were pressing the objection primarily because of the absence from this lawsuit; we don't want to have piled up here a long list of what Warner Brothers salesmen said, and what Fox salesmen said, and what Paramount salesmen said, and particularly when they have been released from the lawsuit.

The Court: Of course, they are still contended in the case as being co-conspirators, and naturally the conspir-

acy will have to be proven before these statements are competent.

Mr. Raftery: Or dismiss the order issued on behalf of the Government to produce these men here and let them state to the contrary.

The Court: Well, probably they will before the case is over. Proceed, Mr. Wright.

[fol. 698] Earl Hendren resumed the stand and testified further as follows:

By Mr. Wright:

Q. Mr. Hendren, in searching the records for the purpose of subpoena serving on you for the Cherokee Company, did you also search the records kept by Mr. Stengel here in Nashville?

A. No, sir.

Q. You don't know now what records answering the description in the subpoena might be here at Nashville?

A. No, sir, I wouldn't know exactly; as a matter of fact, I don't know just what is here.

Q. Will you undertake to find out at the office what there is here in Nashville that answers the description in the subpoena?

A. I guess I could.

Q. Are you willing to do that? Will you do it?

Mr. Armistead: I understand the law to be, your Honor, if a witness hasn't a record in his possession, it is not incumbent upon him to go somewhere and get it.

The Court: Well, if he was an officer of the company he would have access to the records.

[fol. 699] A. I will make every effort to get what you want.

Q. And you will examine all of the records of the Cherokee Amusement Company here at Nashville to see whether there are other records which you haven't produced which answer the description in the subpoena, that haven't been produced?

A. Yes, sir.

Q. Now, during the time that you operated the theaters at Maryville, Greeneville, Lenoir City, Sweetwater and

Erwin as Parrott and Hendren Amusement Company, did you keep any records of the profits earned by those theaters?

A. No; Mr. Gorman kept them.

Q. Well, they were kept for you by him?

A. Yes, sir.

Q. And have you kept any of those records?

A. Well, we kept them for a while and had them stored, these old records, prior to Cherokee, and we had them stored in Lafollette, and two or three years ago a fire up there in the theater destroyed everything we had in regard to records, files, and so on.

Q. So you have no records at all?

A. No, sir.

Q. As to the operating results of those theaters while you were operating for Parrott & Hendren?

[fol. 700] A. No, sir.

Q. Do you remember about that those theaters earned while they were being operated by Parrott & Hendren?

A. They didn't earn much of anything.

Q. How much is that?

A. Well, that is usually a loss.

Q. They were operated at a loss during what period?

A. Well, practically all the time.

Q. Were you operating at a loss in Greenville when you had no competition there?

A. Yes.

Q. And were you also operating at a loss in Maryville when you had no competition there?

A. We didn't operate in Maryville without any competition. We went into Maryville when Mr. Sudekum was already there; so we had competition; we never operated in Maryville without competition.

Q. Why was it that you were operating at a loss?

A. Well, the Depression was one thing; bad management was another; no equipment was another; and there were several reasons.

Q. You were just a thoroughly incompetent operator, is that it?

[fol. 701] A. Well, the film salesmen say I was if I couldn't pay any more for films than what they were asking, that I couldn't run a theater.

Q. Is that what you now say you were?

A. Well, I evidently was; I didn't make any money.

Cross-examination.

By Mr. Armistead for Defendant Crescent:

May it please the Court, in so far as the Crescent is concerned, we had understood that this witness had received a letter from Mr. Arnold's office in Washington to the effect that he should hold himself in readiness to appear as a witness beginning the week of the 14th, perhaps the 21st, and accordingly I made my plans to cross-examine other witnesses; and I would like the privilege of reserving the cross-examination of this witness until a future date.

The Court: Well, you can recall him at any time you want to.

Mr. Armistead: Yes, sir.

[fol. 702] F. M. PITTMAN, called as an adverse witness by the Plaintiff, he having been first duly sworn, testified as follows:

Direct examination.

Mr. Bodey for the Plaintiff:

Q. Will you state your name and address, please, sir?
A. F. M. Pittman; Greeneville, Kentucky.
Q. What is your occupation?
A. Theater manager.
Q. For whom Rockwood Amusements.
—. ——.
Q. At Greenville?
A. Yes, sir.
Q. How long have you held that position?
A. Approximately three years.
Q. Now, prior to the time you became manager of the theater at Greeneville, Kentucky—is that the Crescent or Rockwood?
A. Rockwood.
Q. —What was your occupation?
A. I was theater manager.
Q. Where?
A. In Central City.
Q. For what company?
A. I was manager for Rockwood there for one year, approximately one year.

Q. Now, prior to the time you became manager—For [fol. 703] what theater was that?

A. That was the State Theater.

Q. Was that the theater formerly called the Selba Theater?

A. Formerly called the Selba Theater, yes, sir.

Q. Prior to the time you managed the Selba Theater, where were you?

A. I had a theater in Central City, Kentucky.

Q. What was the name of that theater?

A. The Empress Theater.

Q. How long did you operate that theater?

A. I operated it as an individual about six months.

Q. Prior to that time, were you connected with that particular theater?

A. Yes, in partnership with another party.

Q. Who was the other party?

A. Guy D. Martin.

Q. How long did you and Mr. Martin run the Empress?

A. Approximately 5 or 6 months.

Q. And during this period, what was the date when you and Mr. Martin began operating the Empress, approximately?

A. About around the first of 1937.

Q. That was when you began the operation of the Empress?

A. Yes, sir.

Q. Now, was the Empress being operated at that time? [fol. 704] A. The State, you mean?

Q. No, I mean the Empress; did you open up a new theater?

A. We opened the Empress Theater.

Q. How long had it been closed?

A. We remodeled it from a store room and made a theater out of it.

Q. Prior to the time you opened the Empress in the first part of 1937, what was your occupation?

A. I was Theater Manager for the Selba Amusement Company.

Q. And the Selba Amusement Company operated the Selba Theater at Central City?

A. Yes, sir.

Q. And how long had that theater been in operation?

A. Since 1921.

Q. Now, who were the people in charge of the Selba Theater?

A. You mean the principal stockholders?

Q. Yes?

A. Guy D. Martin, J. R. Martin and the heirs of A. J. Mercer.

Q. Now, when you opened the Empress were you the manager of that theater?

A. I was the Manager of the Selba, and I managed the Empress too, yes, sir.

[fol. 705] Q. Now, at the time you opened the Empress, did you and Mr. Martin open that theater in partnership?

A. Yes. Mr. Martin and I also had a lease on the Selba at that time; we were operating the Selba instead of the company.

Q. At the same time you began operating the Empress you were also operating the Selba Theater?

A. Yes, sir.

Q. In partnership with Mr. Martin?

A. Yes, sir.

Q. Now, at that time Mr. Martin was also one of the principal stockholders in the Selba?

A. Yes, sir.

Q. And you and Mr. Martin owned the Empress together?

A. That is right.

Q. Were both the theaters operated continously?

A. For a short time we operated them continuously; then we went to part time on the Empress.

Q. When did you go to part time on the Empress?

A. After it had been in operation about two months.

Q. And how much part time?

A. About two and three days a week, at the most.

Q. Now, when did the Crescent Amusement Company, or any of its affiliates, or, rather, when did the Rockwood [fol. 706] Company come into Central City?

A. I believe it was the latter part of 1937, when they acquired the State Theater—the Selba Theater.

Q. Did they buy that theater from Guy D. Martin, J. R. Martin and A. J. Mercer?

A. I don't know whether they bought it or not.

Q. They began operating it?

A. Yes, sir; in fact I didn't think it ever closed; it carried right on through.

Q. Now, after they began operating it in the later part of 1937, you and Mr. Martin, were you and Mr. Martin still running the Empress?

A. At that time I had the Empress by myself; we had dissolved our partnership.

Q. At the time the Rockwood took over the State?

A. Yes, sir.

Q. How long did you operate the Empress before you sold the Empress to the Rockwood Company?

A. Approximately a month.

Q. Why did you make that sale?

A. You mean after the acquired the Selba?

Q. Yes?

A. Approximately a month.

Q. Why did you make that sale?

A. I thought it would be best to get together and run together than it would be to run in opposition.

[fol. 707]

Q. Run what?

A. I thought it would be better to get together and run together than to run in opposition.

Q. In opposition to Rockwood?

A. Well, in opposition to any one that gave me opposition.

Q. Did Mr. Stengel or Mr. Sudekum approach you concerning the sale of the Empress Theater there?

A. I approached them first.

Q. You are sure of that?

A. By letter, yes, sir.

Q. They never said anything to you about you selling out your theater to them at all?

A. I didn't know either one of them prior to their coming into Central City.

Q. Well, did any representative of theirs talk to you about selling your theater until you talked to Mr. Stengel and Mr. Sudekum?

A. I don't recall it at all.

Q. Did you sell your theater to Rockwood because you realized you couldn't compete with Mr. Sudekum's buying power?

A. Well, I sold to it because I got a pretty good price, and I realized that any opposition in there, with a good manager, would make it tough on me, and I was running

[fol. 708]

continuously at that time.

Q. Was one reason you sold to him was that you realized you couldn't compete with his purchasing power?

Mr. Armistead: I object to that; he has already given his reason.

The Court He can give his reason again.

Mr. Dobey: Q. Was one of the reasons you sold to Mr. Sudekum was because you couldn't compete with Mr. Sudekum's buying power?

A. I couldn't complete with any one that would run the theater like it should be.

Q. Well, will you answer my question yes or not?

A. Yes.

Mr. Armistead: Well, explain to him what you mean by buying power; I know I haven't thoroughly understood it.

Mr. Dobey:

Q. You answered that yes; you- answer was yes?

A. Yes, that was one of the reasons. Anybody that runs a theater correctly; I had that in my answer.

Q. Wait a minute; the question was, was one of the reasons you sold to Mr. Sudekum was because you realized [fol. 709] you couldn't compete with Mr. Sudekum's buying power? I would like for you to answer yes or no to that.

The Court: You can answer that yes or no, according to the facts.

A. I will answer it yes and say that it would apply to anyone that would run the theater in the same manner as Mr. Sudekum would run it.

[fol. 710] Mr. Dobey: I accept that answer.

The Court: Overruled.

Mr. Dobey: As long as it is limited to anyone who would run it in the same way Mr. Sudekum would run it.

Mr. Armistead: He is his witness, if I understand the law.

Mr. Dobey: I accept that answer.

The Court: Oh, I thought you said you excepted to the answer.

Mr. Dobey: No, I accept it. I accept the witness' statement that that was one of his reasons he sold was because

he realized he couldn't compete with anyone who ran a theater like Mr. Sudekum did.

The Court: I understood that.

Mr. Dobey:

Q. When you sold out to Mr. Sudekum, did he give you a job?

A. Yes, sir.

Q. What was that job?

A. Operating a theater, Theater Manager.

Q. Which one?

A. The Selba Theater, in Central City.

Q. Did Mr. Sudekum continue to operate the Empress to the same extent that you were operating it, as far as [fol. 711] days it was open?

A. For a short time, yes sir.

Q. For a short time?

A. Yes.

Q. For how long?

A. I answered that a while ago, that is what I thought you meant a while ago.

The Court: Your answer "about a month" was, as I undertood it, that you were operating the Empress for about a month after Mr. Sudekum acquired the Selba.

A. That is what I am trying to answer now.

Mr. Dobey:

Q. He has misunderstood my present question. My present question is, how often was the Empress open during the week before it was acquired by Rockwood?

A. We ran it every day because I was running in opposition to the Selba Amusement Company.

Q. You were running it every day?

A. Yes.

Q. When Rockwood acquired the Empress, you became Manager of the Selba. How often did Mr. Sudekum keep the Empress open, how many days a week did it run?

A. After he took over the Empress?

[fol. 712] The Court: No, after he became the Manager of the Selba, of course after he took over the Empress. But that was——

A. I don't think he ran but a few days, just a few days, to clean up what pictures were booked, possibly.

Mr. Dobey: Q. Then the Empress closed down?

A. Yes.

Q. How long did it stay closed down?

A. They just ran along on special occasions there, I don't think it was operated regularly for several months, six or seven months, I mean regular days, but on holidays and things like that we would open on special things.

Q. Is it operated regularly now?

A. No sir; part time.

Q. That part time operation began soon as Mr. Sudekum bought it out?

A. The house was closed for a while.

Q. I mean, when you sold it, it was closed?

A. Yes sir.

Q. You were operating it continuously until *to* sold it?

A. Yes sir.

Q. Now, after you sold out to Mr. Sudekum and you became Manager of the State Theater, I believe the name was changed to State, at that time?

[fol. 713] A. Yes sir, a short time after.

Mr. Armistead: In order to keep the record straight, Counsel don't understand that there was any sale to Mr. Sudekum, the Selba being sold to Rockwood.

Mr. Dobey:

Q. I beg pardon. To Rockwood.

A. That is correct.

Q. After you became Manager of the State Theater at Central City, did anyone from the Crescent Amusement Company, and that would be about the middle of 1937, wouldn't it, the latter part of 1937?

A. No. You mean when I went into the Selba?

Q. When you went into the State as Manager for Rockwood?

A. That was the first of 1938. I didn't sell out until 1938, the first of the year.

Q. After you became Manager the first part of 1938 of the State Theater for Rockwood, did anyone connected with Crescent Amusement Company or Rockwood Amusement Company, direct you to go over to Greenville, Kentucky, to negotiate for the acquisition of the theater there?

A. Not directly, no.

Q. Why do you say "not directly?"

A. Whether this will answer: I was more or less interested in going to Greenville in view of the fact that I lived there and I did go to Greenville and measured and secured the price of a lot, but they didn't know anything [fol. 714] about it until after I had done that and told them it might be available.

Q. They didn't know anything about it?

A. I talked to Mr. Stengal after I had already done it.

Q. Did he know you were going over there before you went over?

A. I don't think so—Well, yes, I did tell him there was a garage burned and an ideal building lot became available, I mentioned it to him, and he said "Well, you might get the information on it and tell me more about it later".

Q. Then you went over and measured this lot?

A. Yes sir.

Q. Did you do that very ostentatiously, that is, did you make a great show about measuring the lot in town so that Mr. Head, who was operating the theater in Greenville, would find it out?

A. I measured it in the day time of course, they knew I was in the show business and it was right next door to the theater or there was only one lot between it and the theater, the lot we were thinking about.

Q. I see. When you came back after measuring that lot, did you report the fact that you had looked at that lot to Mr. Stengel?

A. About a week later.

Q. What did he say?

A. He just said, well, if they don't want to sell it, we will [fol. 715] drop it. And they wouldn't sell it, wouldn't accept the proposition.

Q. You mean, they wouldn't sell the lot?

A. No, they wouldn't sell it, they wouldn't make me a price on it.

Q. Did you know who you were dealing with?

A. On the lot, you mean?

Q. Yes.

A. It belonged to Mr. Oscar Irvin, he is from New York City.

Q. Did you make any effort, under the direction of anyone, looking toward the making of preliminary plans, other than measuring the lot?

A. Yes sir, I did.

Q. Did you contact Mr. Head at that time?

A. No sir.

Q. Did you contact Mr. Head at a later date?

A. Who ran the theater?

Q. Yes.

A. No sir.

Q. Did you tell anyone at Greenville why you were measuring that lot?

A. No sir, didn't have to. Everybody thought that is what we were going to do, I didn't have to say a word. It is a very small town.

Q. Who told you about that site over there at Greenville?

A. I lived in Greenville, I was there when the garage [fol. 716] burned and talked about it the very next morning.

Q. Did you ever discuss it with Mr. Sudekum?

A. I don't believe I ever did.

Q. Now, you know, do you not, that Mr. Head, at a later date, sold out to the Rockwood Amusement Company?

A. Yes sir.

Q. Now, after he sold out to Rockwood Amusement Company, did you go to Mr. Head and apologize to him for starting those rumors in Greenville?

A. I told Mr. Head if he thought or had any hard feelings against me for any of the things that had been started, I certainly hoped he wouldn't hold it against me because we should be friends.

Q. Did you tell him you were ordered to go over there and start those rumors?

A. No sir, I didn't tell him that.

Cross-examination.

By Mr. Armistead:

Q. Mr. Pittman, prior to the time that you became associated with Mr. Martin in the management or operation of that Selba Theater in Central City, Kentucky, did you operate a theater in Greenville, Kentucky?

A. Yes sir.

Q. What year was this?

A. 1922 to 1927, I believe, and then, later, at another [fol. 717] date—would you like to have that?

Q. Let's develop it step by step.

A. All right. The first time was 1922 to 1927.

Q. Did you close that theater or sell it or what?

A. I sold it to the Selba Amusement Company in 1927.

Q. Then what business did you engage in?

A. I went to Central City for Mr. Martin.

Q. To whom did you sell that theater in 1927 in Greenville, Kentucky?

A. The Selba Amusement Company.

Q. So then it had a theater in Central City, that is the Selba Theater?

A. Yes.

Q. They had a theater in Greenville, Kentucky?

A. Yes sir.

Q. What was its name?

A. At that time?

Q. Yes sir?

A. It has changed so much I don't remember. Let's see, I believe it was the Mecca at that time.

Q. The Mecca?

A. Yes sir.

Q. How long did Selba Amusement Company operate the Mecca Theater in Greenville?

A. Approximately a year, or year and a half.

[fol. 718] Q. Did it close out or sell out, or what?

A. They eventually closed out. They were getting business in Central City.

Q. By the way, how far is Central City from Greenville?

A. Seven miles.

Q. What is the population of Central City?

A. 4300.

Q. And of Greenville?

A. About 2300.

Q. Now then, when you went to Central City, there was only one theater there, the Selba Theater?

A. That is right.

Q. The Messrs. Martin were the principal stockholders in that?

A. That is right.

[fol. 719] Q. Now did you gentlemen while you were operating that theater hear that there would probably be opposition in Central City?

A. We did.

Q. Who did you understand then or were you informed was liable to come in there and open up an opposition theater?

A. We were advised that Lee Moffett at Owensboro was coming in to build a theater.

Q. How far is Owensboro from Central City?

A. About thirty five miles.

Q. So when you gentlemen heard that Mr. Moffett was liable to come into Central City, and open up an opposition theater, was that the Selba Theater Company, was that when you got the lease on this store building and converted it into the Empress theater?

A. That was the time Martin and I obtained the lease on the store building and converted it into the Empress theater.

Q. You and Martin were partners?

A. Yes, sir.

Q. And the Selba Amusement Company?

A. The Selba had had no part in the Empress.

Q. Why did you and Martin go down there and open up this Empress?

A. To protect ourselves.

Q. You all didn't belong to Moffett's chain, did you?

[fol. 720] A. No, sir.

Q. As I understood you and Martin were operating both of these theaters there, then you took over the Empress?

A. Yes, sir.

Q. Did you and Martin have a falling out, or what was the trouble?

A. We couldn't meet the running of the Selba and I withdrew and Mr. Martin took our interest in the Selba in the way of equipment, and I took the Empress for that time.

Q. That partnership was dissolved?

A. At that time, yes, sir.

Q. And Martin took the Selba theater and you took the Empress Theater?

A. Yes, sir.

Q. Now then you all were competing with each other, is that right?

A. Yes, sir.

Q. Well, what kind of a manager was Martin there at the Selba theater being managed and operated by him?

A. How is that?

Q. Was he an efficient manager or was he a poor one?

A. I had no trouble about getting business, with all the

modesty in the world I think it was poorly managed. They were interested with other business and did not devote very much time to the theater.

[fol. 721] Q. Didn't Martin then later advertise the theater for sale?

A. That was done sometime later, he wanted to lease or sell the theater.

Q. You knew it?

A. Yes, sir.

Q. Other operators or theaters knew it?

A. Yes, sir.

Q. Now about that time, or shortly after that time, did the Rockwood Amusement Company buy the Selba Theater?

A. Yes, sir, right about that time.

Q. Let's get the seating capacity of the Selba, how many seats did the Selba have approximately, take the Empress first, how many?

A. Three hundred.

Q. How did the Empress compare in appearance with the Selba?

A. At that time it was just about as good, a smaller house but the general outward appearance was just as good.

Q. Was the Selba getting first run pictures?

A. Yes, sir.

Q. What kind of pictures were being exhibited in the Empress?

A. I was playing two and three years old.

Q. You were getting good patronage?

[fol. 722] Q. I was running for ten cents.

Q. Were you getting good patronage?

A. I was doing capacity business.

Q. How was the Selba doing?

A. They were not doing so good.

Q. How much were they charging?

A. Their top admission I think was thirty cents.

Q. Now you say that Rockwood bought Selba out and a short time after that you approached Rockwood to find out whether or not they would be interested in buying the Empress, and did Rockwood name a price?

A. I named a price.

Q. Was there any dickering about it, or did Rockwood accept *accept* that price?

A. The entire deal I don't think took over three minutes, I don't think.

Q. They accepted your price?

A. Yes, sir.

Q. As a part of that transaction or trade, was it a condition that you were to be employed by Rockwood in any capacity?

A. It was not mentioned until after I had sold out.

Q. Now this theater over at Greenville, Kentucky, who was operating that?

A. Griff Head.

[fol. 723] Q. Had you known Griff Head for some time, or how long had you known him?

A. I had known Griff Head for five or six years.

Q. Did the Selba theater, the pictures they got there, did it have any clearance over Greenville?

A. On some of the products, yes, sir.

Q. From these major companies?

A. Some of the major companies, yes, sir.

Q. I say over Greenville, did it have any clearance over Central City?

A. On the same basis, yes, sir.

Q. Well after Rockwood entered Central City, did you have any reason to believe that you could not continue to get the same class of pictures as you had been exhibiting there with your theater?

A. That didn't enter my mind, I thought I could still get the same class pictures.

Q. Do your remember what major Companies the Selba was exhibiting when it sold out to Rockwood?

A. When they sold out to Rockwood I do not remember anything there for about three or four months, and my answer to that would have to be more or less a guess, I don't know some of the major companies, but I do know that some of the major companies were, I know some of them though.

Q. Could you give us their names?

[fol. 724] A. They were playing Paramount and Fox, I can't think of the others, I wouldn't say definitely.

Q. How about Greenville, what major companies were they playing?

A. Greenville was playing MGM, R.K.O. I believe.

Q. From what experience you have had in past years, in purchasing films? How long an experience have you had?

A. About fourteen years, yes, sir.

Q. Acting as an independent exhibitor?

A. Yes, sir.

Q. I will ask you this, Mr. Pitman, if from time to time even with the Major companies, you would *would* be signed up on a contract for their entire product for a season, and if at the end of the season there was some pictures you did not play, if you did not play the entire product, although you were obligated under the contract to do so, was any adjustment made with you?

A. Yes, we received adjustments sometimes at the end of the year.

Q. And cancellations by some of the Major companies to get a contract in force?

A. For the ensuing year, yes, sir.

Q. If there were fifty-two pictures you were obligated under the contract to buy and exhibit, and at the end of the year you had only played we will say thirty of those [fol. 725] pictures, which I understand you were getting from the company, did the company relieve you of your obligation to pay for the remaining twenty pictures?

A. Provided you would make a contract with them for the product for the next year.

Q. It was adjusted?

A. The chances would be quite likely that it would be if we took the product, at least in my case.

Q. I mean in your case?

A. Yes, sir.

Q. How did these film companies, these distributors and producers sell the pictures, sell the pictures to the others at the same price, with a condition to get theirs also without any increase, and you might buy each year?

A. Yes, sir.

Q. Can you give us any instance where an independent or instances were independents had been operation theaters and a chain was operating a theater in opposition, where the film companies discriminated against the independent exhibitor and in favor of the chain operators, where there is a contract and they have been relieved of this obligation?

Mr. Dobey: Objection. Unless there is some basis shown for his knowledge of independent situations.

[fol. 726] Mr. Armistead: I just asked him.

The Court: Do you know of any?

A. I know of one in particular, Will Moffitt in Owensboro.

Mr. Armistead: What happened there?

A. He is still playing pictures there.

Q. Has he any opposition?

A. He has in Warner Brothers now.

Q. Do you know the operation of a theater in Owensboro?

A. I knew of that.

Q. Does that refresh your recollection as to that?

A. I don't know I don't think of any instance where they were, one definite case, and that is still in existence.

The Court: I do not think I quite understand that. What was your question, Mr. Armistead?

Mr. Armistead: I asked him to name me any instance to which he can refer, where the independent received the same sort of consideration that he had been receiving in the same town?

The Court: You mean from the same company?

[fol. 727] Mr. Armistead: From the same companies, yes, sir.

The Court: How is that pertinent to this case?

Mr. Armistead: This is like that, that the distributors discriminated against the independent in favor of the chain.

The Court: All right.

[fol. 728] Q. Now, you spoke of clearance that Greeneville had over Central City. Do you know how many days that was or what the amount of that clearance was?

A. No, I can't say exactly on that, Greeneville over Central City.

Q. How much did Central City have over Greeneville?

A. In some instances it was sixty days.

Q. Both theatres were being operated by ind-pendent exhibitors?

A. That is right.

Q. Now, you stated on your direct examination, referred to the manner in which Mr. Sudekum or Rockwood operated the theatre. Was it buying power or do you mean the manner in which the theatre——

The Court: I am inclined to think that objection was good. It is a question of what happened in this; not what happened in some other case.

Mr. Dobey: The only instance he cited was out of the scope of the case entirely.

Mr. Armistead: All right. They have carried me from Nashville, Tennessee to Lexington, Mississippi in the bill

of complaint and here I am just forty-five miles from Cen-
[fol. 729] tral City, Kentucky, and they are objecting to that.

Mr. Waller: It is the insistence or contention of the Government that these distributors just uniformly and consistently discriminated against independents.

Mr. Raftery: I think that question is out of the case.

Mr. Armistead: Well, I agree with Mr. Raftery.

Q. When you spoke on your direct examination of the operation of a theatre or the manner in which a theatre is operated by Mr. Sudekum or Rockwood and that had an effect on you, just explain that.

A. I naturally assumed that they would, if they went in there, put an efficient manager in charge of the theatre. That was my assumption and no doubt it would have been correct.

Q. And that would have affected your theatre?

A. Certainly, it would have been very injurious to me.

Redirect examination.

By Mr. Dobey:

Q. Did you say that the Empress Theatre was opened solely to prevent competition coming into Central City?
[fol. 730] A. I beg your pardon.

Q. Did you say that the Empress Theatre was opened solely for the purpose of preventing competition from coming in?

A. Originally, yes.

Q. That was the sole purpose?

A. That was the original purpose indeed, yes.

Q. Is that a familiar device?

A. I don't know whether it is familiar or not but we thought it was smart. We had to do something.

Q. Now, do you know of any instances where the Crescent Amusement Company or the Rockwood Amusement Company or any of its affiliates have used that same device?

A. I don't know.

Q. Do you know of instances where the Crescent Amusement Company or the Rockwood Amusement Company have opened a theatre under those circumstances and have then closed the theatre down after the independent either abandoned his plan to come in or after he had closed up?

A. I don't know of that, no, sir. The only situations I am familiar with are the two we have discussed, Greeneville and Central City. That is the only places I have been in the show business.

Q. Did you ever pay for any pictures that you didn't play?

A. Plenty.

Q. Do you know of any instances since you became manager of a theatre for the Rockwood Amusement Company [fol. 731] where the Rockwood Amusement Company has ever paid for a picture it didn't play?

A. I don't know. I have nothing to do with buying pictures.

Q. Were all of the pictures that were used at the Empress Theatre two and three years old, all of them?

A. Practically every one, yes, sir.

Q. Now, had they previously been played at the Selba Theatre?

A. Not all of them, no, sir.

Q. Some of them?

A. Some of them.

Q. And others had not?

A. Yes, sir.

Further this witness saith not.

* * * * * * * *

[fol. 732] C. G. Lawing, Called on behalf of the Government, being first *first* duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. C. G. Lawing, Charlotte, North Carolina, 629 Oakland Avenue.

Q. What is your occupation?

A. I am in the theater business.

Q. Whereabouts?

A. In Albemarle and Norwood, North Carolina.

Q. Managing theaters there?

A. Yes.

Q. Did you formerly operate a theater at Brownsville, Tennessee?

A. Yes, sir.

Q. When was that?

A. From about 1932 through about July 1936.

Q. Had you formerly operated a theater at Paris, Tennessee?

A. Yes, sir.

The Court: When did you operate in Paris, Tennessee?

A. When?

The Court: Yes.

[fol. 733] A. From about June 1935 to about July, 1936.

Mr. Wright:

Q. In July, 1936, that theater was sold to the Crescent Amusement Company?

A. I didn't catch the first part of your question.

Q. In July, 1936, your interest in those theaters was sold to the Crescent Amusement Company?

A. Yes, sir.

Q. When was the first time that you talked with anyone from the Crescent Amusement Company about your theater in Brownsville?

A. Well, about February, I believe it was, 1935, a Mr. Castleberry and a Mr. McGowan, in February, 1935 came into Brownsville, but so far as talking about the theater, I don't know that anything transpired with reference to that.

Q. What time was that with reference to the time that the Crescent Amusement Company started to build a theater there?

A. I believe they announced about January, 1935, by a banner on a store building that they were to build a theater in Brownsville.

Q. Was the sign on a store building?

A. Yes.

Q. Do you recall what the sign said?

A. Not exactly, except this building will be remodeled into an up-to-date theater, to be operated by the Crescent Amusement Company.

[fol. 734] Q. Was this conversation with Castleberry and McGowan about the time that sign was put up?

A. Yes, sir, about the same time, yes, sir, just about.

Q. Do you remember about what the substance of that conversation was?

A. Nothing definite, except that they just made some mention of the fact that they were going to put up a nice theater in the town and they thought it would be a credit to Brownsville.

Q. Did you say anything to them about that.

A. Nothing that I recall, no, sir.

Q. What did you do then?

A. Well, they came back from time to time, for what I never really knew. But, of course, I knew they were representatives of the Crescent Amusement Company, they had told me that they were, but some time along about that time I came to Nashville to talk to Mr. Sudekum about the town and tried to impress him with the fact that I didn't think it was a large enough town to justify a chain operation.

Q. Just a minute, now. When did you see him?

A. I believe that was possibly about February, 1935.

Q. You saw him at his office in Nashville?

A. Yes, sir.

Q. Anyone else present, there?

A. No, sir.

Q. Go ahead with the conversation?

[fol. 735] A. Well, I had a talk with Mr. Sudekum with reference to the town. I told him I liked the town very well, that it seemed that my operation was probably adequate for the town, and that I would like very well to stay there, I had been there for several years, I like the town, and the people like me very well, that had practically raised my family in Brownsville and that I would like to remain there and call it home. But that was to no avail, I don't recall just what Mr. Sudekum said, but he left the impression that they were going ahead with their operation there.

Q. How big a town was Brownsville, then?

A. About 3,000.

Q. And did they go ahead with their operation?

A. Yes, sir.

Q. When did they open their theater there?

A. It was built some time in the Fall of 1935, I can't recall the exact date, sir.

Q. Do you remember the name of it.

A. The Capitol Theater.

Q. What then did you do, after you had this talk with Mr. Sudekum?

A. Well, I went back to Brownsville. I knew that the town wouldn't justify two theaters there and that I would eventually have to find something else to do and I went [fol. 736] into a town of his, Paris, Tennessee.

Q. How big was Paris?

A. Paris was about 8,000 people.

Q. How many theaters were operated there?

A. Only one, sir.

Q. Who was operating that?

A. Crescent Amusement Company, Mr. Lawrence as partner or manager.

Q. What was the name of that theater.

A. Capitol Theater.

Q. When did you open a show there?

A. I opened there with an open air show.

Q. When was that?

A. About May or June, 1935, I believe.

Q. What do you mean by an open air show?

A. Well, I had a 40 x 60 tent, and just rented a vacant lot there and put some seats and projection equipment in it.

Q. How long did you operate this tent show?

A. Up till about the First of November, 1935.

Q. Then what did you do in Paris?

A. Well, I made a lease of a building there and moved the greater part of this equipment inside.

Q. Did you remodel it into a theater building?

A. Yes.

Q. What was it called?

[fol. 737]. A. Called the Gem.

Q. That was the theater you operated at Paris at the time you sold out to Crescent in 1936, July, 1936, in Paris?

A. Yes sir.

Q. Do you recall what films you were able to license for your theater at Paris?

A. Well, I started there with nothing but Paramount. They had several years' product open in the town.

Q. That was product that had not been bought by Crescent there?

A. Yes sir.

Q. I will hand you this contract for the Paramount 1934-1935 product, dated June 26, 1935, and ask you if that is your signature?

A. Yes sir.

Q. That is the contract you made with Paramount for the operation at Paris?

A. Yes sir.

Mr. Wright: I will have this marked with the next number, Exhibit P-13.

Mr. Waller: With regard to this Brownsville situation it seems that a few days ago was the first time that was mentioned, in a bill of particulars. That bill of particulars required them to furnish all information that they intended to go into, within thirty days of trial, that they [fol. 738] knew about. They asked us to answer various interrogatories as to all the towns in which there was any opposition and Brownsville was among the towns mentioned and our answers to the interrogatories included Brownsville; so they knew about Brownsville long before the thirty days was up, so we insist that this situation is not proper in this case.

Mr. Dobey: I think he is a little confused on the particulars. Our bill of particulars was in the thirty days period and included Brownsville, but that the bill of particulars in the last two weeks or so included Paris, Tennessee, also; isn't that correct?

Mr. Waller: No, it is not correct.

Mr. Dobey: Then it is the other way around?

Mr. Waller: The other way around.

Mr. Dobey: That is the reason that we knew about Paris Tennessee, but we didn't know about Brownsville until within the thirty day period. In any event, if they desire a continuance with respect to this particular evidence, they are at liberty to request it and the court is at liberty to have the pleadings amended at the close of the evidence [fol. 739] If that is necessary.

The Court: All right, I overrule the objection at this time.

Mr. Wright:

Q. What other major product were you able to get for exhibition in Paris?

A. Well, I got the 1935-1936 Fox contract.

Q. I will show you this Fox contract for the 1935-1936 season dated February 13, 1936, and ask you if that is your signature there?

A. Yes sir.

Q. That is the contract you made with Fox?

A. Yes sir.

Q. And that letter attached is the letter of transmissal you received from Fox with the contract?

A. Yes sir.

Q. Dated March 6, 1936?

A. Yes sir.

Q. You received it on or about that time?

A. Yes sir.

Mr. Wright: I wish to have the letter and contract marked as Fox Exhibit, Next number.

(Contract & Letter marked Exhibit F-1.)

Q. Outside of the Fox contract of the 1935-1936 season, [fol. 740] were you able to make a season contract with any of the other major film distributors for their product there at Paris?

A. No sir, except some few pictures, I believe, from RKO that the Capitol was not running.

Q. Well, those you didn't get under a season's contract, those were what were known as spot booking?

A. Spot booking.

Mr. Waller: We object to that as the contract would be best evidence.

The Court: Alright, let's see the contract.

Mr. Wright:

Q. Did you attempt to buy second run product for your use, at Paris?

A. Yes sir, I mentioned it to some of the salesmen or managers from some of the other companies but they seemed to think that Paris was a little small for second run pictures. [fol. 741] Q. What company told you that?

Mr. Armistead: We object to that as hearsay testimony.

By the Court:

Q. Did any particular company tell you that?

A. I would say all of them did that I contacted because I didn't get any second run pictures.

Mr. Waller: Now, his answer is just generalities and a conclusion. He said he wouldn't say it because he hasn't recalled any companies. He is drawing a conclusion.

The Court: I understood him to say that none of those distributors would sell him any second run pictures; that Paris was such a small town. Is that what you said?

A. Yes sir.

Mr. Waller: I think all he has said now—he is assuming that that was true because he didn't get the pictures. That is the way I understand him.

By the Court:

Q. Well, is that a presumption on your part or did any of them tell you that specifically?

A. They told me that specifically.

[fol. 742] The Court: How is that material, though, in this case?

Mr. Wright: We want to show that when he went into Paris——.

The Court: They wouldn't sell him any pictures or second run pictures?

Mr. Wright: He did get first run pictures. We want to show that he couldn't get any second run pictures there either although when Mr. Sudekum moved into Brownsville in a town of three thousand he was able to repeat pictures there after Mr. Lawing's theatre.

The Court: All right. Go ahead.

Mr. Raftery: We have got an entirely different situation. We are dealing with a tent show.

The Court: Well, in the beginning it was a tent show.

Mr. Raftery: That is the thing we are talking about.

By the Court:

Q. Did any of them refuse you pictures because you were [fol. 743] operating a tent show?

A. No sir.

Q. Or did they give that as a reason?

A. Well, at the time involved, your Honor, I moved from the tent into a building.

Q. You are speaking now about contracts you tried to make after you closed the tent and moved into a building?

A. Yes sir.

By Mr. Wright:

Q. You continued to try to get a contract for the theatre continuously all the time you were operating at your tent show and the Gem, did you not?

Mr. Waller: That is objected to as leading and suggestive.

Sustained.

By Mr. Wright:

Q. Mr. Lawing, how often did you go into the film exchanges at Memphis and try to buy pictures while you were operating the tent show and theatre at Paris, Tenn.?

A. Well, I was in Memphis nearly every Monday. I picked up most of my films, my film service, and every time I would see any manager or salesman of any of the film companies I would try to make some deal for films for Paris. [fol. 744] Q. Did you make the rounds of all the companies?

A. Yes sir, because I was doing business with practically all of them in one of the other situations.

By the Court:

Q. Well, could you get any films?

A. Nothing other than what has been brought out.

Q. That is, your contract with Fox and spot bookings with RKO and some with Paramount?

A. Yes sir.

By Mr. Wright:

Q. That is with respect to the major companies?

A. Yes sir.

Q. You did get independents?

A. I did have some independent pictures, yes.

Q. What sort of policy was Crescent operating the Capitol at Paris on while you were operating the Gem?

By the Court: Under what sort of policy?

By Mr. Wright:

Q. What policy was Crescent operating the Capitol on in Paris while you were operating the Gem theatre there?

A. Well, they were operating under a four picture policy at that time.

Q. What do you mean by that?

A. Well, on Monday a change and a Tuesday change and [fol. 745] a Wednesday-Thursday and a Friday change.

By the Court:

Q. Four changes a week?

A. Yes sir.

By Mr. Wright:

Q. What admission prices were they charging?

A. Ten, fifteen and twenty in the afternoon, and ten, fifteen and twenty five at night.

Q. Will you explain what those admission prices were for?

A. I don't know.

Q. Ten cents for what, fifteen cents for what and twenty and twenty five cents for what?

A. I would say ten cents for children at all times and fifteen cents in the balcony in the afternoon and twenty cents downstairs, and ten and fifteen in the balcony at night and twenty five cents downstairs.

Q. What was the admission price policy that you were operating the Gem on?

A. Under a ten and fifteen cent policy.

Q. What does that mean, ten cents for children and fifteen cents for adults?

A. Yes sir.

Q. Now, at the time the Crescent Amusement Company opened its Capitol Theatre in Brownsville, Tennessee what [fol. 746] was the policy you were operating your Southland Theatre on?

A. You mean after they opened or before they opened?

Q. Before they opened.

A. Before they opened we were charging fifteen and twenty five at all times.

Q. Fifteen for children and twenty five for adults?

A. Yes sir.

Q. How many changes a week were you making?

A. I was making three and four changes at that time.

Q. Just varying from week to week?

A. Yes sir.

Q. Depending on the pictures you had?

A. Yes sir, that is right.

Q. Then what sort of policy did they open the Capitol at Brownsville on?

A. Under a ten and fifteen cent policy.

Q. That is, ten for children and fifteen for adults?

A. Yes sir.

Q. How big was the theatre that they put there?

A. I was never in the theatre. I would say that it seated four hundred people from what I had been told about it.

Q. Is that all downstairs?

A. No. I would say that one third of the seats were upstairs.

[fol. 747] Q. Was the balcony reserved for the colored trade?

A. Yes, for the colored trade.

Q. How big was your house?

A. Two hundred seats.

Q. Well, during the 1934-1935 season had you exhibited Metro pictures in your house at Brownsville?

A. 1934-1935, yes.

Q. I will hand you this contract dated September 29, 1934, for the 1934-1935 feature products of Metro and ask you if that is the contract you made for those pictures during that season?

A. Yes sir.

Q. And the telegram that is attached is the telegram you received with the approved contract?

A. Yes sir.

Q. On or about the date it bears there, October 1, 1934?

A. Yes sir.

Mr. Wright: I will ask to have this marked Government's Exhibit L-8.

(Contract so filed and marked.)

Q. Now, how long had you been playing Metro pictures there in Brownsville?

A. Ever since I had been operating the theatre there.

Q. That was four years?

[fol. 748] A. Yes sir.

Q. Had you played most of their pictures every year?

A. I played them one hundred per cent every year, yes sir.

Q. Then did you attempt to negotiate for the exhibition of the 1935-1936 pictures in your theatre there?

A. Yes sir, on numerous occasions.

Q. Who did you talk to?

A. Mr. Mock, representative of Metro-Goldwyn-Mayer and Mr. Willingham, who was the branch manager in Memphis of Metro-Goldwyn-Mayer.

Q. When was it you talked to them about the 1935-1936 season?

A. It was on so many occasions it would be practically impossible for me to set the exact date but I would say it was somewhere in the vicinity of when they started trying to sell the season.

Q. That would be when?

A. Either in the spring or summer of 1935.

Q. What did they tell you about the 1935-1936 Metro pictures?

A. Well, they told me they couldn't sell there under the circumstances until they had permission from New York to do so.

Q. Do you recall whether they took an application from you?

A. Yes, they took several applications.

Q. What do you mean by that?

[fol. 749] A. Well, they would take an application for a contract and say that they had looked it over and didn't seem to think that it was exactly proper and they would come back for some sort of improvement on it.

Q. How many times did that happen?

A. I believe it was three times in that particular instance.

Q. What happened with reference to the final application?

A. I never heard any more from it.

Q. Did you try to find out?

A. Yes sir.

Q. Did they tell you anything about the application?

A. They said that they hadn't heard from New York on it and that as soon as they did they would notify me.

Q. Did they ever notify you?

A. No sir.

Mr. Wright: I will ask to have this contract between the Crescent Amusement Company and Metro-Goldwyn-Mayer for the first run exhibition of 1935-1936 Metro features in Brownsville, dated December 14, 1935, marked Government's Exhibit L-9 for identification.

I would like also to have marked as Government's Exhibit No. 46 for identification a letter from J. F. Willing-

hom, Branch Manager, Metro-Goldwyn-Mayer Distributing [fol. 750] Corporation to Mr. Tony Sudekum, Crescent Amusement Company, Nashville, Tennessee, dated December 5th, 1935.

The Court: Do you offer both instruments in evidence?

Mr. Wright: Yes.

The Court: Is there any objection?

Mr. Waller: No sir.

The Court: All right.

(Instruments so filed and marked.)

Mr. Wright: (Reading.)

"December 5th, 1935.

Mr. Tony Sudekum, Crescent Amusement Co., Nashville, Tenn.

DEAR MR. SUDEKUM:

Inclosed you will find contracts for your Capitol Theatre, Brownsvile, Tenn. in accordance with our long distance conversation yesterday. We consider these prices very fair and equitable for a town with the population that [fol. 751] Brownsville has, based on past performances in this situation on guarantee and guarantee against percentages on our product.

Inasmuch as you refused to allow us to have any pictures in this situation on a percentage basis and we had a contract for this product sold with many pictures with a guarantee against a percentage arrangement think these prices are commensurate with the value of the pictures or what we would earn if the contract were played according to the sale we had made to your opposition, but which was rejected.

Prices as per contracts are as follows:

Two features, $75.00 flat rental, plus $3.00 score.
Seven Features, $60.00 flat renta-, plus $3.00 score.
Seven Features, $35.00 flat rental, plus $3.00 score.
Balance features, $15.00 flat, plus $3.00 score.
Two realers, $4.00 each, One reelers, $2.00 each.
Perfect Tribute $4.00.
Trailers, $1.50 each.
Two issues news per week, $2.50 per release.

We trust you will see to it that Mr. Shepard plays our product as certainly when we take the product away from

our old customer in Brownsville, Tenn. such as we are doing in this instance, and give it to you, you should give us 100 per cent representation in all your situations.

[fol. 752] We will appreciate your signing the Brownsville contracts as well as the contracts for Dyersburg, Paris and Union City, which you already have, returning them to us immediately upon receipt of this communication.

With best wishes to you and yours, I am

Sincerely, Metro Goldwyn Mayer Dist. Corp., J. F. Willingham, Branch Manager.

JFW-ES. Incl."

[fol. 753] Q. Did you play Paramount pictures in your theater at Brownsville for the 1934-1935 season?

A. Yes, sir.

Q. I will hand you this contract, dated September 17, 1934, between yourself and Paramount, for the 1934-1935, season pictures, and ask you if that is the contract you made with them at or about that date?

A. Yes, sir.

Q. I will ask to have that contract marked Exhibit P-14. (Contract so marked) How long have you been playing Paramount pictures there?

A. Intermittently ever since I had been in Brownsville.

Q. And did you try to negotiate for a season contract for the Paramount 1935-1936 features for exhibition at your theater at Brownsville?

A. Yes, sir.

Q. Whom did you have those negotiations with?

A. Mr. Bill Bugie and Scott Lett.

Q. Who were they?

A. They were representatives of the Paramount Exchange of Memphis, Mr. Bugie was the representative; and Mr. Lett was representative in my section.

Q. When did you first try to buy 1935-1936 pictures?

A. I tried to buy the 1935-1936 features at the same time I bought the 1934-1935; and they said they were taking no [fol. 754] more contracts at that time.

Q. When was the next time you tried to buy the 1935-1936 product?

A. As well as I recall, it was during the regular selling season of 1935-1936.

Q. What did they tell you?

A. They told me they would be unable to negotiate for product at that time for Brownsville.

Q. Did they tell you why?

A. No, sir, they didn't give me any definite reasons for it.

Q. Did they give any reasons?

A. No, sir.

Q. Did Mr. Lett take any application from you?

A. No, sir; I don't recall signing any application for Paramount.

Q. Did they tell you what they had done with the 1935-1936 pictures?

A. No, sir; the first I knew that they were being featured in Brownsville was when I saw an announcement of it in the newspaper.

The Court: Announcement of what?

A. Of some new Paramount product that would be exhibited at the Capitol Theater.

[fol. 755] The Court: That would be exhibited at the Capitol Theater?

A. Yes, sir.

Mr. Wright: I would like to have marked for identification the contract for the exhibition of the Paramount 1935-1936 pictures in the Capitol Theater at Brownsville, made between Mr. Sudekum and Metro-Goldwyn Meyer, dated August 22, 1935.

Mr. Raftery: You mean between Paramount?

Mr. Wright: Between Paramount; I beg your pardon.

(Said contract marked Exhibit P-15.)

Mr. Wright: Q. Were you using Fox pictures at your theater at Brownsville for the 1934-1935 season?

A. Yes, sir.

Q. I will hand you a contract between you and Fox, dated March 15, 1934, and ask you if that is the contract you made with them for the 1934-1935 season?

A. Yes, sir, this is the contract.

Q. The date on the contract, of March 15, 1934, is the date when you made the application?

A. Yes, sir.

[fol. 756] Q. And the letter that is attached, marked March 29, 1934, is the letter you received with the contract to have approved.

A. Yes, sir.

Mr. Wright: I will ask to have that marked with the next number. (Marked by Clerk Exhibit F-2)

Q. Then were you able to buy the Fox pictures again for the 1935-1936 season?

A. Yes, sir.

Q. And is this contract dated January 17, 1935, for the acquisition of the Fox 1935-1936 product in your theater at Brownsville the contract that you made?

A. Yes, sir.

Q. And the letter of transmittal attached, dated January 28, 1935, from Fox to you was the letter when you received approval of the contract?

A. Yes, sir.

Q. I will ask to have that letter and contract marked F-3. (Marked F-3) And here is a letter from the Crescent Amusement Company to Fox Film Corporation, dated February 11, 1935, that I would like to have marked with the next Government number.

(Marked Government Exhibit No. 47.)

And the reply from Mr. P. S. Wilson of the Fox Company to Crescent Amusement Company, dated February 15, 1935, and ask to have that marked Government Exhibit [fol. 757] 48, for identification. (Exhibit marked Gov. ex. 48, for identification)

Mr. Wright: Now, I offer Exhibit 47 and Exhibit 48 in evidence.

(Exhibits 47 and 48 put in evidence.)

The letter of February 11, from Crescent to Fox, reads as follows:

"DEAR MR. WILSON:

While I was in Atlanta, I intended mentioning to you the fact that we are opening a theater at Brownsville, Tenn, which, of course, is in the Memphis territory and we want that office to bear us in mind in the 1935-1936 product. You know that we are operating at Greeneville, as that situation is handled out of your

office, but on account of Brownsville being out of Memphis District, we thought it might possibly be necessary for Mr. Ballance to notify them—hence this letter. "At Gadsden and Decatur we can take the same commitment of second run pictures as contracted for, second run, at Nashville—rental the same as last season, $15.00, including score. The writer shall appreciate your advising her in this connection."

This letter was written to the Fox Film Exchange, at At-
[fol. 758] lanta, Georgia. The Reply of February 15, 1935, from the Fox Atlanta Manager to Miss Brockett at Crescent Amusement Company——

The Court: Who is that letter signed by?

Mr. Wright: The first letter is signed by M. Brockett, for Crescent Amusement Company. The reply is addressed to her, to the Crescent Amusement Company:

(Reading:)

"Dear Miss Mary:

Please pardon my delay in answering your letter of February 11, but as I have been out of the city it was held for my acknowledgment.

With reference to the first paragraph of your letter, I talked with Mr. Ballance regarding the Brownsville, Tennessee, situation. It so happens that at this point we have a very excellent account who has been playing our product 100% for years, features, shorts and news, and as a matter of fact the 1935-36 product was sold in this section and approved on January 17. The same condition also exists in Greeneville.

As you know, it is our policy, that where an exhibitor
[fol. 759] has been a good account, to continue to sell that exhibitor."

Were you also exhibiting the 1934-1935 product of Warner Brothers at your theater at Brownsville?

A. The 1934-1935 product?

Q. Yes; did Warner Brothers release product during the 1934-1935 season?

A. Yes, sir.

Q. I will now show you this contract dated July 7, 1934, for the exhibition of the Warner 1934-1935 season product

in your theater, and ask you if that is the contract under which you exhibited those pictures.

A. Yes, sir, that is the contract.

The Court: Is that for the 1934-1935 season?

Mr. Wright: Yes, sir.

Q. And the letter attached is dated July 20, 1934, from Warner to you; that is the letter that accompanied or accepted the contract?

A. Yes, sir.

Q. I will ask to have this contract marked W-1. (Contract so marked).

[fol. 760] The Court: Do you want to see that contract, Mr. Armistead?

Mr. Armistead: Yes, sir. I think at this time you could let us have all those contracts already made exhibits.

[fol. 761] Mr. Wright:

Q. Did you try to negotiate with Warner for the exhibition of 1935-36 season products for your theaters?

A. Yes, sir.

Q. Who did you negotiate with?

A. A Mr. Ochs, Byron Adams.

Q. This was with reference to the exhibition of their 1935-36 pictures in your theater at Brownsville?

A. Yes, sir.

Q. Who were they?

A. Mr. Ochs was the branch manager in the Memphis house and Mr. Adams was the salesman in my town.

Q. When did you talk to them about it?

A. I talked with them about signing of the 1934-5 contracts, but they also informed me that they were not taking more than one year contracts at the time.

Q. When was the next time you spoke to him about the 1935-36 pictures?

A. Well I spoke to them on quite a few occasions about the 1935-36 products; but they would not discuss it with me.

Q. Did they tell you why?

A. No, sir.

Q. Did they ever take an application from you?

A. No, sir.

[fol. 762] Q. When was the last time you talked to them about it, do you remember?

A. No, sir, I couldn't remember the exact date, but it must have been in early 1935 that we discussed the 1935-6 contract.

Q. Did they tell you definitely they were not going to sell you?

A. They did not tell me definitely they were not going to sell, but they said their hands were tied in any situation in which the Crescent had gone in to.

The Court: Said their hands were tied in any situation that Crescent had gone into. Who was it said that now?

A. That would be impossible for me to say, Your Honor, it was either the branch manager or the salesman there, I recall the conversation, but I couldn't recall the exact person.

Mr. Wright:

Q. Then I believe you said that after Crescent came into Brownsville, they opened at ten and fifteen cents admission?

A. Yes, sir.

Q. Then what happened to the policy you were conducting your house under?

A. I was supposed to meet their admission price.

[fol. 763] Q. And you went to ten and fifteen cents?

A. Yes, sir.

Q. And how many changes a week were they making?

A. I believe they were making four changes at that time.

Q. Did you shift your policy from three to four?

A. No, sir, I had a three picture a week policy there I believe all the time after they opened.

Q. Did you have enough good pictures left so you could shift to four?

A. No, sir.

Mr. Waller: Objected to, that is a conclusion.

The Court: Yes, sir.

Mr. Wright:

Q. Did you consider it advisable, or did you consider the advisability of changing from three to four when they opened with four?

A. No, sir, I never felt that Brownsville was large enough to justify four changes a week.

Q. From that time until the time you sold out in July, 1936, did you make any money on the operation of the house at Brownsville?

A. No, sir, I operated at a loss there almost continuously.

Q. When was the next time you saw anybody from the Crescent Amusement Company?

[fol. 764] A. Well Mr. Castleberry and Mr. McGowan were there several times during the time they were working on the building of the Capitol theater over there, and they came by and saw me on pretty near every occasion.

Q. What did you talk about with them?

A. Nothing that I recall of any consequence, only just generalities about the show business.

Q. After the Crescent house opened, when was the next time you saw any representative of Crescent?

A. I couldn't recall the exact date, but they were through there quite often from time to time I would see them, I would say every two or three weeks, something like that.

Q. Did you ever see Mr. Sudekum?

A. Not from the first time I came to Nashville, that I came to see him, up until this time.

Q. Until what time?

A. Shortly after they opened.

Q. Did you go over there to see him shortly after they opened?

A. No, I beg your pardon; I went to see him before they opened.

Q. That was the conversation you have already told us about?

A. Yes, sir.

[fol. 765] Q. When they put their sign up?

A. Yes, sir.

The Court: When did you say Mr. Sudekum was there?

A. I said first that I saw him in Nashville, after that he was there at Brownsville one night, and I was at the cafe there and walked through, Mr. Sudekum was there at the cafe and I walked through and spoke to him.

Mr. Wright: What conversation did you have with him?

A. Nothing specially, just social conversation.

Q. Did you finally come in to see him shortly before you sold out in the spring or summer of 1935?

A. Yes, sir, some time during the Summer of 1935, when I figured I would not be able to continue on, I went to see Mr. Sudekum's manager in Paris.

Q. Who was he?

A. Mr. Lawrence, and told him that I would like to see some one in connection with the company, it appeared to me that I had better make some sort of a deal with them, I did not have the money to move my equipment out to any other location.

Q. Then what happened?

A. Well Mr. Sudekum sent Mr. Castleberry down to Paris, Mr. Lawrence came to Brownsville and he picked [fol. 766] me up there, and I came back to Nashville with Mr. Castleberry and had a talk with Mr. Sudekum.

Q. When was that? When was this?

A. I believe it was the latter part of June or early in July, of 1936.

Q. The talk was in Mr. Sudekum's office in Nashville?

A. Yes, sir.

Q. Was any one else present?

A. No, sir, not that I recall.

Q. What was said then?

A. Well I explained to him just what I had explained to Mr. Lawrence, told him I was operating unprofitably down there, I though it might be best, we might make some sort of a deal that I could get out and find something else to do.

Q. Did you talk about Paris, too?

A. Yes, sir.

Q. What did he have to say?

A. I do not recall the exact conversation, he said we could work out something there with him that was satisfactory to both of us.

Q. Did you finally work something out?

A. Yes, sir.

Q. What was the proposition?

A. He was to give me seventy-five hundred dollars for [fol. 767] the two houses and I was to assume any and all outstanding indebtedness on the two situations there at the time.

Q. How was the seventy-five hundred dollars figured?

A. Well I merely figured just about the actual cost of the equipment and improvements on the buildings and so forth, that I had in the two towns.

(Recess).

[fol. 768] Q. Was this deal closed with Mr. Sudekum at $7500.00?

A. Was it closed?

Q. Yes.

A. Yes.

Q. At the time you had the conversation with him.

A. Not right at the time I had the conversation with him Mr. Sudekum informed me that he would discuss it with his men and have some of his representatives come down to Brownsville and consummate the deal.

Q. Did someone come down?

A. Yes.

Q. Who came down?

A. Mr. Castleberry and Mr. McGowan.

Q. Where was the deal closed?

A. I didn't catch the first word of your question?

Q. Where was the deal closed?

A. In an attorney's office in Brownsville.

Q. What was said there?

A. Well, there was very little left to be said. We started to draw up the bill of sale of the equipment of the two theaters and we got that fully drawn up and they wanted to insert a clause in there that I would agree to stay out of any Crescent town for a period of ten years, but they didn't offer any additional consideration or any consideration for it, so I wouldn't allow them to embody that clause into the contract.

[fol. 769] Q. Did you finally make any agreement not to compete?

A. Yes sir, I agreed in this contract not to go into any Crescent operation or affiliation in which they were operating at the time of the signing of that contract.

Q. For how long a period?

A. For five years.

Q. Have you got a copy of that agreement or the bill of sale that was finally made out?

A. I received a copy of it but I wasn't able to find it, sir.

Q. Have you searched for it?

A. Yes sir.

Q. Now, I believe you testified before, that this conversation you had with Mr. Lawrence just before you went into see Mr. Sudekum about making a deal was in June, 1935?

A. That should have been June, 1936. If I said that; it was just an error on my part.

Q. Now, during the time the Crescent was operating the Capital in opposition to your Southland at Brownsville, did they repeat at their theater any of the pictures that had previously been played at your theater?

A. Yes, they repeatd several, I couldn't say how many.

Q. Were they the bigger pictures?

A. They were the bigger pictures, yes sir.

Q. Of what companies, do you recall?

A. I recall they repeated there one or two Warner pic-
[fol. 770] tures and possibly two or three Metro's, as well as I can remember.

Q. They were Warner and Metro that you had played of the 34 and 35 that you had contracted? Is that right?

A. Yes sir.

Q. After you made the—closed the agreement and executed the bill of sale, did you see Mr. Sudekum again?

A. Yes.

Q. When was that?

A. It was abo-t a week or ten days after the deal was fully consummated, I was in Brownsville and I came back to Nashville and talked to Mr. Sudekum.

Q. How did you happen to go to talk to him then?

A. Well, Mr. Castleberry and Mr. McCuen suggested I go to see Mr. Sudekum, that he might be able to fix me up with some sort of a job.

Q. What was the talk you had with him there?

A. About the job, some sort of position with the Company.

Q. Did he offer you one?

A. Yes.

Q. What was the job?

A. I never knew the exact duties. I made a trip to Middlesboro, Kentucky and negotiated with Manring Real Estate Company up there with reference to their building a building for the Crescent Amusement Company in Middllesboro.

Q. What else did you do for him?

[fol. 771] A. I went to Cincinnati to see if there was any product available for Middlesboro.

Q. Over how long a period was ther?

A. The length of time I worked for them.

Q. Yes.

A. Only two weeks.

Q. Did you talk to him when you got back?

A. Yes.

Q. What was finally said?

A. Mr. Sudekum had suggested in the beginning that he would like to have an operation in Middlesboro and he thought possibly I might be the man to negotiate for it up there and possibly operate it, since it was quite some distance removed from his other Kentucky and Tennessee operations.

Q. What did you say?

A. I told him that, as well as I remember, I didn't particularly like the town of Middlesboro.

Q. Did you leave the Company then?

A. Yes sir.

Q. Then what did you do?

A. I went back to Brownsville where I was making my residence, at that time, then on into Memphis and negotiated for some porduct at a little town that someone had mentioned to me at Aberdeen, Mississippi.

Q. After you went back to Brownsville, did you notice whether the theater you had been operating had been [fol. 772] closed?

A. It was closed, to the best of my recollection, the same week that the deal was consummated with Mr. Sudekum.

Q. How about the theater in Paris?

A. I never went back to Paris.

Q. Your home was in Brownsville?

A. Yes.

Q. Do you know whether they closed the theater there or not?

A. I understood that it was closed.

Q. Do you know?

A. Yes, Mr. Castleberry told me on some occasion when he was through Brownsville that they had closed the Gem Theater there, the one I had been operating.

The Court: The Gem at Brownsville? I thought the Gem was at Paris?

A. At Paris was what he was talking about.

Cross-examination.

By Mr. Waller, for Defendants:

Q. What is your age?

A. Thirty-six this coming November.

Q. You are a native of North Carolina?

A. Yes sir.

Q. When did you first leave North Carolina?

A. I left North Carolina in December, 1927.

[fol. 773] Q. What business were you in in North Carolina?

A. In the theater business.

Q. In what place?

A. In Charlotte.

Q. Why did you leave Charlotte?

A. I was offered a better position in Memphis.

Q. With whom were you working at Charlotte?

A. I was Manager of the Royal theater in Charlotte with Mr. McDowell.

Q. Who owned that theater?

A. It was operated by Mr. Annagosta.

Q. Was it a circuit theater?

A. No sir, it was individually owned.

Q. You were offered a better job where?

A. In Memphis.

Q. By whom?

A. S. A. Mayer.

Q. When did you first know Mr. Mayer?

A. I first knew Mr. Mayer, I talked to him over the telephone from Charlotte sometime in November, 1927. Had had an Advance Agent that was working a road show picture through that territory and he asked me if I would be interested in going to Memphis with Mr. Mayer as manager of a theater, that he thought I might be the man that would suit him. And he made an appointment with Mr. Mayer and Mr. Mayer wired me to call him long distance one night [fol. 774] after 12:00 o'clock and talk to him about taking a position down there.

Q. Well, you moved to Memphis, then, did you?

A. In December, 1927, yes sir.

Q. Did you make your home then in Memphis for a while?

A. Yes sir, for several years.

Q. Were you married then?

A. Yes sir.

Q. You and your wife moved to Memphis?

A. Yes.

Q. Any children?

A. Not at that time, no sir.

Q. Well, did you buy a home in Memphis, or merely rent?

A. What?
Q. Did you buy a home in Memphis, or rent?
A. I merely rented at Memphis.
Q. You were in Memphis for a few years?
A. Yes.
Q. Where did you move to from Memphis?
A. I moved from Memphis to Brownsville.
Q. That was in 1932?
A. Yes sir.
Q. How did you happen to move to Brownsville?
A. Well, I was operating a theater, or rather I had a partnership there originally in the beginning and my part-
[fol. 775] ner was not transacting business satisfactorily and I had been going back and forth over the week ends to Memphis, I had maintained my residence in Memphis, so I decided it would be much more economical to move to Brownsville.
Q. Did you sever your connection with Mayer at that time?
A. I don't recall the exact date I left Mayer. But it was some time in 1929, right after the crash and business got to such a point over there that Mr. Mayer couldn't continue to keep a man on.
Q. Then it was that you went into partnership with someone in connection with the theater business?
A. No sir, I did some road show business at schools and churches around about Memphis over there before the time that I went into Brownsville.
Q. When did you first get your interest in the theater in Brownsville?
A. At the very beginning.
Q. Was that in 1932?
A. It was bought in 1931.
Q. Then you moved to Brownsville in what year?
A. It was some time in 1932, I couldn't recall exactly the month. I am sure it was in 1932.
Q. You had a partner there, did you, or was this man working for you that was not transacting the busi-
[fol. 776] ness satisfactorily?
A. He was a partner?
Q. He was the partner?
A. Yes.
Q. Did you buy him out when you went to Brownsville?
A. Shortly thereafter, yes.

Q. How much did you and he invest in this theater in Brownsville at the outset?

A. Well, I think I had about $200.00 in cash and some moving picture machines and few seats.

Q. Did he put up something, too?

A. He was supposed to.

Q. He didn't do it?

A. He may have raised fifty dollars, or something like that.

Q. You rented a store building there, did you?

A. Yes.

Q. And put in the theater seats that you already had?

A. Some few that we already had and we bought some other seats.

Q. You used the equipment you already had?

A. No sir, I traded that in on some Simplex Acme machines.

Q. What had that building been used for before you rented it?

A. It was some sort of mercantile establishment, a little drygoods store, I believe.

[fol. 777] Q. Did you change the floor?

A. Yes sir.

Q. And put a balcony in?

A. No sir, there was a small balcony already in that.

Q. A sort of mezzanine floor?

A. It had been offices.

Q. You put the screen at what end of the building?

A. At the front end as you came in off the street into the theater.

Q. Then where was your projector? Was that on the mezzanine floor?

A. No sir, the projector was on the outside of the building.

Q. Hanging over the alley?

A. There was an alley back there—no sir, it was just a vacant lot. The alley was some further back. The building at the time, it was built—it wasn't built on all the property that belonged to the builder.

Q. How many seats did you put in this building altogether? Was it 180?

A. We started the theater with somewhere around 180 or 185 seats, then later on, we re-seated and bought some brand new seats.

[fol. 778] Q. When was that?

A. I couldn't recall about that.

Q. How many brand new seats did you buy, Mr. Lawing?

A. About a hundred and sixty five, as I recall.

Q. What did you do with the old seats?

A. That would be impossible for me to answer, Sir. I don't recall what happened to the old seats.

The Court: Well, what difference does it make?

Mr. Waller:

Q. Now then, Mr. Lawing, what was your seating capacity after you got those new seats?

A. Two hundred.

Q. Now, how many of those seats were downstairs and how many in the balcony?

A. I beg your pardon. There were two hundred downstairs, and there was about, oh, not over twenty five or thirty in the balcony.

Q. And of those two hundred seats downstairs you say a hundred and sixty five were new seats?

A. Yes sir.

Q. What product did you say you were using in 1934-1935 in Brownsville before the new Crescent theatre was started?

A. I was using some product from practically every company.

Q. Did you have a contract with United Artists?

A. Yes sir.

[fol. 779] Q. For the entire output?

A. That I wouldn't be able to remember, whether it was the entire output or not.

Q. Well, did you play those pictures off in accordance with your contract?

A. I don't think that I did, no sir.

Q. Why not?

A. Well, I paid too much money for them in the first place and their exchange was in St. Louis at that time. They didn't have a Memphis office and I don't know that they have now, but the express was excessive on them and I think I paid them about $20.00 for them, for those pictures, average.

Q. And you figured that was too much so you just didn't play them?

A. I played some few of them.

Q. Do you remember when that contract was made?

A. I don't know.

Q. Did you buy any pictures from Universal?

A. During 1934-1935, I don't recall that I did, no sir.

Q. Don't you recall you bought three pictures and didn't play them?

A. From Universal?

Q. Yes.

A. I really don't know.

[fol. 780] Q. What was your experience with Columbia? Did you buy any pictures from Columbia for that season?

A. I believe I did, yes sir.

Q. Well, did you play them?

A. I couldn't recall about that, Sir.

Q. Don't you recall that as a matter of fact there were quite a number of those pictures you didn't play in accordance with the contract?

A. It seems that there was, yes sir.

Q. Now, you say you also had a contract with Metro, that is, with Loew's?

A. For 1934-1935?

Q. Yes sir.

A. Yes sir.

Q. Then the following year you made two or three applications for a new contract with Metro, you said, and those applications weren't granted?

A. Yes sir.

Q. Did you also make a new application with United Artists and Columbia?

A. Not that I recall, no sir.

Q. With reference to the applications for Metro did you tell the Metro salesman that you would be unable to make a new contract unless some concessions were made on the old contract?

[fol. 781] A. I think that I made some statement like that, yes sir.

Q. Did you also say that even on a new contract you couldn't pay the same film rental as you had previously paid because Mr. Sudekum's opposition had taken some of your business away?

A. I think I made a remark like that, yes sir.

Q. Well, that was true, wasn't it? I mean you weren't able to pay the same prices that you had been paying?

A. No sir, I couldn't have paid it and continued, I don't believe.

Q. And you knew that the reason Metro was selling the product to the Crescent Amusement Company was because the Crescent was paying higher prices for it than you could afford to pay?

A. No.

Q. You didn't know that?

A. No. It was to the contrary.

Q. Then what did you know about it?

A. Nothing other than hearsay.

Q. You had intermittently, I believe you said, bought Paramount products?

A. Yes sir.

Q. Did you have a contract for the 1934-1935 season—is that one of the contracts that was produced there?

The Court: That is one.

[fol. 782] By Mr. Waller:

Q. You didn't have a contract the previous year?

A. I don't believe I did.

Q. Your contract for 1934-1935 was based on playing some of the previous year's product?

A. It was for the year's release of pictures but it was out of two years. In other words, I had the privilege of playing whatever the total number of pictures was out of two years' product.

By the Court:

Q. You mean out of the 1933-1934 1934-1935 pictures?

A. Yes sir.

By Mr. Waller:

Q. Did you have the same situation as to Paramount for the next year, that is to say, you couldn't pay the same rentals that you had been paying?

A. I didn't understand the question.

Q. I say did the same situation exist in regard to Paramount product with you, namely, that you couldn't afford to keep on paying for those pictures what you had previously paid?

A. I don't recall that coming up. It would have been the same, I believe, yes sir.

Q. What about the Warner Brothers contract? Did you play those pictures off in accordance with the contract?

[fol. 783] A. I believe that I did, yes sir.

Q. Would you have been able to have paid the same prices for the Warner product?

A. You mean the same price that I had paid——

Q. Previously?

A. —the last contract I had with them?

Q. Yes sir.

A. I think that I could have, yes sir.

Q. Now, why was it you could have paid the same prices for Warner but couldn't for Paramount or Metro?

A. Well, I don't know that I have any answer for that. I do believe Warner Brothers was a little more equitable than the other contracts. I don't recall the exact figures though.

By the Court:

Q. You mean a little cheaper price?

A. Yes sir.

By Mr. Waller:

Q. Well, all pictures are different, aren't they? In other words, one picture is worth more than another picture and the product of one company may be worth more one season than another season?

A. I never had that opinion about it as far as seasons are concerned except in some rare instances. I wouldn't say that with the bigger companies there would be much difference in them, if any.

[fol. 784] Q. Well, the product of one company sometimes is different from the product of another company insofar as the box office appeal is concerned?

A. Yes sir.

Q. After the Crescent Amusement Company started its theatre in Brownsville you say you then put up a tent show in Paris?

A. Yes sir.

Q. Why did you do that?

A. To make a living.

Q. Now, there was already a good theatre in Paris, was there not?

A. As far as I know, it was a good theatre, yes sir.

Q. When you ceased operating the tent show you got a store building there and put a theatre in it?

A. Yes sir.

Q. A somewhat similar situation to what you had done in Brownsville?

A. I would say a very similar operation, yes sir.

Q. Was it your idea then that you might be able to sell out to the Crescent Amusement Company?

A. I had never had any thought of selling out to the Crescent Amusement Company.

Q. Not even in Paris?

A. No sir.

[fol. 785] Q. Of course, you knew the Crescent Amusement Company had been operating a theatre in Paris for a long time?

A. Oh yes.

Q. And you thought it was your privilege, notwithstanding that fact, to start a theatre in opposition to them in Paris?

A. Well, I had often thought about Paris previous to their coming into Brownsville but I would not have encroached on Mr. Sudekum, knowing the reputation that they had of doing business, etc.

Q. When you went into Paris, I believe you stated you got Fox pictures, did you not?

A. Not at the first; no.

Q. When was it you opened your theatre in Paris?

A. In the building?

Q. Yes.

A. I believe it was about the first of November, 1935.

Q. How long was it before you got Fox pictures?

A. That I couldn't say, off hand.

Q. Did any representative of Fox suggest to you that you might open a theatre in Paris?

A. No sir.

Q. Didn't tell you that if you did you could get Fox pictures there?

A. Not that I recall, no sir.

[fol. 786] Q. Well, in any event the delay was very slight in getting the pictures, wasn't it?

A. No sir. It seems to me like it was quite some time after I went in the building before I got Fox pictures. I could be mistaken about that.

Q. Now, I believe you said you used what other product in Paris?

A. Paramount.

Q. Any RKO?

A. Some RKO, yes sir.

Q. Now, you went to Memphis trying to get second run pictures from other companies, did you not?

A. Yes, sir.

Q. Whom did you see that represented Warner Brothers in Memphis about getting second run pictures from Warner Brothers?

A. Mr. Adams, I believe at that time.

Q. Do you remember when it was that you saw Mr. Adams?

A. That I don't, no sir.

Q. Whom did you see that represented Columbia in Memphis about getting second run Columbia pictures?

A. Mr. Haines and Mr. Rogers.

Q. Did you write to either of those gentlemen?

A. I don't recall writing the-, no sir.

Q. Whom did you see that represented Universal about [fol. 787] getting Universal second run pictures?

A. I don't think I made any application for Universal pictures in Paris. I understood that they were sold up there possibly on a franchise; I don't recall.

Q. What did the Columbia representative tell you when you made application for second run pictures?

A. They sold me some first run pictures that Mr. Sudekum didn't have under contract up there.

Q. Did they refuse to sell you any second run pictures?

A. I have a very vague memory about that. As a matter of fact, I don't know that I recall definitely about asking for second run Columbia.

Q. Now, which companies did you definitely ask for second run pictures?

A. I believe that would be impossible for me to answer except that I possibly went into all of them and asked them if it would be possible to get second run pictures for Paris and they had all about the same answer; that they either wouldn't care to take a contract or that Paris was too small for second run operation.

Q. You say you possibly did that. Do you mean from your recollection at this time it is possible that back in 1935 you did those things?

A. Well, it is customary to call on all the companies and [fol. 788] make every reasonable effort to get product for the towns, yes sir.

Q. I say you are basing your testimony about that on what is possible or what was customary and not on any actual or definite recollection?

A. Well, it would be very vague as far as the definite part of it is concerned.

Mr. Waller: Now, if your Honor please, in view of that, I think we are entitled to have that testimony stricken about the second run pictures on direct examination.

The Court: Well, it is not a question of whether it is competent. It is a question of what weight the Court will give to it.

Mr. Waller: It may be a question of weight.

By Mr. Waller:

Q. What was the seating capacity of your theatre at Paris, Tenn.?

A. Around three hundred seats.

Q. Now, you were renting, I believe, or leasing both at Brownsville and at Paris?

A. Yes, sir.

[fol. 789] Q. You said something on direct examination about having made your home in Brownsville; I don't recall whether I asked you; you did have a place there at Brownsville?

A. Yes, sir.

Q. And did you own a home?

A. Rented it.

Q. Rented it? And from Brownsville you moved to a place in Mississippi?

A. No, sir, I didn't move to Mississippi.

Q. You continued to live in Brownsville?

A. Yes, sir.

Q. And operated a place there?

A. Aberdeen, Mississippi.

Q. Then, when was it you left Brownsville?

A. Well, I left about two weeks after going to Aberdeen and went back to Charlotte.

Q. And you have made your home in Charlotte since that time?

A. Yes, sir.

Q. While you had this theater in Brownsville, did you have any other theaters; I mean, before you started the tent show in Paris?

A. Yes, I had operated a little place in Alamo, Tennessee with some tent show equipment, during the fall.

[fol. 790] Q. Well, did you have a place at Whiteville, Tennessee?

A. For a month or two, yes, sir.

Q. When was it you had the place in Whiteville?

A. I couldn't recall about that.

Q. Was that a tent show?

A. No, sir.

Q. Well, you had all three of these operations at the same time, did you not? I mean the one month that you operated the theater at Whiteville was also at the time you were operating at Brownsville and Alamo?

A. I believe that it was, yes, sir.

Q. Did you play pictures at Alamo or Whiteville which you had bought for Brownsville?

A. Yes.

Q. What were the circumstances?

A. I couldn't recall, except that I could place some bigger pictures over there and cancel some of the lesser pictures from the Brownsville contract.

Q. Did you ever do that without the permission of the owner of the copyright?

A. No, sir, not on feature pictures.

Q. Well, did you on anything else?

A. Yes, sir.

Q. What happened about that?

A. I settled with the copyright bureau about that.

Q. Then you did have some trouble with the copyright bureau?

[fol. 791] A. Yes, sir.

Mr. Frolich: No cross.

Re-Direct examination.

By Mr. Wright, for the Plaintiff:

Q. How big is Alamo, Tennessee?

A. To the best of my recollection, it has about 600 or 700 people.

Q. How big is Whiteville?

A. About the same size.

Q. Well, Whiteville is bigger than Alamo?

A. Well, I am of the opinion it is, yes, sir; I don't know the official population.

Q. Now, Mr. Lawing, if you had been able to continue the license of the Paramount, Metro and Warner features you would have sold your theaters in Brownsville for more than at the time you did?

Mr. Waller: We object to that.

The Court: Sustained.

Mr. Wright: That is all. I don't believe I have offered all these exhibits in evidence. I would like to do so now. [fols. 792-793] The Court: All right; any objections to these particular exhibits, gentlemen?

Mr. Armistead: No, sir.

The Court: All right; let them be put in evidence.

Mr. Wright:

Q. You are doing business with both the major film distributors, are you not, in your theaters around Charlotte?

Mr. Waller: We object to that, as immaterial.

Mr. Wright: I thought perhaps it was not a satisfactory account and I just wanted him to point that out.

The Court: Well, one of those distributors in there said it was mighty satisfactory. Sustained. Of course, if they make any question about that I will let you put in evidence in rebuttal. I don't see any reason for it yet.

And further this deponent saith not.

[fol. 794] E. W. Dozier, Called as a witness in behalf of the Plaintiff, he having been first duly sworn, testified as follows:

Direct-examination.

By Mr. Simon:

For the Plaintiff:

Q. Will you tell the reporter your name, please? What is your name and where do you live?

A. My name is E. W. Dozier, and I live in Madisonville, Kentucky.

Q. What business are you in, Mr. Dozier?

A. I am in the real estate business, just at this time.

Q. Have you ever been in the theater business?

A. Yes, sir.

Q. You have operated theaters?

A. Yes, sir.

Q. Will you tell us where you have operated theaters?

A. At Madisonville, Kentucky and at Earlington, Kentucky.

Q. During what period did you operate theaters in Madisonville, Kentucky?

A. During the fall of 1916, until January 1st, 1932.

Q. Were you a partner of the Crescent Amusement Company in that operation at any time?

A. Yes, sir, I was for a while.

[fol. 795] Q. During approximately what period?

A. Well, in 1930 and 1931.

Q. During the period you were associated with Crescent in Madisonville, did you ever have any discussions with Mr. Sudekum with regard to Earlington, Kentucky?

A. Yes, sir.

Q. Will you tell us what discussions you had with him?

A. Well, the theater was closed at that time over there, and I spoke to him a time or two, thought that probably we should buy that place over there and open up a theater over there; it was a town with a big Western Coal Company that had a lot of employees there, and I thought it would be a good town to open up a theater in.

Q. What did Mr. Sudekum say?

A. He said it was too small a town; that his experience in these smaller towns was it didn't do any good.

Q. What was your experience in the theater, how did it terminate, did they buy you out?

A. Yes, sir.

Q. Have you a copy of the agreement under which you sold your interest in the Madisonville theater to Crescent?

A. No sir; I didn't find it in my file.

Q. Do you recall the provisions of the agreement in Madisonville, in effect?

[fol. 796] A. Yes, sir.

Q. Can you tell us in substance what the provisions were?

A. Well, it was that I should stay out of the town for ten years.

Mr. Simon: I wonder if the defendants could furnish a copy of that agreement?

Mr. Armistead: I don't know whether we have it or not.

Mr. Simon:

Q. Can you tell me what the approximate population of Madisonville is?

A. Something between eight and ten thousand.

Q. Do you know if that was the approximate population of Madisonville in 1935?

A. That was near it, yes, sir.

Q. Well, what was the approximate population of Earlington, Kentucky?

A. About 3200.

Q. And do you know how large Earlington was in the year 1935?

A. Well, there wasn't much difference; it was about the same.

[fol. 797] Q. How far is Earlington from Madisonville?

A. Between three and four miles.

Q. And there is a highway connecting the two towns?

A. Yes, sir.

Q. Is that highway paved?

A. Yes, sir.

Q. Was it paved in 1935?

A. Yes, sir.

Q. Is there more or less of a free interchange of traffic between Earlington and Madisonville?

A. Yes, sir.

Q. Can you tell me what you did after you sold your interest in the Madisonville Theater, as to Crescent?

A. Well, of course, I had been in the theater business for the last 15 years, so I decided I would go over to Earlington and open up a theater over there.

Q. What was the name of the theater you opened up there?

A. Roxy.

Q. Was there any theater in the town when you came in with Rockwood?

A. No, sir.

Q. There had been previously operated a theater there?

A. Yes, sir.

Q. But it was closed?

[fol. 798] A. It was closed.

Q. How many seats did the Roxy have when you operated it?

A. Between 500 and 600; I don't know exactly.

Q. How long did you operate the theater, the Roxy Theater, in Earlington?

A. I opened it May 12, 1932 and sold it August 1, 1939.

Q. And who did you sell it to?

A. To the Crescent Amusement Company.

Q. Was the Roxy the only theater operating in Earlington during that entire period of 1935-1939?

A. No, sir. The Crescent Amusement Company opened up the Earl in the Spring of 1937—I think it was in April, 1937.

Q. And is it true that from that time until you sold it to Crescent Amusement Company there were two theaters operating in Earlington, Kentucky?

A. Ask the question again.

Q. I asked if it was true that from the time the Earl Theater opened until you sold out to the Crescent Amusement Company there were two theaters operating in Earlington?

A. Yes, sir.

Q. Did those two theaters continue to operate after you sold out to Crescent?

[fol. 799] A. No, sir, they closed one of them.

Q. Which one was closed?

A. Well, they operated the Roxy, the theater they bought from me, for a while; and the theater they had built there was down town, and the business men petitioned them to close the Roxy and open the Earl; they did that; they opened the Earl.

Q. How long after you sold out to Crescent was the Earl Theater closed?

A. I would say 60 days; that might be more or less; I don't know exactly.

Q. Do you know Mr. Kermit Stengel?

A. Yes, sir.

Q. How long have you known him?

A. Between two and three years; I don't know just the exact time.

Q. Do you remember the first occasion on which you met him?

A. Yes, sir; I remember the occasion, but I didn't meet him and talk to him; I don't know whether I had casually met him before or not.

. . . . . .

[fol. 800] Q. In what year did this occasion you have in mind occur?

A. Well that occurred in the fall of 1936.

Q. Where was your conversation, where did your conversation take place, with him?

A. In his office here in Nashville.

Q. In his office here in Nashville?

A. Yes, sir.

Q. Did you come to see Mr. Stengel?

A. Yes, sir.

Q. Why did you come to see him?

A. Well it had been orated around that they had taken an option on a lot in Earlington to build a theater on.

The Court: You said what, it had been orated?

A. It had been talked.

The Court: Some of these folks from the East might not understand that language.

Mr. Simon: Will you tell us what conversation you had with him on that occasion?

A. We came down in the morning, we, or I really came down to see Mr. Sudekum, but he was busy, and after we exchanged a few words with him, he turned us over to Mr. [fol. 801] Stengel, and I talked with Mr. Stengel. First I asked if they had an option on a lot over there, and he said they did, and I asked him why he didn't just let Earlington alone, it was just a small town over there, and Mr. Sudekum at one time before refused to come in there when we were in partners there, and I had a very nice business over there and that was not sufficient business for two theaters, why they did not just let me have that town over there and not bother me coming in over there. And he said that they had made up their minds to come up there, that they were coming in there, see, and then I talked to him about if he was going to come in there, even though I didn't want to sell, lease or anything else, but if he was coming in, realizing there was not enough busi-

ness for two theaters, and the difference in the buying power they had over me, I would like to sell my theater.

Q. And what did he say to that?

A. Well he said that he didn't think that they would want to buy it, but they might lease it, so we talked on that line, and I told him I didn't want to lease it, if I did anything, which I didn't want to do, I would sell it.

Q. When was the next occasion you saw Mr. Stengel?

A. Well I saw him at my office in Earlington.

Q. About how much later?

A. Well it was some time after that was the date, but [fol. 802] a short time because he told me when he left he would talk it over with Mr. Sudekum and come to see me, or come on some occasion, so the next meeting with him was at my office at Earlington, Kentucky.

Q. Can you tell us what conversation took place on that occasion?

A. He said they had been thinking this thing over and he would not buy it, but he would talk lease to me, and at that time I tried still to talk him out of coming into the town, let me alone, go ahead with what they had in Madisonville, and let me run in that little town; and he said, no, they were going to come into the town, if they could lease it off me they would call it a lease, and they would work out a lease with me, and if they couldn't they were going to buy that lot and build on it.

Q. Did you tentatively work out the terms of a lease on that occasion?

A. Yes, sir.

Q. What kind of terms did you agree upon?

A. We agreed upon a ten year lease with a privilege of ten more, at a hundred and eighty-five dollars for the first ten years and a hundred and fifty for the second ten years.

Q. How did the conference end?

A. Well after we had talked it over from every angle, why [fol. 803] then he left for Nashville and told me to get up a lease along the lines of our conversation, which I did, —I had it gotten up and submitted to him.

Q. Did you offer it to him?

A. Yes, sir.

Q. Did you subsequently enter into that lease with the Crescent Amusement Company?

A. No, I didn't enter into it?

Q. Why not?

A. Well the understanding was that he told me at that time it was the Rockwood Amusement Company that was leasing it and of course, I didn't have any information on the Rockwood Amusement Company, only what he said, he said that Mr. Sudekum, and I knew Mr. Sudekum, and he told me that Mr. Sudekum owned it, but it was a corporation, the way I understood it and of course too I wanted a financial report on it before I entered into any lease with them. So some time later he did furnish me with a financial report, after I had sent in the proposed lease and the financial report didn't show, didn't warrant me in leasing the property to them anyway from the information we could get from it, you see, it was a very meager financial report.

Q. Did you subsequently notify Mr. Stengel that you [fol. 864] had changed your mind about leasing the theater?

A. Yes, sir, after I received that financial report I notified him that I did not wish to go ahead with it.

Q. Do you know approximately when you notified him of the withdrawal of the lease?

A. Well it was getting up about the seventeenth, between the seventeenth and the twenty-fifth of December—of January—no, between the seventeenth and the twenty-fifth of December.

Q. Of what year?

A. 1936.

Q. Then did you notify Mr. Stengel that you were no longer interested in dealing with them, did you have any further conversation with him?

A. Yes, sir, he came right up I think now the next day after he received that.

Q. Where did this conversation take place?

A. In Madisonville.

Q. Whereabouts in Madisonville?

A. In the lobby of the Hotel Madison.

Q. Was there any one else present?

A. No, sir.

Q. Will you please tell us what conversation you had?

A. He insisted on going ahead and making this lease, and I told him that I didn't figure from the financial statement [fol. 805] that it was to my interest to make the lease, without Mr. Sudekum personally or the Crescent Amusement Company personally would sign that lease, I said it would

not do, see, this was the Rockwood Amusement Company, but they would not do that, see, and I told him then that there wasn't a chance for me to make the lease on it. I also told him at that time that, which I tried to do before, that I would sell it to him outright if the Crescent Amusement Company, or Mr. Sudekum either one would sign the notes, see, for sixteen thousand dollars, two thousand dollars down, down payment, and name his terms on the balance. He would not agree to that at all and finally we had a pretty abrupt ending. He said that if I didn't sell, not didn't sell, if I didn't lease it, he would build in Earlington, but the Crescent Amusement Company which had the money to build and that they might buy and build over there, and put me out of business. So that was about the end of the conversation.

Q. And the Earle theater was opened in Earlington after that?

A. Yes, sir.

Q. When did you finally sell the Roxy theater to the Crescent Amusement Company, who did you negotiate the deal with?

A. With Mr. Sudekum and Mr. Baulch, I talked with both [fol. 806] of them.

Q. Where did those negotiations occur?

A. In Nashville here.

Q. Did you come to see them about selling?

A. Yes, sir, I did.

Q. When did you first approach them to talk about selling?

A. Well it was some time in July, June or July of 1939, see, it was to take effect as of August first, 1939.

Q. Will you tell us what conversation you had with Mr. Sudekum when you first approached him?

A. Well I came down to see him and tell him that I wanted to sell out to get out of the picture show business, because it had gotten to where I could not get product, and that there was just not sufficient business in the town for two theaters, but if they would buy out at a reasonable price, I would sell to them. When it gets to where you can't get sufficient pictures, regardless of the building you have, it is time to get out, so I just negotiated the best deal I could with them and sold.

Q. What was the deal you negotiated with them?

A. They paid me seven thousand dollars for it.

Q. Was there another town that was related to that field?

A. Well we had a lease agreement on the Alhambra theater in Hopkinsville, which was operating that theater.

Q. Who was operating that theater, then.

[fol. 807] A. Crescent Amusement Company.

Q. You were leasing it to them?

A. Yes, sir.

Q. How did that theater enter into this deal with the Roxy theater?

A. At the time he was here he asked me about the Alhambra theater, buying our lease and equipment down there, and my wife and I only owned a half interest in that, and my brother, and my brother who was not interested in the other theater, owned the other half, so I told them at that time I did not know whether they wanted to sell that, I would have to talk that over with my brother, and they told me they would not be interested in buying one without they bought the other theater there. So I did go back and talk to my brother and we sold it, with the equipment and lease on the Alhambra at Hopkinsville.

Q. Would you have sold that lease on the other Alhambra theater at Hopkinsville, unless you had sold the Roxy theater?

Mr. Armistead: We object to that.

The Court: Objection sustained.

Mr. Simon:

Q. Do you have a copy of the agreement you entered into [fol. 808] when you sold out the Roxy theater?

A. No, I haven't, they gave us a copy, but I was out I didn't look after it.

The Court: Let me ask you a question right there. This Seven thousand dollars, did that cover both deals, the Alhambra building and the other?

A. No, sir, the Alhambra deal was eighteen thousand dollars for the equipment down there, and seven thousand dollars for the Roxy.

Mr. Simon:

Q. Seven thousand dollars for the Roxy?

A. Yes, sir, seven thousand for the theater at Earlington, and eighteen thousand dollars for the Alhambra.

Q. At Hopkinsville, is that right?
A. Yes, sir.

[fol. 809] The Court: That is lease and equipment?

A. Yes sir. We just figured it out from an insurance proposition, I had an insurance company to figure the value of it for me and that is the way we arrived at the value of the Alhambra.

Mr. Simon:

Q. I didn't get that last?

A. I had the Alhambra lease and equipment; had an insurance company figure so much a month, so many years, that is the way the lease was, that is the way we arrived at the value of that lease.

Q. Did the agreement that you entered into with the Crescent Amusement Company for the Roxy Theater in Earlington contain any provision with regard to your operating other theaters in Earlington?

A. Yes.

Q. Do you recall the substance of those provisions?

A. Well, it just prohibited us from entering into or operating a theater in Hopkins County and I believe that lease or that contract covered any town where the Crescent Amusement Company was operating. I am not positive about that. I think that is right.

Q. Do you recall for what period?

[fol. 810] A. For a ten-year period.

Mr. Simon: I wonder if we could have a copy of that lease?

Mr. Armistead: We are not objecting because you haven't the original.

Mr. Simon:

Q. I would like to ask you if you had any fire in the Roxy Theater in the year 1936, or 1937?

A. Yes sir, we had a small fire in our booth there when a film caught fire one night while the second show was operating.

Q. Do you recall in which year that was?

A. I believe it was in 1936.

Mr. Armistead: May I ask what the purpose of this is. Is it claimed the Crescent had anything to do with that fire?

Mr. Simon: Oh no, it isn't claimed they had anything to do with the fire, but I think it will appear later that certain contracts were entered into with Crescent on account of the fire that occurred in that theater and we are trying to develop through this witness whether there was a fire in the theater.

Q. I didn't get your answer to the question?

A. I believe the fire was in 1936, I am positive about that.

Q. Was the theater closed down for any period of time on account of that fire?

[fol. 811] A. For just a short time. I knew we made a trip to St. Louis and Indianapolis to get the equipment and open it up again and it was just a short time.

Q. Was it more than a week?

A. I believe it was about ten days or two weeks, that is near the time.

Q. Do you recall in what part of the year 1936 that occurred? Was it during the period when you were negotiating with Mr. Stengel for the lease of the theater?

A. I believe it was, but I wouldn't be able to say whether that was before the original negotiations with Mr. Stengel or whether it was between that time, I am positive that is correct though, it was before that time.

Q. You think it was before the negotiations with Mr. Stengel ever occurred?

A. Yes sir.

Q. During the first year that you operated the Roxy Theater did you show any pictures before Madisonville?

A. Yes sir.

Q. Did you show any pictures after Madisonville?

A. I don't recall one; I don't think so.

Q. During the second year that you operated the Roxy Theater did you show pictures before Madisonville?

A. Yes.

[fol. 812] Q. Did you also show pictures after Madisonville?

A. I don't think so. I never showed a picture after Madisonville unless it was absolutely necessary for us to get the products.

Q. Was it necessary to do that in the second year that you operated the theater?

A. No sir, it wasn't.

Q. During the 1932-1933 and 1933-1934 seasons, did you exhibit Paramount pictures?

A. Yes.

Q. Did you exhibit them ahead of Madisonville?

A. Yes sir—May I correct a statement back there, about second run pictures? I believe the second year I was there I showed some Metro-Goldwyn pictures following Madisonville, because they bought them away from me and I think I did show some Metro-Goldwyn pictures for second run.

Q. I want to ask you if, in your experience, you find it more profitable to play pictures before Madisonville, or after Madisonville?

Mr. Raftery: We object to that as speculative.

Mr. Simon: This man has had experience. I am asking him about pictures he actually played.

A. Very much more profitable to play them ahead of Madisonville.

Q. To do what.

A. To play them before Madisonville.

[fol. 813] Mr. Simon: I would like for this to be marked as Government's Exhibit P—Whatever the next number is.

(Document marked Exhibit P-16.)

Mr. Simon:

Q. Mr. Dozier, I would like to show you Government Exhibit No. P-16 and ask you if this is the contract you entered into with Paramount Pictures Corporation for their pictures for the 1935-1936 season?

A. Yes sir.

Q. Did you enter into that contract on or about the date it bears?

A. Yes sir.

Q. Who was the salesman with whom you negotiated that contract?

A. Mr. Newman, Mr. Duff Newman.

Q. Now, I would like to call your attention to the clearance provision in that contract where it says: "Subject to final decision of Indianapolis Clearance Board."

Mr. Rafrety: That is the NRA Clearance Board, is it, that phrase looks like that.

Mr. Simon:

Q. I would like to ask you if at the time you entered into that contract you had any discussion with Mr. Newman [fol. 814] about that clearance clause in relation to Madisonville?

Mr. Armistead: The contract speaks for itself; the contract provides that it contains all the terms of the agreement.

Mr. Simon: It is our contention that that contract does not speak for itself, that it is very vague and indefinite and there was an oral understanding which I believe will be supported by correspondence that we are later going to introduce as to whether or not there was to be clearance over Madisonvile under that contract.

The Court: Well, what does the contract say about Indianapolis? Is that a Clearance Board?

Mr. Simon: That is right.

The Court: How is that indefinite?

Mr. Simon: Well, I think there was an understanding as to what the Indianapolis Clearance Board was to decide. I don't want to testify for this witness, possibly we should ask the witness to leave the room, but there was some discussion as to whether or not, under that contract, the exhibitor was to play before or after Madisonville, and if so, the clearance that one town was to hold over the other, and none of that appears in the contract, though I believe it is borne out by correspondence that we are going to intro- [fol. 815] duce, and we would like to get the conversation that this witness had at the time the contract was negotiated.

Mr. Waller: If all that is true, he has just got a breach of contract suit with that company and it doesn't belong in this case. We submit it is irrelevant, as well as the other objection.

Mr. Simon: We are not trying to try Mr. Dozier's breach of contract case for him, if he had one. We do intend to show instead of entering into a contract with Mr. Dozier which called for him to play pictures ahead of Madisonville, he did not play pictures ahead of Madisonville but rather behind them, because of the subsequent contract that Paramount entered into with Crescent Amusement Company.

Mr. Waller: That contract doesn't call for him to play pictures ahead of Madisonville.

Mr. Simon: I think that is right, I think if you will look at the contract itself, you couldn't be sure what it calls for, but this oral understanding they had with the salesman was to this effect, that he was to play—Stop me if you don't want me to go ahead, your Honor, because I don't want to testify for the witness.

The Court: Go ahead, that is all right.

[fol. 816] Mr. Simon: The oral understanding, as I get it, that he had with Newman, Paramount's salesman, was, that he was distinctly to play ahead of Madisonville but the question of how many days ahead of Madisonville he was going to play, in other words, what clearance he was to have over Madisonville, was to be determined by the NRA Clearance Board of Indianapolis, but in spite of that, a few months later, they sold——

The Court: Do you have written evidence in the form of correspondence to that effect?

[fol. 817] Mr. Simon: Well, we don't have anything that expressly says that but we have written correspondence between Mr. Dozier and Paramount calling Paramount's attention to the fact that Madisonville has been sold to run ahead of Earlington, and later we have the superseding contract that Paramount entered into with Mr. Dozier definitely providing that it was following Madisonville and reducing his film prices about seventy five per cent, I believe, conclusively indicating that the prices that he charged when they entered into this contract were prices for showing ahead of Madisonville, in other words, first run showing, however, for the three preceding seasons Mr. Dozier had been showing Paramount pictures ahead of Madisonville because during those three preceding seasons Madisonville had not been buying Paramount pictures and they had played some spot booking products and played them after Earlington.

The Court: Well, we will determine that matter after lunch. Adjourn until 1:30 for lunch.

Thereupon a recess was taken for lunch.

[fol. 818] Afternoon Session

The Court: Gentlemen, I don't know whether the plaintiff or the defendant subpoenaed Mr. S. B. Ford of the Star Theatre at Lexington, Mississippi but I have a letter from Dr. Stevenson saying he is very ill and in addition to that, he is seventy years old and deaf.

Mr. Dobey: He was a star witness for the Government, your Honor.

The Court: Mr. Simon, is it the contention of the Government that the question of clearance was not settled by the Board at Indianapolis?

Mr. Simon: That is right. As far as Mr. Dozier knows, there was never any hearing on the matter in Indianapolis. That contract was signed at the end of April, 1935, and, as your Honor knows, the NRA was declared unconstitutional about thirty days later and the Board all broke up as soon as NRA was declared unconstitutional.

The Court: Of course, that wasn't contemplated by either the salesman or the operator at that time. Now, what is it you wish to prove, certain statements made by the sales-
[fol. 819] man?

Mr. Simon: We wish to prove the conversation that Mr. Dozier had with the salesman indicated both of them understood by that clearance provision that all the Indianapolis clearance board was to decide was how long after Earlington Madisonville or any other town in that vicinity was to play under that contract ahead of Madisonville, Kentucky.

Mr. Raftery: Are you stating accurately about that clearance board? Wasn't the clearance set up by this NRA board at Earlington to play ahead of Madisonville? Wasn't the larger towns set up with clearance over the smaller towns? That is the way they operated. That is the way the board operated. I am not trying to defend these boards but I am just trying to point out the way it was done.

Mr. Simon: I think, your Honor, that the contract doesn't say anything really about the towns over which Earlington is to take clearance. It just says that clearance is to be subject to the decision of the Indianapolis clearance board.
[fol. 820] The Court: What does the Government propose to show actually happened in connection with the clearance?

Mr. Simon: We propose to show that at a subsequent date, sometime in August of 1935, Paramount entered into a contract with the Crescent Amusement Company for their theatre at Madisonville and at the same time for other theatres in the Crescent circuit and that that contract gave Madisonville clearance over Earlington and as a result of that Mr. Dozier was unable to play Paramount pictures during that season of 1935-1936 ahead of Madisonville but instead had to play them after Madisonville, and then later on, about four months after the Crescent contract in De-

cember Paramount adjusted Mr. Dozier's contract by entering into a superseding contract with him, decreasing his film rentals that he was going to pay. Now, it seems that that indicates what the parties had in mind when the first contract was executed was that Mr. Dozier was to pay these higher rentals for the privilege of playing first in that vicinity, and then when they sold Madisonville ahead of them they naturally had to reduce the film rentals because obviously he couldn't afford to pay those high rentals and still play after Madisonville. Those rentals were just about [fol. 821] what Madisonville payed for the privilege of playing ahead of Earlington.

Mr. Armistead: I withdraw my objection.

Mr. Raftery: I haven't any objection or I would withdraw it.

The Court: Now, just a minute before proceeding with this witness. I stated Friday that I would rule today on the question of the admissibility of certain evidence pertaining to bank nights, hot seat nights and amateur nights, I believe, instituted by the Crescent Amusement Company in connection with the operation of the Gallatin Theatre. I am not entirely prepared at this time to make a definite ruling on that proposition in view of the fact that I have already ruled once, and I would like to give counsel the benefit of what the Court has in mind so that I can hear from counsel on the legal proposition. Clearly the question involved in that matter is one of the important and decisive questions to be decided in this case.

It appears to the Court that the exhibition of motion pictures is purely a local matter and the question of competing theatres, building finer houses and having finer equipment, [fol. 822] reducing prices, bank nights, amateur nights, hot seat nights, advertising, etc., that is purely a local matter and purely a local proposition.

Now, if the Crescent Amusement Company had obtained a large number of theatres and went into a town and opened up a new theatre and used all of those methods for the purpose of eliminating competition of any theatre that was running in the town at that time, that would be purely a local proposition, it appears to the Court, and not a violation of the Sherman Act, but when it comes down to the proposition of the Crescent Amusement Company through or rather on account of the fact that it did operate a large number of theatres and through agreements and dealings

with the distributors secured all the first run pictures to show at their theatres, resulting in the competing theatres being unable to obtain those pictures, that is an entirely different proposition. That does involve or affect interstate commerce in procuring and shipping those pictures.

Now, I have gone into these cases again, the case of Foster & Kleiser vs. Special Site Sign Company. In that case Foster & Kleiser were operating billboards, signs, and oper-
[fol. 823] ating them in several states and shipping materials from one of their agencies or stores or departments in one state to other states, and the court held there was no competition in that; that they were just shipping to themselves but on the other hand it was urged that they procured signs and lithographs and posters from companies outside of the state and that in those operations interstate commerce was involved. Now, Foster & Kleiser were charged with certain acts of procurement of sites for billboards, and preventing other competitors from obtaining sites, unfair and discriminatory prices, cutting prices to induce competitors' customers to break their contracts with competitors, priorities, rebates, and other methods. The Court said: "All the means alleged to have been used for the carrying out of the conspiracy were adopted to the injury or destruction of plaintiff's business in its intrastate aspects. None are alleged to have directly affected interstate trade in posters or lithographs." In other words, they didn't keep their competitors from obtaining posters and lithographs from outside the state. The only reason they did that, they didn't have any use for them because they couldn't get any sites for their billboards.

[fol. 824] "Neither the allegations of damages nor the allegations of acts of conspirators in inflicting the damage are in any way related to the allegation as to a conspiracy to restrain trade and commerce in posters and lithographs."

Well, here the allegations and the theory of the Government is that trade and commerce are restrained by the fact that competing companies with the Crescent Amusement Company couldn't get pictures, which were shipped in interstate commerce.

[fol. 825] The Court (Continuing): What is the paragraph relative to the Bank Nights?

Mr. Waller: Paragraph 54.

The Court: Also, in the Bodman Dairy Co. case vs. C. & C. Ice Cream Company, it is stated there that while the bulk of the raw ingredients used by the parties in the manufacture of ice cream came from Kentucky, the flavoring and part of the milk came from outside of the State, it is not shown that appellant company has shown any reduction in the monopolization of these supplies, that is, the supplies it received in interstate commerce for the manufacture of this ice cream. That is the theory of the Government in this case, that there was a monopolization in the supply of films that came into these theaters. We do not regard the transactions of the nature that during the three years here involved more than 90 per cent of the product was sold in Kentucky, and that which was sold outside of Kentucky was distributed through independent dealers and not through independent stores. All the ice cream sold in this price war was sold in Louisville and, Jefferson County, [fol. 826] Kentucky. We don't regard the transactions complained of as creating a direct and substantial burden on interstate commerce. The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky. The sale through retail stores was entirely of a local nature." Of course, if a man operated a picture show in a small town where there was another picture show, and had clearance provisions in his contract; it might be said that that would not be a burden on interstate commerce, because it did not have the effect of keeping competitors from securing films on account of the fact there were no competitors. And then, too, where there are two towns close together there may be discriminations in favor of one independent operating in one town against an independent operating in another; and a situation is presented that it might be said that, Well, that is just a question of one independent trying to make the best deal he can, so he can show pictures before the other small town close by can show them, not for the purpose of eliminating competition, or not for the purpose of driving that independent in the nearby town out of business. I think the purpose and intent of these agreements have considerable to do with the legal question, and of course where the operations are on such a large scale [fol. 827] with such a large number of picture shows, it is a very serious question as to whether or not it does not affect interstate commerce competitors from securing films. You

make an allegation in the original bill that the methods adopted by the defendants, in giving away large sums of money prizes, and so forth, was a part of a conspiracy to restrain trade and commerce?

Mr. Dobey: I think that is true, if your Honor please. If you will notice, paragraph 45 says to combine to restrain interstate commerce in the operation of motion picture theaters in the following manner: and then follows the rest of the complaint.

Mr. Waller: Perhaps your Honor will recall that before, that Mr. Sherer, who was here on the motion, in regard to paragraph 54, he was asked if it charged that the distributors had anything to do with Bank Night and so forth, and he expressely stated that the Government did not contend that was a part of the conspiracy.

Mr. Dobey: We also charge a conspiracy between the exhibitors themselves to restrain interstate commerce in [fol. 828] motion picture films, without regard to whether there is any conspiracy of the distributors in that respect.

The Court: Paragraph 45 says the defendant exhibitors have combined with each other and with each of the defendant exhibitors unreasonably to restrain trade in interstate commerce in motion picture films.

Mr. Dobey: The first conspiracy is continually combining with each other and with each of the conspirators; a conspiracy among themselves and also a conspiracy between them and each of the distributors.

The Court: And to monopolize or attempt to monopolize the exhibition of motion pictures, in the operation of motion picture theaters in the present towns and in the other towns in Tennessee, Arkansas, and Mississippi, in violation of section 2 of the Sherman Act, in the following manner." I suppose "in the following manner" would carry us to Paragraph 55, down to the prayer of the bill?

Mr. Dobey: I think that is true, they were; and in addition to——

[fol. 829] The Court: There are a lot of periods in there.

Mr. Waller: And they start again in paragraph 50, "in the following manner," all over again.

The Court: Combine with each other and with each of the defendant exhibitors, and so forth, to monopolize, or attempt to monopolize, the exhibition of motion pictures in the operation of motion picture theaters, in violation of

sections 1 and 2 of the Sherman act, in the following manner:

Mr. Dobey: If that is stricken out, I think that would leave "in the following manner" in the original paragraph; and we ask leave to amend at this point. In addition to that, your Honor, I think that, on the part of the sentence that you ordered stricken out, I think that sentence reads, That for the purpose and with the effect of monopolizing the exhibition—Now, we concede exhibition is purely local, looked at separately; and the operation of motion picture theaters. Now, the operation of a motion picture theater [fol. 830] includes the licensing of films in interstate commerce; and when we allege that they did this for the purpose and effect of monopolization of the operation of motion picture theaters, the whole includes the licensing of films in interstate commerce; and we have, therefore, alleged that they did this; that is, the purpose and effect of monopolizing and licensing of films in interstate commerce.

[fol. 831] The Court: The question in this case is not monopolization of the exhibition of motion pictures, but the monopolization of the right to purchase the films in interstate commerce, distribution.

Mr. Dobey: I think you are looking at it from the wrong angle, it is a buying monopoly.

The Court: That is what enables them to monopolize it.

Mr. Dobey: I do not think the word distribution is quite appropriate.

The Court: Purchase of products, purchase of films, and in order to obtain all the first class films, and prevent their competitors from obtaining those films.

Mr. Dobey: That is true.

The Court: If there is ever any violation of the Sherman Act, I don't think the exhibition of the pictures would be.

[fol. 832] Mr. Raftery: We do not think it is by itself, by any means.

Mr. Dobey: No.

Mr. Raftery: I do not think Mr. Dobey thinks it is. There are certain fundamental principles of law we are going to have to get back to. The trader has the right to select his purchaser. That is ignored. Consequently you have the right to sell or not to sell as you see fit, just as an exhibitor has a right to buy or not to buy as he sees fit. In this particular situation as I see the evidence and the

way it is building up, they started in by assuming that there is some right in the exhibitor per se, to purchase different films, that particular exhibitors want, or a particular exhibitor wants to purchase, irrespective of a competitive condition. Now this clearance question which Your Honor mentioned, and the main reason I stood up, clearance in no way restrains interstate shipment of pictures; clearance is a factor by which prints are made available for every run of pictures, and that is the consent decree, there is a special provision set in that consent decree, [fol. 833] that every exhibitor who wants to deal with the big five has the same right, and every one of the five involved in this lawsuit, therefore, has a right to come in by arbitration and get some run of picture. For instance we are discussing at Madisonville and Earlington, the fact that Madisonville takes clearance over Earlington, does not deprive the gentleman on the stand at Earlington of any pictures. On the contrary, if you sell a run of pictures at Madisonville with fourteen days' clearance over Earlington, that means that this gentlemen has a right to exhibit any picture he wants under that contract fourteen days after Madisonville. What has been the practice up there is that pictures that are shown in Madisonville, are not shown in Earlington, and pictures that are shown in Earlington, like that Paramount that they are talking about, they were shown in Earlington and never saw the light of day in Madisonville. So you have a situation with respect to commerce up there, where you have had a run at Madisonville, and it has first run, it is the larger community, and then a run in the smaller community, so you would have a shifting of pictures, which would bring [fol. 834] in the regular course of business, and that is what clearance does, it opens up commerce, it staggers commerce and goes to the making of trading in the pictures.

For instance, as the showing of pictures in this immediate territory, the largest town is Nashville, then you select the second largest community and third largest, it may be it will be Knoxville, or Chattanooga, or they might play all three good towns on the same day, and you then go down the line, until you reach the smallest hamlet in the neighborhood. But the Government makes no effort to discriminate between them. Mr. Simons stands up and says we are restraining commerce, that is these pictures being thus exhibited ahead of Madisonville, that

stopped the showing in Madisonville. Now that is local practice, as I said in my opening statement, an exhibition is purely a local proposition.

The Court: I am going to agree with you on that.

Mr. Raferty: But Your Honor, where we are discussing this clearance, may be restrain-g, we contend that clearance is such interval of time that elapses between one run and another.

[fol. 835] The Court: So far as the evidence at this point in the suit is concerned, it shows that in all instances where the question has been brought up, where one town had clearance over the other, and where the first entered or other towns that ordinarily take clearance over the first town.

Mr. Raferty: That is Earlington is a smaller town.

The Court: Yes, Columbia, or Mr. Pleasant.

Mr. Raferty: Mt. Pleasant, a town of two thousand population, forty per cent colored, and the other town about ten thousand.

The Court: That is just one instance, I would not decide the lawsuit on one instance or circumstance.

Mr. Raferty: Those are the circumstances, for instance, you have a newspaper published in Columbia.

The Court: What about the proposition there when it gets down to the same towns?

[fol. 836] Mr. Raferty: In the same way, two towns same size.

The Court: In two shows, in one show, and one gets pictures and the other can not.

Mr. Raftery: It is not a question of the other show not getting a picture: They can get pictures but may not be able to get the ones they want.

The Court: It strikes me that you could not get some of the best pictures you might as well close your doors.

Mr. Raftery: No, I know some accounts that are living and living very well.

The Court: Don't misunderstand me, I did not mean to imply that United Artists or any of the rest of them are in this class, so far in this suit.

Mr. Raferty: Your Honor I assume that you can divide [fol. 837] the audience up too much, just like you have four grocery stores one on every corner here, some one is going to fall by the wayside.

The Court: You wish to amend so as to allege that the defendant exhibitors have conspired among themselves and also operated some of their theaters at a loss for the purpose of driving their competitors out of business.

Mr. Dobey: Do you think that is necessary.

The Court: That is a question for you to make up your mind on.

Mr. Dobey: I might ask that it be considered to apply the the entire plan.

The Court: Which paragraphs are stricken out?

Mr. Mosby: Fifty to fifty-three, inclusive.

Mr. Dobey: In other words, the complaint will read as it reads now with those paragraphs stricken out, no change in the complaint is necessary, except eliminate the [fol. 838] paragraphs that have already been stricken out. The complaint may stand exactly as it is if the Court will accept our interpretation of that phrase, in the following manner, in paragraph forty-five, that it applies to the ent-re remainder of the complaint.

The Court: What do you say about it, Gentlemen?

Mr. Waller: Your Honor please, I take it that they have conspired to do these things, that they have also conspired among themselves to do it.

The Court: Yes, sir, that is what the allegation is, whether they prove it or not.

Mr. Waller: The government expressly stated they did not intend to charge it.

The Court: Well it would depend upon the construction of paragraph forty-five.

Mr. Frolich: May I say this, that Mr. Dobey's request can not consistently be applied to the language of the complaint, his statement, in the following manner, may only apply to [fol. 839] paragraphs forty-six, forty-seven, forty-eight and forty-nine. When you get down to Paragraph fifty-four Your Honor, it follows the stricken paragraphs, and says by reason of the control by the defendant exhibitors of the most desirable motion pictures, etc. The defendant exhibitors have been able; it alleges here another conspiracy, this has nothing to do with paragraph forty-five, it is an entirely separate conspiracy, he says by reason of what has been done in all these other methods, and the exhibitors have done, certain things have been done, which have resulted in a monopoly.

The Court: As I said, I think the operation of theaters, even theaters cutting prices, having bank nights, amateur nights, hot seat nights, all of that is a local proposition, local management, but when all those things taken together are sufficient to enable the exhibitors to secure from the distributors contracts giving to them preference, and eliminating of pictures for the benefit of their competitors, that is a different proposition and that it seems to me is a restraint on the purchase and shipment of films in interstate [fol. 840] commerce.

Mr. Waller: Of course it affects the shipment of films, Your Honor please, but does not make a restraint.

The Court: It restrains them from being shipped to the competitors.

Mr. Waller: Yes, to one theater instead of to another theater, which is not a restraint on interstate commerce. Mr. Dobey said it has to be a buying monopoly, and of course a buying monopoly is not a violation of either section one or section two of the act.

. . . . . .

[fol. 841] The Court: Well, I don't know. It would be practically the same theory that the Government had in the Interstate case, cited in the District Court of Northern Texas.

Mr. Waller: There are two theories of that case.

The Court: Yes, there were two theories in that case, that there was a general conspiracy. As I understand the Government doesn't claim, it is not contended that there was a general conspiracy in this case among all the distributors. In that case, there was charged a general conspiracy. There all of them imposed practically the same restrictions and the correspondence addressed to all of them, containing the same proposition. Of course, I don't know what the evidence in this case is going to show with respect to whether or not there was a general conspiracy.

Mr. Waller: That is abandoned, that is abandoned completely in this case, there is no general conspiracy in this case.

Mr. Dobey: In the interstate case, it was also held by the Supreme Court, with reference to one distributor, in certain localities, to-wit, Paramount, between that one distributor alone, and constituted a violation of the Sherman [fol. 842] act.

The Court: I am not so sure about that.

Mr. Waller: Of course, that is not what the Court held.

The Court: As I remember, the Court decided that case on the ground that it was a general conspiracy, and that was just one part of it.

Mr. Dobey: There was a general conspiracy. Yes. It was held that a conspiracy between a general exhibitor and that group of distributors, a general conspiracy existed and was a violation of the Act. As I recall reading that case, it was also held in the case that in addition to this general conspiracy, there was a separate conspiracy between the exhibitors and one distributor, to-wit, the Paramount, to restrain the distribution of that distributor's product by compelling other houses not to show that product in connection with double features, and to maintain a specific admission price. That is wholly apart from the general conspiracy in the case.

The Court: Did it hold Paramount was one of the general conspirators.

Mr. Dobey: That was a conspiracy applying to a different territory.

[fol. 843] Mr. Raftery: I would like to hand up to your Honor, the Westway case, which I have undertaken to read over night, which will shed a good deal of light on how the Interstate case was held by Justice Chestnut. It was appealed to the Circuit Court of Appeals on the opinion below and it has, also, a pretty thorough discussion of the subjects of run, and clearance, and many of those questions that are involved in this case, and I would particularly like to point out to your Honor what Judge Chestnut had to say about the Interstate case. He says: "I conclude, after a careful study of the whole opinion, that it was not the effect of the quoted provision to create new, but only to apply old, well established facts as to the anti-trust acts." As far as the Interstate case was concerned, there was no specific findings of facts. They first went up on appeal and the appellants forgot to have the lower Court make a finding of facts. So eminent Counsel were there ready to argue and were sent home by the Court. Then Judge Chestnut found a specific finding of facts.

The Court: The Court ought to know better than that.

Mr. Raftery: Government Counsel, Mr. Henderson, was it, put in this provision, it was that letter which your Honor [fol. 844] referred to and was based on the finding that

the eight distributors all agreed to insert the provision that no theater in Houston or Dallas, and a few other cities, could exhibit pictures for less than 25 cents which were shown for 40 cents down-town. In the course of the evidence it was found that the dominant exhibitor or one of the Big Five, which have been entirely exempted by the consent decree, controlled practically all second run down-town houses, and in the outlying districts they got a quarter admission. So, any exhibitor who wanted to play after the other house, had to charge a quarter if he wanted to show the pictures. Judge Chestnut, in his opinion, showed that his conscience was shocked by the situation that the man in the hovel couldn't see a good picture for a dime or fifteen cents.

The Court: I noticed that.

Mr. Raftery: That is the underlying idea. When they got up in the Supreme Court to a seven-judge bench, you have got a 4 to 3 decision; it is really a debate between Judge Roberts, who wrote the minority opinion, and Justice Stone, who wrote the majority opinion. Much of the language in Judge Roberts' opinion, where he seeks to reduce to the [fol. 845] absurd the contention of the majority of the Court, was more against the picture and the business methods of operation, than the language in the majority opinion. I remember a great deal of the debate we had before Judge Chestnut where we were trying to understand and that Judge Chestnut finally observed that Judge Roberts was trying to show the majority of the Court that, in his opinion, that was an absurd conclusion and he was trying to reduce it to an absurdity. Nevertheless Judge Chestnut took the whole case where it referred to the clearance as being illegal per se, and where one distributor made a contract with the Texas Company circuit involved, made it impossible for the plaintiff, Westway Corporation to get a picture until 14 days after the other theater, that that provision by itself was illegal per se because of the language in the Interstate case decision. That is the language that I read to your Honor. I wish your Honor to consider it.

The Court: I will be glad to have it.

Mr. Dobey: I want to point out again, that the Interstate case does involve a conspiracy between, apart from the general conspiracy, it does involve a conspiracy between exhibitors and the Paramount alone, a separate conspiracy [fol. 846] between Paramount and the exhibitors with re-

spect to certain localities. As to that locality there was no conspiracy whatsoever between the other distributors and the exhibitors, but in that locality it was simply a conspiracy between Paramount and the exhibitors, and the Court held that that conspiracy between those exhibitors and that one distributor was a separate violation of the Sherman Act.

Mr. Waller: Before your Honor looks at that, may I give you my version of what Mr. Dobey has referred to. That is, that was not a conspiracy between the exhibitors and a distributor, but the Court took one of those contracts and said "I have gone into the contract to see if the contract, standing alone, contains an auxiliary agreement which is an unreasonable restraint of trade." Of course, the question of whether a contract is in restraint of trade is an old common law proposition. We have the ten year provision not to compete. That is taken as to whether it is reasonable or unreasonable, and we have the copyright privilege which is a privilege by reason of the copyright for a certain period, and there is a provision in the licensing agreement as to what shall or shall not be done by the licensee and as to what the licensor shall do. If the copyright goes be-
[fol. 847] yond the necessities of protecting the owner of the copyright, then the Court can say it is in restraint of trade. The question is whether it is reasonable or not. You take each individual contract brought out in this case, and we have a separate lawsuit in each one as to whether that particular provision in the particular contract goes beyond the necessities of trade and is reasonable or unreasonable. It is not a question of conspiracy at all.

Mr. Dobey: Do you have the Supreme Court case there, Your Honor?

The Court: Yes sir. There is one paragraph right at the end that I had in mind. The Court said: "We think the conclusion is unavoidable that a conspiracy existed, and each contract between the Interstate and the distributors by which those products were affected by the Sherman Act." Well, that means each contract when taken all together. As a part of the general conspiracy, as I interpret it. Point out to me where you say it holds that the Paramount by itself was guilty of conspiracy.

Mr. Wright: The discussion at page 219, where the separate restraint in the Rio Grande Valley is first discussed,
[fol. 848] you will find at page 219 in the second paragraph

at the beginning of the first full paragraph on the page reads as follows: "None of the distributors yielded to the demand that subsequent runs in towns in the Rio Grande Valley served by Consolidated (one of the defendant exhibitors) should be restricted. One distributor, Paramount, which was affiliated with Consolidated, agreed to impose restrictions in certain other Texas and New Mexico towns." Those cities were entirely unrelated to Houston and San Antonio. First runs that involved the conspiracy with the other distributors, and the action of the trial court, is discussed on page 220 in the second paragraph of that page, where they say, after stating that the trial court enjoined the conspiracy with respect to runs of the chain, or Interstate for making license agreements and enforcing them. They said: "These included both the contracts of the Interstate with the distributors and the contracts between the Consolidated and Paramount, whereby the latter agreed to impose restrictions upon subsequent run theater in Texas and New Mexico served by it." That was the restriction [fol. 849] imposed by Paramount alone in the Rio Grande Valley.

The Court: Didn't that hold that was a part of the general conspiracy?

Mr. Wright: Not at all, there was no such holding in the case, because none of the other distributors had given any basis for such a holding.

The Court: In general, at one time, all of those things were agreed upon.

Mr. Wright: Not in the Rio Grande Valley. Each of the other defendant distributors in this case declined to impose restrictions, they refused to impose them, they didn't impose them. There was, of course, one possible basis for holding that there was any conspiracy between the distributors——

The Court: I understand Paramount imposed them in the Rio Grande Valley.

Mr. Wright: Yes, they were the only one.

The Court: No, it says in certain other Texas and New Mexico cities.

Mr. Wright: That refers to the Rio Grande Valley towns that are referred to there on page 219. That language is also used "in certain other Texas and New Mexico cities", and in that case "Texas and New Mexico cities" were other [fol. 850] than those involved in the general conspiracy.

The Court: I don't understand the case to hold that Paramount imposed restrictions in the Rio Grande Valley.

Mr. Wright: Yes, they were the only distributor which did. The others all declined to impose them there. The only place where there was a concern of action between the other distributors and Paramount was in the large cities of Houston, San Antonio and Dallas. But that was the territory with respect to which the general conspiracy was made. Now, with respect to these other towns in Texas and New Mexico, it was the Paramount alone who yielded to the demand; all the other distributors refused. There was, of course, no possible basis for any charge of conspiracy in granting the demand, for nobody granted it at all but Paramount.

[fol. 851] The Court: I don't get that impression of the facts from reading the bill, I mean that case. What I got was this, that they all agreed to certain restrictions in some of the larger cities in the circuit but that none of them agreed to the restrictions that Consolidated asked for the Rio Grande valley but that Paramount did agree to impose restrictions in certain other Texas and New Mexico cities which were not part of the Rio Grande valley. Now, that is the way I got it.

Mr. Wright: Whether they call it the Rio Grande valley or not, the towns in which Paramount agreed to impose restrictions were towns in which every one of the other distributors had refused to impose restrictions or with respect to those towns.

The Court: I don't understand they refused to do it. The- just didn't do it.

Mr. Wright: There was certainly nothing in the case upon which any finding could be based. There was no attempt to make a finding that the distributors, Paramount and the other distributors had conspired or agreed among themselves to impose restrictions in those other towns in [fol. 852] Texas and New Mexico, and the injunction ran, of course, as to those only against the distributor Paramount and the exhibitor Consolidated, which were the only parties that had been involved in the restrictions that were held to be illegal. Also, the court held them illegal and enjoined their renewal and the language of the court in affirming not only the injunction arising out of the general conspiracy but enjoining each contract plainly referred to the contracts that had been made between Paramount, Loews,

and Consolidated. There is no question from an examination of the whole record but what those contracts were enjoined along with the others.

The Court: All of them were enjoined. There is no question about that.

Mr. Wright: And the entire injunction was considered and expressly affirmed by the Supreme Court.

The Court: From a reading of the case once I got the impression it was enjoined as part of a general conspiracy.

Mr. Wright: I think if your Honor will read it——

[fol. 853] Mr. Raftery: I think, in fairness to us, Mr. Wright is confusing the issue of conspiracy and the overt acts that were committed under the conspiracy. The conspiracy in the other state case originally with the O'Donnell letter that O'Donnell wrote to the eight exchanges the same date, about the eight named contained in it, were a series of demands. Now, let's assume that seven of the companies complied with fourteen of the demands and one company complied with fifteen. * * * Now, they all came out with the same statement about these overt acts that they allege were committed, and one was that Consolidated, an affiliate of Paramount—and by the way the Paramount distributor they referred to has repudiated and Paramount went the whole hog and gave them everything but it was all out of one general conspiracy.

The Court: That is the expression I got from reading the case. I don't mean to say you can't have a conspiracy between exhibitors and one distributor but all I mean to say was that I didn't understand this case to hold that particular point.

Mr. Dobey: May it please, your Honor, apparently they [fol. 854] deny there can be a conspiracy to restrain or a conspiracy to monopolize the product of just one distributor and I think that is obviously unsound. The statute says, "To restrain trade or commerce." Now, the Paramount product moves in interstate commerce; The statute says to monopolize any part of trade or commerce. Paramount's produce is part of trade or commerce. Therefore, the only question involved—therefore, it seems to me to follow logically and irrevocably that there may be restraint of trade or monopolization of the product of just one distributor and the question in each case will be whether there was a reasonable restraint or reasonable monopoly.

The Court: All right. Mr. Waller do you or Mr. Armistead have anything you wish to say on this question?

Mr. Waller: No sir, I think I have stated our position.

The Court: I will pass on this in the morning.

Mr. Frolich: Your Honor please, I haven't read the case in weeks but my impression is there was a separate conspiracy between Paramount and the other group. I think that would answer it.

[fol. 855] Mr. Dobey: Whether it is a conspiracy or contract in restraint of trade, whether they call it a contract or conspiracy, doesn't make a great deal of difference, so far as I can see.

Mr. Waller: In response to that may I say this is a conspiracy case. The Government is undertaking to bring into this case, without any pleading ten or fifteen or twenty contracts, unrelated contracts, and ask your Honor as to each of those ten or twenty contracts to pass upon whether that particular contract is a contract in restraint of trade, and that depends on the reasonableness of the provision in each particular contract. There are no pleadings on that. This is a conspiracy case and not a question of ten or fifteen or twenty contracts which the Government says are in restraint of trade. Now, if your Honor should hold that those twenty contracts were in restraint of trade what would your Honor do about it? If Columbia or United Artists or Universal were parties you might enjoin them, but as to Loews, RKO and Paramount, your Honor can't enjoin them. They are neither one before the Court.

The Court: That is what the evidence shows so far.

[fol. 856] Mr. Dobey: Is that in respect to "in the following manner"?

The Court: Yes.

Mr. Dobey: The complaint as it is, is all right. It is just a question they are arguing as a matter of construction. I like the construction and think it is all right. I think the complaint is all right.

The Court: Then, I take it, you don't wish to amend?

Mr. Dobey: I think the construction is all right.

Mr. Mosby: With reference to that question, may it please your Honor, in response to one of the interrogatories propounded by, I think it was the Big Five, the question was asked, referring to Paragraph 45: "In what manner was this combination affected?" And their reply is as follows: "The manner in which defendant exhibitors combined is as

set forth in paragraphs 46, 47, 48 and 49." Now, "the following manner" then certainly could not be extended over [fol. 857] to cover paragraph 54.

Now, furthermore, with respect to paragraph 54, in response to another interrogatory they say this:

The Court: Now, were those interrogatories made before paragraphs 50 to 53 were stricken or afterwards?

Mr. Mosby: I think they were—I think paragraphs 50 to 53 were stricken probably in February or March when you had the hearing on the motion to dismiss as to the distributor defendants now in the case, and at that time I think an extension of time was given to answer the interrogatories propounded by the various defendants. And that later on these answers were made after 50 and 53 were stricken. I think I am correct about that. I am not positive. Now, that is after 50—if I am correct about that, after 50 and 53 are out. Well, they say that the manner in which the combination was effected and the conspiracy was effected has reference to 46, 47, 48 and 49.

Now, with respect to 54 they say this: "With respect to the allegation that independent exhibitors have been induced to sell their theatres to defendant exhibitors under the threat, express or implied, that if they refuse to sell defendant exhibitor would open competing theatres in the [fol. 858] same town and prevent the independent exhibitor from procuring desirable pictures, it is not claimed that the defendant exhibitors acted pursuant to any agreement with the defendant distributors but it is claimed that the defendant exhibitors have been able to eliminate competition of independent exhibitors by reason of "—what?" "of their circuit buying power, and their control of the most desirable motion picture theatres, which control was obtained by agreements with the defendant distributors, as set forth in paragraphs 45 to 53."

Nothing said there about any local tactics.

The Court: Well, I don't think that plaintiff seriously insists that they can prove or even charge in this case that the exhibitors in this case conspired with the distributors relative to putting on bank nights, hot seat nights and amateur nights for the purpose of eliminating competition. I don't think the distributors would have been interested in that and I don't understand that that is their theory of that matter at all. Is it or not?

Mr. Mosby: Then, if your Honor please, where does the conspiracy come in with reference to——

[fol. 859] The Court: I don't know; they might. They might be insisting on it.

Mr. Wright: If your Honor please, our theory with reference to bank nights and the local competitive practices which the defendant exhibitors combine with each other to use against independent competitors, obviously the distributors had no interest as such in furthering those practices, but those were practices by which this combination of exhibitors were able to eliminate competition in other towns and thereby obtain a monopoly of film licensing power in those towns, by which they were able to coerce distributors into granting them discriminatory treatment in the other situations where they had competition, so that, in turn, they could eliminate competition in other towns. Now, it is all part of one connected process. You can't possibly separate circuit buying power that we are attempting to attack in this case from the means by which they acquired it and the way it is being maintained. Of course, the fundamental means is the control of theatres, and of course, particularly the elimination of competing theatres, so that they can get single buyer in many towns and then by linking up those [fol. 860] towns in which they have a complete monopoly in buying films with towns where there may be competitors, and in turn drive out these competitors and close those towns. Now, that is the theory on which we offer the evidence with respect to local competitive practices in the towns that they went into and in the towns where an independent sought to come in against them.

The Court: Well, I think you will agree that if they had just done that and nothing more they wouldn't have violated the Sherman Act? That is, leaving out the connections and ability to buy films?

Mr. Wright: That is true, if there was nothing more.

The Court: And the violation, according to the theory of the Government, is they are to get favorable contracts from the distributors so that the Crescent shows would get all the first class pictures and the competing shows none, is that correct?

Mr. Wright: Not merely that but that is one of the many forms of discrimination in licensing films that enables them to suppress competition. That is possibly the principal one.

[fol. 861] E. W. Dozier, Witness for the Plaintiff, Resumed:

By Mr. Simon, For the Plaintiff:

Is the witness going to be allowed to testify——

The Court: Ask him the question.

Mr. Simon:

Q. I will ask you the question, whether you had any discussion with Mr. Newman about the time that contract was negotiated, about the clearance provision which appears in it?

A. Yes, sir.

Q. Will you tell me what discussion you had with him at that time?

The Court: Who is that now?

Mr. Simon: This is Mr. Newman—N-e-w-m-a-n—a Paramount salesman, in April, 1935. This contract is dated April 3, 1935.

A. Yes, sir, we discussed the number of days, first, that I should have over Madisonville, whether it would be 7 days, 14 days or 30 days; and he said that this clearance board at this time fixed those dates, that he didn't have anything to do with them, but that they would set those [fol. 862] dates and let me know, you see.

Q. I would like for all of these letters to be separately marked with the next numbers.

The Court: Who are they addressed to?

A. The first letter, from Mr. Dozier to Charles M. Ragan, Times Square, New York City. Second letter is a copy of a letter from C. M. R. to Mr. E. W. Dozier. The next one is a letter from Mr. E. W. Dozier, signed E. W. Dozier, by M. to Mr. Newman, Indianapolis, Indiana, Attention: Mr. Ettinger.

The Court: That is all right; you need not go into such detailed description. Now, I understood you to say that Mr. Newman told him that Earlington would have clearance over Madisonville, but that the Board would fix the dates, and that he didn't have anything to do with it; is that your answer?

A. Exactly; we didn't discuss anything—This is the first contract; we were discussing about the contract I was buying. This clearance board down here was the one that fixed these days, you see.

The Court: All right, mark those exhibits. (Exhibits marked).

Mr. Simon:

[fol. 863] Q. I would like to show you Government's exhibit No. 49, and ask you if your signature appears on that letter?

A. Yes, sir.

Q. Is that a letter that you wrote to Mr. Charles M. Ragan about the date it bears?

A. Yes, sir.

Q. Had you known Mr. Ragan previous to this time?

A. Yes, sir.

Q. How did you happen to know him?

A. He was in charge of the Indianapolis exchange—exchange manager there for years.

Q. For what company?

A. Paramount.

Q. The first paragraph of this letter reads:——

Mr. Armstead: I object, your Honor, that letter is a letter from Mr. Dozier to Mr. Ragan of the Paramount Company. We are not bound by anything that may be said by Mr. Dozier, what he wrote to Paramount.

The Court: Well, I don't know that he is introducing it for that purpose, but may be generally to show what happened up there with reference to this contract.

[fol. 864] Mr. Armistead: I know, but this defendant isn't bound by any conversations Ragan had with Dozier or Dozier with Ragan, or any letter that was written about it. He can tell what the situation was up there but he can't prove it by letter.

The Court: I overrule the objection.

Mr. Armistead: May I add one other ground of my objection.

The Court: Yes, sir.

Mr. Armistead: That is, that the introduction of that would be to introduce evidence which is not sworn to.

Mr. Simon:

Q. The first paragraph of this letter, Mr. Dozier, refers to Mr. Ragan's letter of August 22, with reference to the Crescent Amusement Company. You had had previous correspondence with Mr. Ragan?

A. Yes, sir.

Q. You have copies of that previous correspondence?

A. No, I have no copy of that.

Mr. Simon: Your Honor, we have asked Paramount to [fol. 865] produce that, and we are advised by the Paramount representatives that they are unable to find this previous correspondence in their files; so I would like to ask the witness to tell us the substance of that previous correspondence.

The Court: Well, that wouldn't make it competent, just because they couldn't find it in their files; they are not entered here as defendants.

Mr. Simon: But they are co-conspirators; and we subpoenaed those letters, and they have not been able to find them.

The Court: Well, I think the letter that you have there speaks for itself, as to what they were writing about.

Mr. Simon:

Q. Well, will you tell us, then, why you wrote this letter?

A. I wrote him to ask him about their product for 1935-1936.

Q. And why did you do that?

A. Because I was uneasy; I didn't know as to the situation; I didn't know whether I would get the product or not, you see.

[fol. 866] Q. What made you uneasy?

A. Well, the Crescent was going to come in, as I understood, and I was trying to protect myself as far as that was concerned. I didn't mention that factor in the first letter.

Q. Did you receive an answer from Mr. Ragan?

A. Yes, sir, I did.

Q. Do you have that answer?

A. No, sir, I haven't got that here.

Q. I would like to show you Government Exhibit No. 50, and I will ask you if that is an answer that you received to the letter I just showed you?

A. Yes, sir; as I recall that, that is the letter I received.
Q. I would like to read Government's Exhibit No. 50.

The Court: Is that in answer to the letter you have just examined him about?

Mr. Simon: Yes, sir.

The Court: You haven't offered that in evidence yet?

Mr. Simon: No, I am going to offer both letters together. [fol. 867] Mr. Armistead: We object to it, in the first place, that letter is immaterial; and I renew my objection there about introducing letters passed between Mr. Dozier and Paramount or any other company. He could sit down there, may it please the Court—I am not saying Mr. Dozier did this, but just using this as an illustration—sit down and write Paramount a letter, and Paramount write him a letter and say Crescent Amusement Company ought to have its throat cut. Now, I certainly ought to have an opportunity to be there to see on what they base that, to cross-examine, to find out something about it. They have introduced a letter here from a man who has not testified in this case and I don't know whether he will or not; and I certainly have a right to cross-examine him.

The Court: As I understand, that is a letter that was written by the witness?

Mr. Simon: Yes, sir.

The Court: Now, you are seeking now to introduce a letter [fol. 868] to the witness in answer to the first letter?

Mr. Simon: Yes, sir, I am; this is a letter written by an agent of one of the co-conspirators, Charles M. Ragan, whom I think at that time was Assistant National Sales Manager of Paramount.

Mr. Waller: If your Honor please, we don't object to the fact that the witness got the letters; we only object to the letters being introduced for the purpose of showing the truth of what they contain. Here is a man writing a letter to Mr. Dozier and makes certain statements of fact. We would like to cross-examine that man as to where he got that information.

The Court: Are you going to have that witness here?

Mr. Simon: I think we are going to have Mr. Ragan here. Here is J. B. Howard and son, another one, on behalf of Paramount, and we shall probably have him here. And here is a Mr. M. Ettinger.

The Court: Of course, when you put in evidence a letter from an official of Paramount addressed to this witness [fol. 869] making statements of fact, that in effect admits the witness to testify as to those facts without the privilege of cross-examination.

Mr. Dobey: May it please the Court, isn't that the same as an admission of the immediate co-conspirator, or a declaration? This comes in subject to making out a prima facie case of conspiracy between the exhibitors and distributors.

[fol. 870] Mr. Raftery: All we are asking is that they leave Paramount out of this case, and they are burdened to bring them back here on something that is competent on his examination.

Mr. Frolich: Your Honor let all this go in the record on the ground of proving a conspiracy; there is no conspiracy so that they can show that anything that a co-conspirator, like Paramount, says is admissible, because there is nothing here to prove that Paramount is a co-conspirator, they are just talking about it.

The Court: Well I have stretched the rules of evidence pretty far in this case, I guess, I assume the letters would be as competent as statements made by officials and salesmen of Paramount. I will overrule the objection and permit the introduction of the evidence, upon the theory that a statement of a co-conspirator will be competent, and upon the contingency of the plaintiff proving a conspiracy to exist.

Mr. Simon: I should like to introduce government's ex-[fol. 871] hibit forty-nine, and put it into the record, read it into the record. Letter dated September 14, 1935.

Mr. Raferty: Your Honor I would like to join in Mr. Armistead's objection, because I think it is taking away from these defendants on this side of the table a very substantial right, if they ever did come to the position of a conspiracy in this case, which we doubt, but for the burden, shift the burden of calling these witnesses to the defendants, now the plaintiff is responsible for these defendants not being in this case, and that was why I made the objection in the morning against the assumption of that motion, that would cast the burden of proving there were some officials or salesmen of this big five, making statements or writing letters, it just makes, it just makes hearsay competent, and they say they are non-parties, but

they stress the fact that they are co-conspirators by calling them co-conspirators, and they let them out of the lawsuit, and I say to Your Honor that it is a great injustive to our clients, the fact of their having to go through this lawsuit, wiether it is on statements or letters.

[fol. 872] Mr. Frolich: I join in that objection.

Mr. Armistead: May it please the Court, may I make a general objection as to all evidence, to all future correspondence.

The Court: Yes, sir. Proceed.

Mr. Simon: Government's exhibit number forty-nine is a letter dated September 14, 1935, from E. W. Dozier to Mr. Charles E. Reagan, care Paramount Pictures Distributing Corporation, Times Square, New York City, N. Y.

"Dear Charlie: Glad to receive your letter of August 26 in reference to pending deal with Crescent Amusement Company.

"I appreciate your kind consideration in this matter, would like to know just what the outcome has been.

"I had your picture Every Night at Eight set in for Sat, Sun, Mon Sept 14/15/16 and they set it in ahead of me on an overnight notice September 11:12, at a lower admission price.

"I would appreciate a word from you telling me just [fol. 873] what the set-up is, of course it disturbs me just what the set-up is, of course it disturbs me quite a bit, as I had already had these pictures bought and a good number of them set in and you know my situation here,

Kindest regards."

Now I should like to offer Goverment's exhibit number fifty, and read that into the record. This is a copy of a letter dated September 16, 1935, with the dictator's initials CMR-F.

"Mr. E. W. Dozier, Roxy Theater, Earlington, Kentucky. Dear E. W.: I am referring your letter of September 14th to Mr. Howard our Indianapolis branch manager, for his attention.

"I am sure you will find he will give your problems the usual fair consideration to which they are entitled.

"Kindest regards."

I would like now to show you Government's exhibit number fifty-one and ask you if that document bears your signature?

A. That is not my signature, that is my name signed there by Mr. Murphy, my manager, I dictated that letter.

Q. That letter was written under your instructions?

A. Yes, sir.

Mr. Simon: I should like to offer Government's exhibit number fifty-one and read it into the record. This letter is dated September 15, 1935, addressed to Mr. Duff New-
[fol. 874] man, Care Paramount Pictures Distributing Corporation, 116 West Michigan Street, Indianapolis, Ind.

"Dear Duff: I just came back from Indianapolis last night and failed to get to see Mr. Howard.

"I talked with Ettinger, but he knew nothing of the Sudekum deal at all, so I wish you would talk with Mr. Howard and let me know the exact line up.

"I feel that this picture was set in before any deal was made, by the New York office, because you saw the letter from Charlie to me, saying that he would take care of this situation.

"The Capitol ran Every Night at Eight Wednesday and Thursday and advertised big in the newspaper to be shown at regular prices, 10-16-26¢, which has been my regular prices for several months.

"If you and Ettinger could figure out to set in for me, Two for Tonight for September 21/22/23 and The Big Broadcast the next Sat, Sn Sun and Mon, I would consider it a personal favor. You boys figure out just what you can do and write me Sat or Monday. Kindest regards."

Q. Can you tell us who the Mr. Howard you referred to in this letter is?

A. Paramount's exchange manager.

[fol. 875] Q. Who is Mr. Ettinger?

A. He is the booker.

Q. In what city?

A. Indianapolis.

Q. Can you tell me the conversation with Mr. Ettinger you refer to in that letter?

A. I said I didn't have any information at all at the office about any of that. Didn't know anything about it and would not know until Mr. Howard came back.

Q. Now I would like to show you government's exhibit number 52 and ask you if that bears your signature?

A. Yes, sir.

Q. I would like to read Government's exhibit number 52 into the record. This is a letter dated September 19, 1935, from Mr. E. W. Dozier to the Paramount Pictures Distributing Corporation, 116 West Michigan Street, Indianapolis, Indiana, Attention Mr. Ettinger.

"For your information the shorts you confirmed to me this morning, the first two Judge for a Day and Symphony in Black played Madisonville last week with Every Night at Eight.

"Referring to last paragraph of your letter in which you state Mr. Howard was writing Atlanta for information from them.

"I have a letter from Mr. Reagan dated Sept. 16 [fol. 876] replying to my letter of Sept. 14 to him, in which he states that he is turning it over to Mr. Howard, and that he would gibe me fair consideration in this matter, so please tell Mr. Howard to write me the facts just as they are, and what I can depend on as I am sure he will already have the information by the time he receives this letter.

"What I want to know if they sold protection over this town, and if so, for what lenth of time. Kindest regards."

Q. Now, Mr. Dozier, do you remember if you received a reply to that letter?

A. Yes, I received a reply from Mr. Howard a few days after that, I don't remember.

Q. You have a letter Mr. Howard wrote you in reply to that letter?

A. No.

Q. I show you Government's exhibit number 53 and ask you if that is a copy of the reply you received from Mr. Howard?

A. Yes, sir, that is the reply.

Q. I s-ould like to offer Government's exhibit number 53 in evidence and read this, it is a copy of the letter dated

September 23, 1935, addressed to Me—E. W. Dozier, Roxy Theater, Earlington, Kentucky.

"Your letter of the 19th addressed to Milt Ettinger, [fol. 877] our booking manager, has been turned over to me by him.

"Our Atlanta office has sold Madisonville, Kentucky. The first information I had of it was when I received word from our Home office as to the details. I have acquainted Duff Newman with every bit of information I have relative to the Madisonville deal and your setup. Duff tells me he plans on calling on you some time this week, and at that time will give you all the dope which I have on this matter. Our purpose is not to with-hold anything from you relative to your new setup and I think that you will find that Duff will give your problems every bit of consideration possible.

"Kindest regards."

Q. I would like to ask you, Mr. Dozier, whether in your dealings with Paramount for the Roxy theater at Earlington, you had been doing your business with the Indianapolis office, or with any other office of Paramount?

A. The Indianapolis office.

Q. Had you ever had any dealings with the Atlanta office?

A. Not with Paramount.

[fol. 878] Q. You recall booking in for your theater pictures "Annapolis Farewell," "Two for Tonight," and "Big Broadcast of 1936," and "Virginia Judge"?

A. Yes sir.

Q. Did you receive any communication from Paramount with respect to those pictures?

A. Yes sir, after, the way I remember it, after they set those in, they came along and asked me to pull them out, to take those pictures out.

Q. Do you have a copy of the letter you received from Paramount?

A. No sir I haven't a copy of that letter.

Q. I would like to show you Government's Exhibit No. 54, and ask you if that is a copy of the letter you are referring to?

A. Yes sir.

Q. I would like to offer Government's Exhibit No. 54 in evidence, and read that letter, which is dated September 28, 1935 from M. Ettinger (Reading):

"Dear Mr. Dozier: Due to selling the Capitol Theatre at Madisonville, Kentucky we have been forced to cancel the features Annapolis Farewell, Two for Tonight, Big Broadcast of 1936 and The Virginia Judge, which we had booked for your use.

We are also enclosing herewith, a new notice of [fol. 879] availability covering these productions together with other features which we have available for you. We would appreciate your favoring us with new play dates accordingly. Very truly yours"—

(Recess.)

Mr. Simon: Your Honor, I would like to call your attention to a letter, which we are offering as Government's Exhibit No. 55, from M. Brockett to Mr. Dave Prince, Paramount Pictures Distributing Corporation, Atlanta, Georgia, dated September 30, 1935.

The Court: My ruling didn't go so far as to hold letters were competent from one member of the Paramount organization to another.

Mr. Simon: Oh no, Mr. Brockett is an employee of the Crescent Amusement Company.

The Court: That is all right.

Mr. Simon: This letter says (Reading):

"Dear Mr. Prince: Please note the attached letter from our manager, Mr. Smith, at Madisonville, returning it for our files.

Please take this matter up with the Indianapolis in order that we may be assured of protection over Earlington at that point. Your attention will be appreciated. Yours very truly,"

This letter that was attached is a letter dated September [fol. 880] 28, 1935, from F. F. Smith, to Miss Mary Brockett, Crescent Amusement Company, Nashville, Tennessee, and is as follows (Reading):

"Dear Miss Mary: For your information Earlington played HERE COMES COOKIE, a Paramount New Season picture on Thursday Sept. 26th, and is also playing WITHOUT REGRET today, Sunday and Monday, Sept.

28-28-20. We have this latter picture in on Oct. 25. Kind personal regards. Cordially yours"——

I would like to offer Government's Exhibit No. 55 and Government's Exhibit No. 56 in evidence.

(Letters, respectively, marked Exhibits Nos. 55 and 56.)

Mr. Simon:

Q. You have a copy of that contract, Mr. Dozier?

The Court: It may be necessary for you to bring in some of the officials of the Paramount to prove some of these letters, if you don't have any additional proof of conspiracy, under the ruling I have made.

Mr. Simon: Has Government's Exhibit No. P-16 been offered in evidence? If it has not, I will offer it at this time.

The Court: What is the date?

Mr. Simon: That is the contract that Mr. Dozier signed on April 3, 1935, the one we have been talking about up [fol. 881] until now.

The Court: Let it be admitted. That is one of the clearance matters that would be determined by the Indianapolis Clearance Board?

Mr. Simon: That is right.

Q. Does Government Exhibit No. P-17 bear your signature, Mr. Dozier?

A. Yes sir.

Q. Is that the contract entered into by you with Paramount Pictures on or about the date it bears for their 1935-1936 product?

A. Yes sir.

Q. Does that contract cover the same seasons product as was covered by Government's Exhibit No. 16?

A. Yes sir, group S-7 in each one of them.

Q. With whom did you negotiate that contract?

A. With Mr. Newman.

The Court: What year was that, what season?

A. 1935-1936.

Mr. Simon:

Q. I note that this contract marked Government's Exhibit No. P-17 contains the words "Superseding Contract." Can you tell me what those words mean?

A. That supersedes the original contract that was written for first run, and this is a second run contract.

[fol. 882] Mr. Waller: We object to that being for second run pictures. I think the witness should explain what he means.

The Court: Does it say "Second run"?

A. No sir, it says "After Madisonville", which makes it second run by me.

Mr. Armistead: That is a conclusion of the witness.

The Court: Let him state what it says, I will construe the contract.

A. The original contract, Judge, was for four pictures at $50.00 each, and this is four pictures for $15.00.

The Court: The same pictures?

A. The same pictures, yes sir.

Mr. Simon:

Q. Do you know why Paramount allowed this reduction on the same pictures?

Mr. Rafrety: This is the sort of evidence that we think Paramount should cover.

Mr. Simon: All right, we will withdraw that question. We will offer in evidence Government's Exhibit No. P-17. I should also like to offer in evidence Government's Exhibit No. P-18, the contract between Paramount Pictures and Crescent Amusement Company, dated 8/22/35, for the Capitol Theater at Madisonville, Kentucky.

(Exhibits marked Exhibits Nos. P-17 and P-18, respectively.)

[fol. 883] Mr. Simon: I would like to call your Honor's attention to the clearance provisions of this contract, which reads—This is Exhibit P. 18. (Reading:) "Clearance: None. To play ahead of Earlington, Kentucky, provided Madisonville plays within 60 days of National Release."

Mr. Simon:

Q. Referring to the negotiations of the contract, which has the words, "Superseding Contract", marked on it, Mr. Dozier, did Mr. Newman tell you why Paramount was allowing you those reductions?

Mr. Armistead: We object.

The Court: Overrule the objection.

A. Because of the difference in the value of the pictures to my town and because they had sold the first run to Madisonville and left me second run, so, consequently they reduced the price per picture.

Mr. Armistead: I object to the witness stating that those pictures he was accepting and that are called for in this contract, in Earlington, were second run pictures. That contract speaks for itself. He says "Second for Madisonville." It applied as behind Madisonville.

The Court: Yes.

The Witness: The situation of Madison and Earlington [fol. 884] was one proposition. If you paid the price, then the first run included Madisonville and Earlintgon, if I didn't get the first run, they were second run almost the same as if they were in the same town.

The Court: I see what you had in mind.

Mr. Simon:

Q. Does Government's Exhibit P-19 bear your signature?

A. Yes, sir.

Q. Is that a contract that you entered into on or about the date it bears, for Paramount Pictures for the 1936-1937 season?

A. Yes sir.

Q. Whom did you negotiate that contract with?

A. Mr. Newman.

Q. Did you have any discussion with him with regard to the clearance clause that contract bears, at the time it was negotiated?

A. Yes sir.

Q. Will you please tell us what conversation you had about that?

Mr. Armistead: Objected to.

Mr. Simon: Now, I am trying to develop the negotiations leading up to the putting of that clearance clause into the contract.

Mr. Frolich: We will object to that.

The Court: Overruled. Go ahead and state what you were negotiating for.

[fol. 885] A. This contract here was to be a first run contract, if Madisonville didn't buy the pictures. If Madisonville should buy them, I was to supersede it, the same as I did the year before, 1935-1936.

The Court: Is that what it says?

A. If Madison buys F-8, this contract is to be superseded, as was S-7, Dawson Springs and Madison.

Mr. Simon:

Q. This is 1936-1937 product and the other was 1935-1936?

A. Yes sir.

Q. The question I meant to ask you was, whether prior to the time Mr. Newman wrote that clause into the contract, you had any discussion about that provision?

A. Yes sir.

Q. Will you tell us what the discussion was?

A. Well, the whole discussion was that I was to get pictures ahead of Madisonville, but he wouldn't sell them to me first run, so, he said, if we don't sell Madisonville, why then this will be a first run contract, if we sell Madisonville, then we are to write a superseding contract at a lower price per picture.

The Court: That is what the contract says?

A. That is right.

Mr. Simon: I would like to offer Government's Exhibit P-19 in evidence.

(Exhibit marked Government's Exhibit P-19.)

[fol. 886] Mr. Simon:

Q. Does Government Exhibit P-19 contain your signature?

A. Yes.

Q. Is that the contract you entered into with Paramount for their pictures for their 1937-1938 product?

A. It is.

Mr. Simon: I would like to call your Honor's attention to the clearance provision in this contract, which reads: "Clearance: Over Dawson Springs and Madisonville, Kentucky; 30 days over Earl Theater, Earlington."

The Court: Do you mean Paramount gave the clearance over Earl Theater in that year, which was the last year you had a contract with Paramount, and gave the witness' theatre, the theatre belonging to the witness over the Earl Theatre?

Mr. Simon: That is right. Now, there are *tow* things: first of all, they gave the witness' theatre clearance over

Madisonville, they also gave his theatre clearance over the new theatre that the Crescent was putting into Earlington.

The Court: What is the purpose of introducing that evidence?

Mr. Simon: We are introducing that to show that in 1937-38 season, when Paramount wasn't able to get together on a deal with Crescent, Paramount sold its pic- [fol. 887] tures to the witness with clearance over Crescent, and in just a moment, we are goin*t* to introduce the contract of the next season, S-10, under which contract, the clearance was taken away from the witness and on the contract, Madisonville was given, was clearance over the witness.

The Court: I don't see that helps your case a great deal. They took it away one year and gave it back the next year. How does that help the Government's theory that Mr. Sudekum was able to get it all the time in preference to the other?

Mr. Simon: He was able to get it all the time he wanted it, but in the year 1937-1938, Crescent didn't play Paramount pictures anywhere in its circuit until very — later in that season and when Paramount entered into a five-year contract with Crescent. Now, that franchise, in addition to the other Crescent towns, included Madisonville, Kentucky for the 1937-1938 season, and subsequent seasons. We are goin*t* to introduce that franchise in evidence in a day or two. But inasmuch as Paramount has already sold its pictures in Earlington to Mr. Dozier, and had a contract with Mr. Dozier, they didn't do the same thing that [fol. 888] year as they did in 1935-1936, take the contract away after they had entered into it with him, they permitted Dozier to play out the pictures on that contract, then the next year there, 1938-1939 season, he was able to,——

[fol. 889] The Court: That is a matter of argument.

Mr. Waller: We object to the statement of counsel.

The Court: He is not making a statement; he is just arguing the case.

Mr. Waller: In other words, there is a provision in this contract that has not been called to your Honor's attention that we want to call to your Honor's attention later on.

The Court: All right. I will hear you.

By Mr. Simon:

Q. Does Government's Exhibit No. 57 contain your signature?

A. Yes sir.

Q. Is that a letter that you wrote Mr. E. J. Barnard on or about the date it bears?

A. Yes sir.

Mr. Simon: I would like to read Government's Exhibit No. 57, a letter dated February 8th, 1937 to Mr. E. J. Barnard, Paramount Pictures, Inc., 116 West Michigan [fol. 890] Street, Indianapolis, Ind.

"Dear Mr. Barnard:

I have not heard from you since I talked to you in your office a few weeks ago about a three or five year franchise for Earlington, Ky.

I wrote Mr. Reagan a letter to the New York office regarding the franchise I talked to you about, but I have not heard from him yet. I did receive a letter from New York office acknowledging receipt of letter and said the letter was being forwarded to Mr. Reagan at Indianapolis, Ind. and while there he would talk to you in regard to this franchise.

So please let me know what has been done.

Yours truly, E. W. Dozier."

Q. Did you receive an answer to that letter, Mr. Dozier?

A. Yes sir.

Q. Do you recall who the answer was from?

A. Yes, it was from the branch manager, Mr. Barnard.

Q. Do you have the answer?

A. No, I haven't got a copy.

Q. I show you Government's Exhibit No. 58 and ask you if that is copy of the answer that you received from Mr. Barnard?

A. Yes sir, that is it.

Mr. Simon: This letter is addressed to Mr. Dozier and [fol. 891] it is a reply to the letter of February 8th.

(Reading:)

"Replying to your letter of February 8th, we should like to advise that the company does not look favorably upon franchises, as a matter of policy. I did

not get a chance to discuss this matter with Mr. Reagan when he was here, due to the press of other matters and the fact that he had only a very short time to spend here. However, I am communicating with the Home Office in an effort to find out whether or not they will consider changing their attitude in regard to your franchise. I do not, however, hold out any hopes along those lines. Nevertheless, I will try to give you something definite within the next two weeks. Kind regards.

Yours very truly, E. J. Barnard, Branch Manager."

Q. Now, did you receive a further letter from Mr. Barnard?

A. Yes, I received a letter sometime later on, stating the fact that the New York office——

Q. Well, just a minute. Do you have that letter?

A. No sir.

Q. I show you Government's Exhibit No. 59 and ask you if that is copy of the letter you later received from Mr. Barnard?

A. Yes sir.

Mr. Simon: This letter states:

"Dear Mr. Dozier:

[fol. 892] "As I anticipated, our Home office, as a matter of policy, does not wish to make more than a one-year deal in any situation the size of Earlington. I realize that this does not solve your problem, but unfortunately, there is nothing that can be done about it.

"Kind regards.

Yours very truly, E. J. Barnard, Branch Manager."

Mr. Simon: I would like to offer Government's Exhibits 57, 58 and 59.

(Papers so filed and marked.)

Q. Does Government's Exhibit No. P-21 have your signature on it? (Showing paper to witness.)

A. No, that is my manager there, Mr. Murphy signed it.

Q. Is that the contract that your corporation, the Roxy Theatre Company, entered into with Paramount for their pictures for the 1938-1939 season?

A. Yes sir.

Mr. Simon: I would like to call your Honor's attention to the provisions of this contract for the 1938-1939 produce. This contract says: "Available 14 days after Madison-
[fol. 893] ville."

Mr. Simon: I would like to offer Exhibits P-20 and P-21 in evidence.

The Court: Well, that is the 1938-1939 season?

Mr. Simon: That was the 1938-1939, the last one.

Mr. Raftery: There is something else on there about clearance?

Mr. Simon: Yes.

Mr. Raftery: You had better read that.

Mr. Simon: I will be glad to read that. There is also another clearance provision in here which provides—these provisions are somewhat separated. The other provision says "Sixty days over Earlington; available fourteen days after Madisonville."

Q. Does your signature appear on Government's Exhibit F-4? (Handing paper to the witness.)

A. Yes.

Q. With whom did you negotiate that contract?

[fol. 894] A. With Mr. Landis and Mr. T. O. McLeester.

Q. Is that a contract for the exhibition of Fox pictures for the 1935-1936 season?

A. Yes sir.

Q. In the Roxy Theatre?

A. Yes sir.

Q. Prior to the time you executed that contract had you had any discussion with any agent of Fox about their 1935-1936 product?

A. Yes sir.

Q. Who was that agent?

A. I don't know whether it was Mr. Coleman or McLeester. I imagine it was Mr. McLeester. It was one that he made.

Q. Where did that occur?

A. At my theatre at Earlington.

Q. Will you tell us what that conversation was?

A. Well, about the only thing they would say, they didn't know whether they were going to get together with the Crescent Amusement Company or not; if they didn't I would have a chance to get the pictures.

Q. When was your next conversation with an agent of Fox about the contract?

A. I would watch to see whether they did and they didn't play any pictures, so right after the first of the year I [fol. 895] made a trip to Indianapolis to see about the pictures and saw the branch manager, Mr. Lansden, and Mr. McLeester, the salesman was there too. I met him there.

Q. Were you able to buy Fox pictures for the 1936-1937 season ahead of Madisonville?

A. No, it was the 1935-1936 I bought ahead of Madisonville?

Q. How about the 1936-1937 season?

A. I didn't get a chance to buy them. They sold a franchise or sold them away from me.

Mr. Armistead: I haven't been objecting because I think we have a general objection in to any testimony of any of these film salesmen or representatives of any of these distributors or producers——

The Court: All right. Let the record show a general objection.

Mr. Waller: I think this objection should go a little further. They use the word "agent." Formerly they said "film salesman" and now they call the film salesmen agents, convert them into agents.

Mr. Simon: I think we can understand that wherever [fol. 896] we have been using the word "agent" we mean film salesmen.

Q. Did you have any discussion with any representative of Fox concerning their 1936-1937 product?

A. Yes sir.

Q. Who was that representative?

A. I am sure it was Mr. McLeester. I may be wrong on that. I think Mr. McLeester was working the territory at that time.

Q. How long after the signing of this contract did that conversation take place?

A. Well, it was sometime early in the spring of that year.

Q. And what was the conversation you had with him?

A. Well, we wanted to buy pictures for another year.

Q. And that was the 1936-1937 year you refer to?

A. Yes sir.

Q. And what did he tell you?

A. Well, he said that they were not selling at that time; he would be around to see me when the proper time came and try to make a deal with me.

Q. Did he come around to see you later?

A. Yes sir. He worked that territory. He went back and forth through there and he would stop sometimes when he wasn't trying to sell pictures.

Q. And he did come back later to see you?

[fol. 897] A. Yes sir.

Q. When he came back again what conversation did you have about the 1936-1937 product?

A. Well, I just remember one conversation about it. He said he would see me at the proper time and the next thing I knew after that, why, they had sold away from me. I didn't have any chance to buy after that.

Mr. Waller: That is objected to—"sold away from him".

By the Court:

Q. Well, they sold to somebody else, supposedly?

A. Yes.

Mr. Waller: At Madisonville or Earlington or where?

By the Court:

Q. Who was it?

A. Sold to Madisonville. That is who I considered my competitor.

Mr. Simon: I offer Government's Exhibit F-4 in evidence, and also offer in evidence Government's Exhibit F-5, which was a contract between Crescent Amusement Company and Fox Films Corporation, dated 10/19/34 for the Fox 1934-1935 product, at Madisonville.

(Papers so filed and marked.)

[fol. 898] Q. Going back to the relations with Paramount again for just a moment, Mr. Dozier, did you have any conversations with any Paramount representative early in the year 1938 in regard to the 1938-1939 Paramount product?

A. Yes sir, I talked with Mr. Newman.

[fol. 899] Q. Can you recall when you spoke to him about it?

A. Well, it was early in the year, when he came by the theater and stopped there, and I asked him about the 1938-1939 product, you see.

Q. Do you recall what he told you?

A. And he told me that they had sold a branch of it, sold a branch of it, you see, and I wouldn't be able to get any more except second run, you see; he wanted to sell me second run all the time.

Q. Did you have a conversation with Mr. Barnard about the 1938-1939 product?

A. Yes; I talked to him about it.

Q. Do you recall when you spoke to him?

A. Well, it was early in the Spring; I don't know just the exact time.

Q. Of what year?

A. It was in the Spring of 1938.

Q. And where did this conversation take place?

A. It happened at Indianapolis, at the office up there.

Q. Can you tell us what was said?

A. I just told him that I would like to have their product again another year, and they said they had sold the franchise and wouldn't be able to sell me anything except second run pictures.

[fol. 900] Mr. Waller: We object to the issue of second run pictures. I don't think he has discriminated in any of his answers as to second run pictures.

The Court: You mean second run to Madisonville or second run to Earl Theater in Earlington?

A. Second to Madisonville. I didn't consider the Earl. If you get the first run pictures you could run your theater; if you couldn't get the pictures you couldn't.

The Court:

Q. Did he state to whom he sold this franchise?

A. To the Crescent Amusement Company.

Q. For Madisonville or——

A. For Madisonville.

Q. When was that in 1938?

A. It was in the Spring of 1938, the way I remember it.

Q. Now, when he told you he could only sell you second run pictures, for that reason, did you understand that he meant he could only sell you second run pictures to run behind Madisonville?

A. That is right, yes, sir.

Mr. Simon:

[fol. 901] Q. In Government's Exhibit No. 60, is the signature of B. S. Murphy made under your direction?

A. I either dictated the letter or gave him the language of the letter I wanted him to write, you see. I believe I dictated that letter.

Mr. Simon: I offer in evidence Government's Exhibit No. 60, which is a letter to United Artist Corporation, 408 North Illinois Street, Indianapolis, Ind.

"Attention Mr. Rosenthal

DEAR MR. ROSENTHAL:

We understand that United Artist has been unable to get together with the Crescent Amusement Co. on your 1937-1938 product.

If this is true you have about 8 or 10 pictures that we could use if we can get these pictures right where we can make some money on them and that we be served out of the Indianapolis office, as the express and parcel post rates are too high for us to consider being served out of the Atlanta office.

Please advise us in regard to the above.

[fol. 902] Yours truly, Roxy Theater Company, Inc., B. S. Murphy, Manager."

Subsequently, did you enter into contracts with the United Artists for some 1937-1938 pictures?

A. Yes, sir.

Q. Was Exhibit No. 61 written under your directions?

A. Yes, sir.

Q. This is a letter from B. S. Murphy, Manager Roxy Theater Co., Inc., to Mr. M. Kruger, United Artist Corporation, 408 North Illinois Street, Indianapolis, Indiana.

"DEAR MR. KRUGER:

Mr. Dozier instructed me to write you relative to waiving the protection clause in the contract that was signed by him a few weeks ago.

We are waiving this clause as per your phone conversation with Mr. Dozier made with the understanding that we play these pictures on the 'nose', which

we want to do, and if your booking department will shoot them to us we can date same.

I am sure this contract will go through under the above conditions, and if you are going to have any [fol. 903] pictures available soon, send me availability list and I will submit dates.

Now, what season's product does that letter refer to, Mr. Dozier?

A. That would be the 1938-1939 product.

Q. Will you tell us about the telephone conversation with Mr. Kruger that that letter refers to?

Mr. Raftery: He is asking this witness to tell a conversation between a man named Kruger and a man named Murphy.

Mr. Simon: No, between Kruger and Dozier.

A. As to what conversation I had; Mr. Kruger called me from Indianapolis and said that it was impossible for him to write the protection clause in the contract, and since he hadn't sold the Crescent Amusement Company at that time, he was sure they wouldn't, and for me to go ahead and let them put the contract there without the protection clause, he would get it approved and get to serving some pictures right away. That is what Mr. Murphy meant there about playing on the nose; and I did consent to that, and they put the contract on through without interference; and it just so happened that it was the same as a first run contract.

[fol. 904] Mr. Simon: Due to the witness' statement, he said—it was a little inaccurate when he said Crescent didn't buy them; I believe there were some pictures bought this year, with the Crescent people ahead of the Roxy. I was already going to develop that.

A. That might be true; I can't recall exactly what did happen.

Q. Do you recall the picture "Stage Coach," Mr. Dozier?

A. Yes, sir.

Q. Do you recall having any discussion with anybody at United Artists about that picture?

A. Yes, sir, after we had bought the product——

Mr. Raftery: What year did he say this contract was?

Mr. Simon: 1938-1939 season.

A. After we permitted them to put that contract through, we played on during the year with a date, a number of pictures, and without notice in advance, we had "Stage Coach" set and advertised about Thursday I noticed the Capital began to advertise the same picture I had, about at the same price, I am sure, but it wasn't on the same day of the week we played.

[fol. 905] The Court: Before you or after you?

A. Just before, or at the same time we played; I don't recall; I believe we went on Saturday, and I think they went on Sunday, Monday and Tuesday.

Mr. Raftery: Was there such a clearance run, when your contract was produced, when the man had no clearance on the contract that he objected to?

A. I objected to it immediately and I paid for the cards I put on it.

Q. Did the same thing happen with respect to the picture "Cap and Furry?"

A. I don't recall that.

Q. What about the picture "Wuthering Heights"?

A. "Wuthering Heights," they bought four pictures ahead of me; I don't remember definitely; but they played before, ahead of me; I am positive of that.

Q. Do you have a letter to Mr. B. S. Murphy, dated June 27, 1939, from Mr. Frank of the United Artists Corporation (handed to witness)?

A. I have got a few letters here.

Q. Will you mark as Government Exhibit No. 62 a letter that Mr. Murphy received from Mr. Frank, of the United Artists Corporation?

[fol. 906] A. Yes, sir; I saw that letter.

Q. I think there are only two paragraphs of this letter that——

Mr. Raftery: Is that the same letter?

Mr. Simon: Yes.

Mr. Armistead: Read the whole letter.

Mr. Simon:

Q. The letter reads as follows: It is a letter from G. R. Frank, dated June 27, 1939, to Mr. B. S. Murphy, of the Roxey Theater: (Reading:)

"Dear Mr. Murphy:

Mr. Kruger is enroute to your situation in order to clear up your playdate situation once and for all.

However, we want to specially call to your attention that our approval definitely did not specify clearance over Madisonville, and your letter of September 8th acknowledged the fact that the Earlington contracts did not stipulate clearance over Madisonville.

[fol. 907] Certainly United Artists has given you every possible break, as for our company to deliver pictures to you against a big circuit on an equal basis, is showing you our willingness to appreciate your problem and give you complete cooperation. We therefore want you to sit down with Mr. Kreuger and work out the playdates on those pictures that are in question, without fail.

Sincerely yours, United Artists Corporation."

[fol. 908] Mr. Simon: I offer this in evidence as Government's exhibit number 62.

The Court: Any more evidence along this line for United Artists.

Mr. Simon: That finishes that.

Mr. Dozier, the witness: Judge, I would like to say something, I don't know whether he wants it or not, in regard to that situation there.

The Court: You want to examine him about that?

Mr. Simon: No, not now.

The Court: What is the use of cluttering up the record with a lot of immaterial matters here, so far as this United Artists incident is concerned, I do not see any significance in it one way or the other. He asked for protection and they declined to give it to him when he signed the contract.

Mr. Simon: We think the paragraphs of the letter show [fol. 909] in substance some facts we are going to show.

The Court: That is all to the benefit of the United Artists. If I had been them I would have put them on as testimony for the defendant.

Mr. Simon: We think that paragraph is not.

Mr. Raftery: Oh.

The Court: All right.

The Witness: Judge, may I say one word?

The Court: Your counsel have asked you the question.

Mr. Simon: I would like to know if there is any more cor-

respondence that you have had with Warner Brothers with respect to the 1936-37 product?

A. I have one letter, two probably.

Mr. Simon: Will you mark these with the next government's exhibits please? (Marked by the clerk.)

Q. While he is marking those, Mr. Dozier, will you *you* [fol. 910] permit me to ask you about something else, at the time the Earle theater in Earlington was opened, were you operating a bank night at your theater?

A. Yes, sir.

Q. And what was the initial pot on bank night you were operating?

A. We started out with twenty-five dollars.

Q. How many days a week were you running bank night?

A. Tuesday night.

Q. And when the Earle theater opened, how many nights a week did they have for their bank night?

A. For a short time they operated one on Tuesday night.

Q. Just what did they do then?

A. They advanced up to two nights a week.

Q. What was the initial pot they offered?

A. A hundred dollars, put it on the same night that I had mine.

Q. They put theirs?

A. Yes, sir.

Q. Did that affect your business?

A. Yes, sir, quite materially.

Q. I show you government's exhibit number 63 and ask you if this is a copy of a letter you wrote to Warner Brothers Pictures on or about the date it bears?

A. Yes, sir.

[fol. 911] Q. This letter reads.

(Reads letter.)

Q. I offer that in evidence. Did you receive a reply to that letter?

A. Yes, sir.

Q. Is that the reply you received, Government's exhibit number 64?

A. Yes, sir, that is right.

Q. Did you also receive this further answer from Warner Brothers in reply to your letter, which is Government's exhibit number 65?

A. Yes, sir.

Q. Government's exhibit number 65 is a letter from G. C. —— branch manager, to Mr. E. W. Dozier, dated January 18, 1937. (Reads.)

Q. Had you ever played Warner Brother's pictures in your theater before?

A. I do not recall playing but just one.

Q. On what occasion was that?

A. It was an occasion we had that flood up there and all the films were stranded in the territory and I played one picture, Three Men On A Horse.

Q. I would like to offer in evidence Government's exhibits 64 and 65, and also like to offer in evidence Government's exhibit Number W.2, which is a contract between [fol. 912] Rockwoor Amusement Company and Crescent Amusement Company for the theater at Earlington Kentucky.

The Court: For what?

Mr. Simon: Between Rockwood and Warner Brothers for the new theater at Warlington, Kentucky.

The Court: What do you want to put Warner Bros. correspondence in, what is the purpose of that? I do not see any significance to that, why fill up this record with a lot of things that do not mean anything one way or the other, immaterial matter, lets get down to the real issues in this lawsuit.

Mr. Simon: I think that Warner Brothers correspondence is significant.

The Court: It looks like and sounds like sales talk to me.

Mr. Simon: In the second place they had a contract with the new theater in Earlington, Kentucky, at least an application dated January 15, 1937.

[fol. 913] Mr. Armistead: Was it accepted, it wasn't accepted, was it?

The Court: That is all? Do you offer that in evidence?

Mr. Simon: I should offer this in evidence, exhibit W.2. This is the contract for Warners.

The Court: Do you make that an offer?

Mr. Simon: I withdraw this exhibit and also those two letters.

Mr. Armistead: If he is withdrawing them, I am going to put them back in.

Court thereupon adjourned.

[fol. 914] Volume Six

Tuesday, July 15, 1941

The Court: I would like to know, if you gentlemen can enlighten me, with regard to the findings in other District Courts on the question we had up yesterday afternoon.

Mr. Raftery: The question was up in 113 Federal Circuit. And also was followed by Judge Kellogg, the other case in Chicago, who made practically the same identical findings of fact and conclusions of law that were made in that case; that is, the same reasoning; went up on appeal and was just recently affirmed on appeal in that circuit; that is, within the past six months.

The Court: I was interested to know the findings in that case.

Mr. Raftery: That is right, that is the reason I mentioned it to your Honor yesterday, on account of the extraordinary view the Government was taking in the Interstate case.

Mr. Wright: If the Court please, we didn't quite hear the [fol. 915] citation he was referring to; was that the Westway case in Baltimore, the one your Honor mentioned?

The Court: Yes.

Mr. Wright: In that case, I think your Honor will recall that Judge Chester devoted a great deal of space in his opinion to the particular clearance that was shown in that case. Of course, there wasn't any necessity for him to go into the reasonableness of the clearance, for he took the view as a matter of law that there couldn't be any violation by the one distributor imposing any reasonable clearance with respect to a certain situation, because he said then there was nothing to indicate any conspiracy between and of the distributors. Then he reviewed the facts very carefully and reached the conclusion as to each particular clearance which each distributor had given.

The Court: Well, he did differentiate the question in the Westway case from the question in the Interstate case, on [fol. 916] the ground that there was concerted action in the Interstate case between the distributors and exhibitors, and nonconcert of action in the Westway case.

Mr. Wright: That is my point; he didn't stop there but went on and found it necessary to differentiate between particular instances, and the theory on which he did that

was the violation would have occurred if a single distributor had caused a violation of——

The Court: I think the particular facts in each case are necessary to determine the question.

Mr. Wright: There is no question about that. It is certainly true that each clearance case depends upon the facts in which the clearance was made. I don't think there is any question under the Interstate case or under the other case; both Judge Harlan's opinion in Chicago and Judge Chester, considered the question of the distributor, whether the distributor caused unreasonable clearance. That is, of course, the theory on which unreasonable clearance is arbi- [fol. 917] trated in the consent decree; there is not any necessity for any injunction against a conspiracy there whatsoever between distributors; but the distributor has the right to come in and, with respect to any single distributor, arbitrate the question whether or not that distributor has or has not imposed unreasonable clearance with respect to his pictures. I think certainly that has been understood to be the law by all parties to that situation. I do not think any of these cases that were decided indicate any view of the law with respect to when an unreasonable clearance has been taken by any District Judge.

The Court: It comes back to the facts.

Mr. Raftery: In the majority opinion in the Interstate case the Court in effect said a distributor could independently and separately sell an exclusive run in any given situation. That would mean that a second run with agreement not to be exhibited again anywhere in the State of Tennessee; that is what exclusive run means. So I can't follow. If you have a right to sell exclusively under the [fol. 918] law, you certainly would have the right to sell any clearance you want to sell. There is no evidence of any offer as yet as to any unreasonable clearance there, as to duration and when. The nearest approach to a long clearance came out yesterday, when this gentleman took 60 days clearance for his theater in Earlington over his competitor, the Earl, the Sudekum house; that is the longest clearance that I have heard so far in this case.

The Court: All right, Mr. Waller.

Mr. Waller: I want to say this, your Honor, that assuming Mr. Wright is correct in his theory, that we can take each of these contracts that may be brought into this case and go into each one of these contracts and find out whether

those clearances are reasonable or unreasonable. Suppose your Honor finds some contracts are unreasonable, what can your Honor do about it? These contracts have expired; these parties to the contracts are not before the Court, and there is nothing that your Honor can do about those contracts in this case. And this case isn't a conspir-
[fol. 919] acy case as far as the distributors are concerned; that is out of the case.

The Court: You mean so far as the distributors as a group are concerned?

Mr. Waller: Yes, sir, so far as the distributors as a group are concerned.

The Court: Now, as I understand, it is the defendants' theory in this case that the restrictions imposed are not unreasonable, because of the fact they were imposed on the defendants.

Mr. Waller: Even if they were, that is not a conspiracy; a contract between an exhibitor and a distributor as to clearance is not unreasonable. Unless they can be tied up with a conspiracy among the distributors they don't belong in this case.

The Court: It could be brought in under section 2 of the act, could it not?

[fol. 920] Mr. Waller: No, of course not; section 2 of the act prohibits the monopolization of interstate commerce. Now, a bunch of distributors who had control of a large percentage of the distribution of films, could get together and monopolize the supply of films; but one of those distributors couldn't possibly monopolize the supply of films. Now, the only people that could monopolize the supply of films would be the distributors and the only way they could do that by monopolization would be to buy them.

[fol. 921] The Court: They follow the words of the statute, in commerce, means any particular item of commerce.

Mr. Waller: Yes, in other words, monopolizing has the same meaning.

The Court: Does not mean any small part, any particular item.

Mr. Rafferty: Judge Stone in the — case I think pretty well disposed of that.

The Court: All right, proceed with the witness.

Cross-examination.

By Mr. Armistead:

Q. Mr. Dozier, I believe you stated on yesterday that the population of Earlington was about three thousand?

A. About thirty-two hundred, that is what their signs say, I don't know the population.

Q. And the population of Madisonville was about ten thousand?

A. Yes, sir.

Q. Those two towns are just three miles apart?

[fol. 922] A. Between three and four, yes, sir.

Q. Now that theater in Madisonville, the Capitol theater, was the one in which you at one time were interested?

A. Yes, sir.

Q. I wish you would describe the size of that theater, the number of seats it had in it?

A. I think eight hundred.

Q. Did it have nice rest rooms, nice seats, good equipment in it?

A. Yes, sir, reasonable equipment and reasonable seats and rest rooms too.

Q. And nice outward appearance?

A. Yes, sir.

Q. Well managed?

A. Yes, sir.

Q. Now this theater that you constructed in Earlington had how many seats in it?

A. Between five and six hundred, I do not remember exactly.

Q. But that was not as large a theater building?

A. No, sir.

Q. As the one in Madisonville?

A. No, sir.

Q. Now you and the Crescent Amusement Company owned that Capitol theater at one time—that was a corporation, was it not?

[fol. 923] A. Yes, sir.

Q. And you sold that stock to Crescent?

A. Yes, sir.

Q. May I ask why you did that?

A. Why I sold the stock?

Q. Yes, sir, was it because of the depression through there?

A. It was because that theater was not properly financed. Mr. Sudekum said it was not necessary, that the Sumner Construction Company built the theater, from this city here, and they could carry along without properly financing, and of course then when the crash came, why we had a note in this town for about seventeen thousand dollars in one bank and this bank was taken over by another bank, and then they called on us for the money, see, and it was necessary for us to get up that money to pay that off, and Mr. Sudekum said get up your money my half and he would get up his and we would pay it off, we would pay the note off, but at that particular time it was hard to get money, and you had to put up three or four to one to get it, and so I sold my interest out at a small amount, because I would have to sacrifice too much in order to get the money, in the first place, the only reason I had taken him in and built the other theater was financing, and I needed him for nothing else than that. I thought he was the one that should have carried on the financing as we started it.

[fol. 924] Q. Now as a part of that agreement to sell to him, you obligated yourself not to compete with the Crescent company in Madisonville?

A. That is correct.

Q. Was Earlington big enough for a theater?

A. Well there had been one over there for years, operating once in a while, so Mr. Sudekum didn't, and then the theater would close up a while, so Mr. Sudekum didn't think it was big enough, I thought it was big enough for a small theater over there, to make a reasonable amount of money.

Q. Now after you started to operating that theater in Earlington, didn't you advertise your shows and pictures in Madisonville, Kentucky?

A. Yes, sir, they had the only newspaper we had in the county out there, see, probably one at Dawson Springs, but that was in the western part of the County.

Q. So you were competing with Crescent Amusement Company in Madisonville?

A. I think I had a right to advertise in the papers, put my cards in Madisonville and Earlington and Dawson Springs, they were all near Earlington, and I thought it was all right to put my cards in Madisonville.

Q. Was your Earl theater—so your Earl Theater was competing with the Capitol theater at Madisonville?

[fol. 925] A. If you call that competing.

Q. Don't you think that it took some business from it?

A. Took quite a bit, yes, sir.

Q. Coming back to these Paramount contracts; you, started you theater on May 12, 1932? I believe?

A. That is right.

Q. And started using Paramount products at that time?

A. That is right.

Q. Did you have any understanding with Paramount that if it sold its films in Madisonville, that Madisonville would have a prior run over Earlington?

A. Well the way I remember it there was nothing in the contract, the first conference was written out if Madisonville, if they should write a superseding contract,—I do not have the first two or three contracts, I do not have those first contracts, they were written.

Q. It was not in the contract, but there was a tacit understanding between you and Paramount that if Paramount films were sold to Madisonville, that it would have a right to show those films prior to Earlington?

A. No, that was not the understanding.

Q. How about this 1935-36 contract with Paramount, was that modified later on, it was, was it not?

A. Yes, sir.

Q. Why was that done?

A. Well because they sold them away from me to Madi-

[fol. 926] sonville. I needed some pictures and there wasn't anything I could do, it just—of course my contract was for a first run for the situation down there, and when they sold Madisonville, that depreciated the value of my pictures at least my part of the playing of the pictures, seventy-five per cent, and they gave me a reduction of about that amount, see?

Q. If you had a contract with Paramount that you had a right to exhibit films in Earlington prior to the exhibition of them in Madisonville, why didn't you stand up for your rights?

A. Well whenever you go to suing a picture concern, you don't get very far, so the people you do business with, I have been in business with Paramount for years, and *and* we want to do business with them, and I could get it back may be in years, but they had passed, I had to do the best

I could about getting pictures from then on every time I made any effort I couldn't afford for them to get mad about anything, I would have probably gotten less consideration than I did if I had got mad.

Q. Now Paramount never allowed a film, one year's films, to be exhibited in Earlington, Kentucky, during the entire time you were operating the theater there, until after you had exhibited the film in your theater, is that not correct?

A. Ask that question again, Mr. Armistead?

[fol. 927] Q. I say during the entire time you were operating the theater in Earlington?

A. Yes, sir.

Q. Paramount never allowed any of its films to be exhibited in that town until after you had shown the films in your theater, isn't that correct?

A. Well, there wasn't any other theater there to show films during the time the Crescent built the Earl, I had the only building there.

[fol. 928] Q. Well, my question was,——

The Court: His question included your Earl Theater.

A. No, the Earl didn't show Paramount pictures while I was there.

Mr Armistead:

Q. So, every Paramount picture exhibited in Earlington was exhibited by your theater.

A. That is right.

Q. Now, yesterday you mentioned that you had trouble getting product, you couldn't get product. When the opposition theater, the Earl Theater opened in Earlington, Kentucky, what product were you using?

A. When they opened?

Q. Yes, sir.

A. Well, I was using Paramount, Columbia, and Universal and probably some product from some of the independent concerns, I am not sure whether I was using United Artists or not, but I believe I was.

Q. Now then, during the entire time that the Earl Theater was in opposition to you, you continued to use Paramount, Columbia, and Universal, did you not?

A. I did not. I was using Paramount for the second run because that meant nothing to me, as a second run proposition.

[fol. 929] Q. What is that you were using?

A. I was using Paramount when they offered me a second run contract but I didn't consider that was anything—about 25 per cent of what they were when they were first run.

Q. So you were using Paramount, Columbia and Universal and you continued to use that product until you sold out?

A. Yes sir.

Q. Now, you were offered Warner's product, were you not?

A. Pardon me, I didn't get that?

Q. Were you offered the Warner product?

A. I was offered a second run proposition, perhaps, from them.

Mr. Armistead: I would like to have the letter from Warner to you, which was withdrawn, Mr. Simon, please sir.

Q. On January 18, 1937, Warner Brothers Pictures wrote you a letter as follows: (Reading)

"Dear Sir:

Your letter of January 16th at hand, and in reply wish to say that we have just consummated a deal with Madisonville, Ky. which is owned and operated by the Sudekum Circuit.

I understand Sudekum is opening a theatre in Earlington and is desirous of using our pictures there, however, I have left this town out of the deal inasmuch as I understand you are a Warner customer, and preferred to give you first preference on the product. [fol. 930] "I would thank you to advise me, by return mail, whether or not you will be interested in Warner product after Madisonville, Ky.

Yours very truly, —— ——."

Q. You received that letter, didn't you?

A. Yes.

Q. It says in here that you were using Warner product; is that correct?

A. That was not correct.

Q. Well, that you were a Warner, or had been a Warner customer, is that correct?

A. I never had been. I ran one,——

Q. Why didn't you accept that offer?

A. Because I knew that offer was not—They knew I wasn't interested in second run, they knew I was only interested in what they had sold to Crescent Amusement Company, all the film companies knew, all of them knew, what it took in my situation and that their second run didn't mean anything to me, except just to fill in pictures.

Mr. Armistead: Defense offers this letter in evidence as Defendants' Exhibit No. 34.

(Letter marked Defendant's Exhibit No. 34.)

Q. Mr. Dozier, I understood you to say a while ago, in your opinion, Earlington, Kentucky, was a big enough town for a theatre?

A. Well, I thought that Earlington and with the little [fol. 931] towns surrounding there in that part of the county, you see, that is the South part of the County, that was the situation there, with only one theater running in Madisonville and two others close over there, that there would be sufficient business there for in that territory, for another theatre.

Q. Well, had you ever endeavored to buy Warner's product for Earlington, Kentucky?

A. Well, Madisonville had that product bought when I went into business over there and my understanding was about it that they had a franchise that had been in operation for quite a while, so I was in Indianapolis a time or two and asked them about the product and they always told me it was sold to Madisonville but they would sell me second run, but I was not interested in second run.

Q. That would be first run in Earlington, wouldn't it?

A. That isn't the way you would figure that. It would be, in Earlington, but Earlington is only a part of the situation in that territory there. Second run, after it followed Madisonville, didn't mean anything to me in Earlington, that is, a feature picture. Other than that, it didn't make much difference because a certain amount of people in Earlington didn't go to Madisonville, and Western pictures and stuff like that, it didn't make much difference, but a feature picture, it made a good deal of difference.

Q. Did you buy Metro's product?

[fol. 932] A. Yes.

Q. What year?

A. Well, I tried to get it, I did get it the first year I was there, I started out, the first two pictures I ran were Metro. At Madisonville, Crescent Amusement Company hadn't bought them and didn't have them in Madisonville and I understood they hadn't been used for several years and of course a year or two I got them, in fact I wanted to use the product and started with them, and after I had been buying them, then Crescent bought them. My Second pictures was "Eminent", I ran it Saturday and Sunday and they bought it and put it in Madisonville Sunday and Monday.

Q. You and Crescent were competing with each other, you would like to show a picture that Crescent had, and Crescent would like to show a picture that you had?

A. It meant money for each one of us to get the picture first.

The Court: Was it your theory after you sold out your theatre in Madisonville, that had been running these pictures as first run, then went over and opened up a theatre in Earlington, which is close by, that the producers would have given you their product in preference to Madisonville?

A. There was sufficient product for both of us, he run one theatre and I run one and for the people as a whole to have a chance to see every good picture. They could run one [fol. 933] and I run one, there was sufficient for both theatres.

Q. How could you both run first run?

A. The pictures he ran in Madisonville I didn't buy for Earlington, and what I bought for Earlington, he didn't run in Madisonville and we would have good pictures for that community which was made by all the producers of the pictures. It was an ideal set-up for the territory up there. He was running one at Madisonville and I was running one at Earlington; of course, hardly ever a year that he buys all the product, so the people would get only a part of the product there.

Q. And the other part would be available for you?

A. Yes, the part they didn't want was available to me—yes, if they couldn't get together or didn't buy.

Q. Crescent Amusement Company in Madisonville didn't show the entire product of all those other five distributors,

I mean, of all six distributors, did it—Paramount, Metro, Fox, United Artists?

A. What years are you talking about?

Q. Any of those years?

A. From the beginning over there, they had certain products and I had certain products for Earlington, and of course what product they didn't buy, I did buy. The distributors, as a whole, gave them, at least the five major companies, they gave them the preference, they would give him the first chance to buy the pictures, and if they couldn't [fol. 934] agree, or they didn't trade with them or didn't sell them then I got a chance to buy.

Q. Madisonville was nearly three times as large as Earlington?

A. Yes sir, that is about right.

Q. Let me see if I understood correctly. Is it your idea that these distributors should have sold these pictures in Earlington in preference to Madisonville?

A. No, not particularly that. They tried to sell all of them to Madisonville first, except United Artists, pretty well, they tried to, but I don't believe Columbia and Universal, I think they stayed right off, I don't think they tried to sell Madisonville because they were getting as much out of Earlington as they would get out of Madisonville and Crescent didn't get those two products.

Q. Did you get any clearance at all over Madisonville from any distributor when the product had been sold to Madisonville?

A. No, not when the product had been sold to Madisonville, I didn't get any clearance.

Q. This clearance you got over Dawson City, how far is that from Earlington?

A. It is about 18 miles. They advertise out just — they do in Dawson Springs, which is about 18 miles away.

The Court: What size town is Dawson Springs?

A. It is about 2500, I believe. That would be my guess, something near that.

[fol. 935] Q. Now, Mr. Dozier, when you first, you and Mr. Stengel, were negotiating for the sale of the Roxy Theatre in Earlington, you didn't set any price, did you, at that time?

A. With Mr. Stengel?

Q. Yes.
A. Yes sir.
Q. You did set a price?
A. Yes.
Q. What was it?
A. $16,000.00.
Q. What did you finally receive?
A. $7,000.00.
Q. Well, that was how many years later?
A. Well, that was two and a half years, about that.
Q. Now, in this final sale, there wasn't any real estate involved in it at all, was there?
A. No sir, no real estate.
Q. Now, Crescent Amusement Company, during the 1936-1937 and 1937-1938 years was not using Paramount product in Madisonville, isn't that correct?
A. Well, they didn't use it when I went over there, they didn't use the product until 1935-1936. They used it that year then they used it in the year following, then I used it a year and then they bought the franchise.
[fol. 936] Q. To refresh your recollection, Mr. Dozier, wasn't it 1936-1937, and 1937-1938, that Crescent was not using Paramount products?
A. In Madisonville?
Q. In Madisonville, yes, they were using it in 1935-1936?
A. They were using it in 1935-1936.
Q. And the following year they didn't use it at all, isn't that correct,
A. No, they used it the next year, the way I remember, 1936-1937, and then had it one year, you see, and then sold the franchise to them. I am sure that is correct.
[fol. 937] Q. We'll straighten that out in a little bit. I think you are mistaken about that.
A. Well, I might be, as far as the dates are concerned.
Q. Now, didn't you tell Mr. Stengel to inform Tony Sudekum that if the Crescent opened a theatre in Earlington to compete with the Roxy that the Crescent certainly would have competition in Madisonville?
A. Well, the last talk I had with Mr. Stengel was in the Hotel Madison lobby and after I had withdrawn the proposition of leasing it to him for the reason that the financial statement of the Rockwood Amusement Company didn't warrant making a lease but I would lease it to the—if Mr. Sudekum or the Crescent Amusement Company would

sign the lease, but I preferred to sell it to him and let him name his own terms, and he said, no, they weren't interested but one way and that was to lease it. Of course, I told him I wouldn't lease it on those terms he suggested, see, and he said if I didn't lease it to him the Rockwood would not build in Earlington but the Crescent Amusement Company would buy a lot and they would build in Earlington and run me out of business over there. And I said if they do that I will build a theatre in Madisonville against them.

Q. In spite of your contract of agreement that you would not?

A. I said that to him but, of course, at that time it [fol. 938] was in the heat of argument and I didn't at that time think—of course, I had signed a ten year contract not to come back into Madisonville and I tried to live up to it.

Q. You say you tried to live up to it?

A. Yes sir.

Q. By opening the Roxy Theatre in Earlington?

A. Yes sir, I did, because I didn't tell him—you see, you wasn't Mr. Sudekum's attorney at that time; it was Mr. Stokes, but he had written in this contract to keep me out of Hopkins County and I talked to him and I said, yes, that was the agreement; I agreed to stay out of Madisonville. I said I might open up a theatre at Dawson Springs or Earlington for Dawson Springs wasn't open at that time. I have got to make a living from some source and Mr. Sudekum said to his attorney, yes sir, that is correct, just Madisonville; that was the deal, so the contract was written just to cover Madisonville.

Q. Mr. Dozier, referring to your contract, which has been made an exhibit—anyhow, it is the contract with Paramount and you dated April 3, 1935, which has been made an exhibit by the plaintiff, and in that I call your attention to the following printed matter, in the contract:

"Selection of play dates.

6th. Unless otherwise agreed upon or unless defi- [fol. 939] nitely specified or otherwise provided for in the schedule, exhibition date or dates of each of said motion pictures shall be determined as follows: (1) Subject to prior runs and/or clearance granted or hereafter granted by the distributor to other exhibitors and within reasonable time after a print or

prints of any said motion pictures are received at the exchange of the distributor out of which the exhibitor is served; and provided, the exhibitor is not in default hereunder. The distributor shall mail to the exhibitor a notice in writing of the date when each of such motion pictures will be available for exhibition by the exhibitor, which date is hereinafter referred to as the available date. Such notice shall be mailed to the exhibitor at least fifteen days before the available date therein specified."

That was in the contract, was it not?

A. Well, those contracts are such one-sided contracts. I don't think that I ever read a contract because they have only one contract for you to sign and you sign it or you don't sign it, whether it is right or whether it is wrong. They are all one-sided as far as the exhibitor is concerned.

Q. I say those words I read were in this contract?

A. I imagine they were; whatever is in there; I didn't read them.

Mr. Armistead: Counsel for plaintiff says or has agreed that those words are in the contract.

[fol. 940] Q. Now, you had Paramount put the sixty day clearance clause in your contracts at your request, did you not?

A. Well, probably so but as far as the sixty days clearance is concerned over the Earl, that didn't amount to anything in particular. I never asked for any undue clearance over Madisonville. There came up a claim ahead of Madisonville where they finally decided seven days. I didn't care whether it was seven days or seven weeks. The main thing was to play ahead of Madisonville, and the Earl Theatre there, as far as that is concerned, didn't amount to anything to me on my feature pictures. It did mean competition on serials, westerns and the smaller contracts but the feature pictures it didn't amount to anything one way or the other.

Q. Why did you request the clearance clause be inserted?

A. I couldn't tell you that; I don't remember.

Q. Did Paramount have any serial pictures?

A. No.

Q. And you don't know why you asked that the sixty day clause be inserted?

A. I suppose he just figured it was reasonable clearance. I didn't ask for any certain number of days. As far as the Earl was concerned, it didn't make any particular difference.

Q. I was trying to find my notes. I made some notations yesterday when you were testifying. As I caught it, you said that Paramount cancelled the contract about certain pictures, three or four pictures. You didn't mean [fol. 941] they cancelled and they wouldn't let you exhibit those pictures, but just changed the play dates or re-arranged the play dates, is that correct?

A. Well, I don't just recall what particular thing you are talking about but there when I had bought the 1935-1936 and then when they sold the run at Madisonville ahead of me, why, then, of course, I had those pictures already set in and they took these pictures out and then I bought a superseding contract and then they re-dated those pictures after I bought a superseding contract.

Q. In other words, you did get to exhibit the pictures?

A. Yes, second run.

Q. Now, Mr. Dozier, they were exhibited in Earlington for the first time, weren't they?

A. Mr. Armistead, the situation at Earlington is just like it is throughout the United States, on all of these independents. You only get the pictures when the chains don't need them or don't want them. There is no other way they get them today. That is not only in Earlington that way but it is the same thing throughout the United States.

Mr. Armistead: I move to strike the answer on the ground that it is not responsive.

The Court: Yes, it is a conclusion of the witness.

[fol. 942] Cross-examination.

By Mr. Frolich:

Q. Mr. Dozier, you got Columbia product in Earlington from 1933 down to 1939, didn't you?

A. Yes sir.

Q. Did Columbia make all of its pictures available to you each and every season for Earlington?

A. Yes sir.

Q. I show you these contracts, Defendant's Exhibit No. 35, and ask you to be good enough to look at the contracts

and state whether or not they are the contracts made by you with Columbia from 1934 down to 1939, a group of eighteen contracts.

A. Yes sir, they look like the contracts.

Mr. Frolich: I offer these in evidence as group exhibit No. 35 for the defendant.

(Contracts so filed and marked.)

A. In fact, Columbia was very fair with me about pictures except the fact that, of course, in all our contracts there they said in there if they sold to Madisonville, of course, I have no contract; it is out.

Q. Didn't these contracts contain a provision that you had clearance of fourteen days over Madisonville?

A. Well, I noticed one down there that it also says if they sold to Madisonville, see? If they sold to Madisonville I have the right to cancel the rest of that contract, [fol. 943] see? That was the only kick I had with Columbia, the fact that I never knew whether I had a contract or didn't have it. If Madisonville bought it I didn't have that contract and if they didn't buy it, why, I had a contract.

Q. Don't you know that Madisonville never sold Madisonville all those years?

A. Yes sir. That is the way it worked out.

Q. In 1939 when you sold out to Sudekum you had at that time in your possession the last contract of this group of contracts for fifty seven Columbia pictures?

A. That is right. The only kick I had with them was that I never knew but it worked out that I always had pictures.

Q. Did you ever give voice to the kick by any letters to Columbia?

A. I am sure I did. I kicked to the salesman every year I signed a contract. It left me in the dark as to whether I would have a product or whether I wouldn't.

Q. And actually you received your pictures each season from Columbia?

A. Yes sir.

Q. So that your fears were really groundless, weren't they?

A. Yes sir.

Q. Columbia treated you very fairly, didn't they?

A. Yes sir.

[fol. 944] Re-direct examination.

By Mr. Simon, for the Plaintiff:

Q. Mr. Dozier, when you sold the Roxy Theater in 1939, did that sale include the sale of the equipment in the theater?

A. Yes, sir.

Q. And what was, in your opinion, the value of the equipment in the theater when you sold it to Crescent?

A. Well, I had in the theater equipment between six and seven thousand dollars; and three thousand dollars, about, of that was spent in remodeling the building, and the balance of that was equipment, seats and necessary cooling system, and all the necessary equipment that goes with the theater.

Mr. Raftery: That was not in response to the question asked.

The Court: I did not have my attention on that. Read the question and answer. (Reporter reads question and answer.)

The Court: Well, he said the equipment was about six or seven thousand dollars. All right.

And further this deponent saith not.

[fol. 945] Wm. P. Miller, called as a witness in behalf of the plaintiff, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wright, for plaintiff:

If the Court please, Mr. Miller, the next witness, is employed as manager of the theater at Rogersville by Crescent Amusement Company; We are calling him as an adverse witness under Rule 43b.

Q. State your name and address, please?

A. William Pope Miller. Rogersville, Tennessee.

Q. Will you try to keep your voice up, so that these gentlemen over here can hear you. What is your occupation?

A. I am now managing the Rogersville Theater.

Q. For whom?

A. For Rockwood Amusement Corporation.

Q. How long have you been employed as Manager of that theater?

A. It will be three years September 4.

Q. That was the date on which you sold the theater to Crescent? or sold your Palace Theater to Crescent?

A. And September 4, 1938.

Q. How long had you been in the theater business in [fol. 946] Rogersville before that?

A. I went in the theater business in 1917, about September 17.

Q. You opened the Palace Theater there in February, 1933?

A. No, I had the Palace Theater in 1917; kept the name all the way through.

Q. But you built a new theater there and named it the Palace, in February, 1933?

A. Yes, sir.

Q. That was the theater that you sold to Rockwood Amusements?

A. Yes, sir.

Q. Now, was that the only theater in town when you started it?

A. Yes, sir.

Q. How big was the town then?

A. About 1600 and something, I believe, in population.

Q. Do you know about how large it is today?

A. About 2200.

Q. Then, when was another theater opened in the town?

A. In about October, in 1936, I believe it was.

Q. Now, when did you first learn that that theafer was going to be built there?

A. During the summer of 1936.

[fol. 947] Q. How did you find out about it?

A. I found it out through the bank that had sold them a piece of property near the hotel for a theater site.

Q. Was there any sign on the site?

A. Yes, sir, there was a sign on the site later; later on they put a sign on the site.

Q. What did the sign say?

A. I don't remember what it said at the present time?

Q. Well, before the sign went up, or before you found out about the new theater, did you have any conference with anybody from the Cumberland Amusement Company about it?

A. No, sir.

Q. Or any one else?

A. No, sir.

Q. When was the first time you talked to any one from the Cumberland Amusement Company about the new theater?

A. Well, about a week or ten days before the theater opened.

Q. To whom did you talk?

A. He was foreman on construction for the Cumberland Amusement Company. I believe his name was Lawes.

The Court: You say his name was Boss?

A. Lawes.

[fol. 948] Mr. Wright: L-a-w-e-s.

Q. What was the conversation you had with him?

Mr. Waller: We object to that, if your Honor please—a conversation with a construction foreman.

The Court: Yes, sustain the objection.

A. Mr. Lawes, he——

Mr. Wright: They object, and it was sustained.

The Court: Yes.

Mr. Wright:

Q. When was the next time you saw any one connected with the Cumberland?

A. It was in 1937, I believe.

Q. And who did you see then?

A. A Mr. Potts, who was manager of the Morristown Crescent Amusement Company house.

Q. At Morristown?

A. Yes, sir.

Q. What was the conversation you had with him?

[fol. 949] Mr. Waller: If your Honor please, that is not competent; he is not shown to be an officer of the company.

Mr. Wright: He was manager of the Crescent Amusement Company and made arrangements for them to get in touch with the Cumberland.

The Court: Overruled.

Mr. Wright:

Q. What was the conversation you had with Mr. Potts?

A. Well, he said I should get together with the Cumberland Amusement Company and sell out to them, and to tell them the town, I believed, was too small for two theaters.

Q. Well, what did you say?

A. I said, I hate to sell out. I am not doing any good, but I think this town belongs to me; I went through all those years and have had it hard; but I will write you and make you a proposition to send it into the company; and he said he would send it in to Nashville, to Mr. Tony Sudekum—the proposition.

Q. Is that about all the conversation you had there?

A. That is about all.

[fol. 950] Q. Then did you write a letter making a proposition to Mr. Sudekum?

A. Yes, sir—No, I don't know whether I made it to him or Mr. Potts; he said he was acting as a representative of the company, and it would be all right, everything would be O. K. and he wanted to send it in.

Q. Have you a copy of that letter?

A. I have a copy of that letter.

Q. Have you got it with you?

A. No, sir, I didn't bring the letter because my subpoena didn't say anything about any letter on the trade proposition.

Q. Do you recall what the substance of the letter was?

The Court: How much did you offer to sell for?

A. Offered to sell for $4500.00 and a job at $250.00 a month to take over the theater; that was $250.00 and pay for employes.

Mr. Armistead: I didn't get that last.

The Court: That he was paid $250.00 a month to operate the theater and to pay the employes out of the amount.

A. And me to keep my equipment.

[fol. 951] Q. To keep it up?

A. No, to keep my equipment.

Q. And what were you selling in that equipment?

A. I was just selling the key to the town.

Q. Selling at least the good-will, is that it?

A. Yes, sir.

Mr. Wright:

Q. Then, after you wrote the letter, what happened then?

A. Well, there was some entanglement in there, and I can't remember just what did happen.

Q. Did you go to Tullahoma?

A. Yes, sir, I was in Tullahoma.

Q. That was the principal office of the Cumberland Amusement Company?

A. There were some wires came in there to the manager and he had a check I understood, but he never approached me with a check.

Q. Who is this manager you are speaking about now?

A. A Mr. Davis.

Q. He was managing what?

A. Managing the Rogersville Theater for the Cumberland Amusement Company.

Q. Was that an opposition house the Cumberland had opened?

[fol. 952] A. Yes, sir.

Q. And you say he mentioned something about a check; did he make you a definite offer?

A. No, sir; I never came in contact with him, not that one; he might have contacted my son; I was out of town quite a bit at that time.

Q. Did you go to Tullahoma to talk to Mr. Hill, the president of the company?

A Yes, sir.

Q. Do you remember what time that was, at the time you wrote the letter?

A. No, sir, I do not.

Q. It was afterward, wasn't it?

A. I don't remember whether—Yes, it was afterward, I am sure.

Q. What was the conversation you had with him there?

A. I told him I wasn't doing any good, and it looked like I wasn't going to get any pictures and I said I would like to sell out to them.

Q. What did he have to say?

A. He says, You can go up to McMinnville and see Mr. Oldham I believe was his name.

Q. Cowan Oldham?

[fol. 953] A. Yes, sir; and he will carry you up to Nashville and you can see Mr. Tony Sudekum.

Q. Did you go over to see Mr. Oldham?

A. No; he was going to lunch and he says wait a few minutes and I will be back to see you after lunch; and I waited until 5:30; I had my wife waiting in Knoxville, and I got in the car and went back home.

Q. You didn't go to see Mr. Sudekum at Nashville at that time, then?

A. No.

Q. Now, was there a change of management in the Rogersville theater along in the latter part of 1937?

A. Yes, sir.

Q. Who took it over then?

A. Why, the manager came in and I talked to him and he said the Rockwood amusements in Nashville was taking over the Rogersville Theater; that was in 1937, along about Christmas, when he came in there.

Q. Did you have any conversation with the new manager about taking over your theater?

A. No, sir.

Q. When was the next time you talked to any one from Rockwood, Cumberland or Crescent about your theater?

A. It was during the year of 1938.

[fol. 954] Q. I say it was in the early part of the year?

A. No, it was along during the summer I think, along about July or August, I don't remember the exact date, I think as well as I remember.

Q. You think it was some time during 1938, the first part of the year?

A. Yes, sir.

Q. Who did you talk to?

A. I think the first man I talked to was a man by the name of Castelberry.

Q. When did you talk to Mr. Castleberry, when did you talk to him and where?

A. He came up to the theater.

Q. What was the conversation you had with him?

A. Well something about selling out, I don't remember the exact words.

Q. Do you remember the substance of the conversation?

A. No, sir, not word for word.

The Court: He said did you remember the substance of it.

Mr. Wright:

Q. I just want to get your best recollection, whatever it is?

A. He said a different company had the theater now, and that we should get together.

[fol. 955] Q. Did you tell him you wanted to sell?

A. I told him I would sell, things were getting worse all the time for me and I had to do something.

Q. Was that all the conversation you had then?

A. That is all I remember, we had more, but I do not remember just what.

Q. When was the next time you saw any one from Crescent Rockwood, or Cumberland?

A. I believe I had some correspondence during that time, I lost all my correspondence.

The Court: You say you are from Rogersville?

A. Yes, sir.

The Court: Is that where Dave Hale lives?

A. Yes, sir.

The Court: All right, excuse me.

Mr. Wright:

Q. Where did you see Mr. Stengel and Mr. Baulch?

A. They came in to see me along in August I believe that was along in August.

Q. Shortly before August, 1938?

A. Yes, sir.

Q. What was the conversation you had with them?

[fol. 956] A. I made him a proposition to sell out to them.

Q. What was the proposition?

A. Well, as well as I remember it was twenty-five hundred dollars for my equipment and I believe I made him a proposition of two hundred and fifty dollars a month, the same as I made to take over the theater.

Q. What did they say?

A. I think as well as I remember I had a letter from Mr. Stengel, he made me a proposition.

The Court: Talk a little louder, even I can't hear you.

A. You want me to give you all my answer to that, as well as commissions?

Mr. Wright:

Q. So far as you can remember what the proposition was, give it to us?

A. He made me a proposition to pay me forty-five hundred dollars for the theater, of course there were some notes added in there, a thousand dollars down, notes for a thousand dollars each, a hundred dollars a month, five per cent commission over two hundred and fifty dollars per week taking out the cash night and the state tax of Tennessee.

The Court: That is over two hundred and fifty dollars a week, you mean two hundred and fifty dollars gross re-
[fol. 957] ceipts?

A. Two hundred and fifty dollars gross receipts.

The Court: Gross receipts.

Mr. Wright:

Q. And I understand you to say that in addition to the two hundred and fifty dollars before your percentage started they would add the cost of the bank and cash nights and local tax?

A. Yes, sir, that is what I stated on there.

Q. Did you accept that proposition? At that time?

A. Yes, sir, and they gave me the equipment.

The Court: Did that enable you to sell the equipment?

A. I got the equipment.

The Court: So you sold the equipment at this time?

A. Yes, sir—no, sir, not a thing, I didn't sell them a thing, I didn't sell them the key to the town, I would have to take a ten year proposition to stay out of the town, and I say so the only way I am doing, I can open up tomorrow and you can fire me tomorrow, and that was my proposition.

Mr. Wright:

Q. So it stands that if they did fire you, you could open up a theater in the town?

[fol. 958] A. Yes, sir.

Q. You did not make any agreement not to compete?

A. No, sir, it is this proposition I sold to them, I can put up a theater tomorrow whenever I want to, or they can fire me today if they want to. I don't think much of signing

up this ten year proposition no way, it don't amount to anything, if you want to get rid of a man.

Q. When this little theater was opened by Cumberland in the fall of 1936, what policy did it open up at?

A. Opened at ten and twenty-five cents.

Q. That was what you were charging in your house?

A. Yes, sir.

Q. During the time that they were in opposition to you, both policies stayed the same?

A. No, sir, they didn't run very long until they changed the policy.

Q. What was the change that was made?

A. It run a single night on Saturday, and doubled the feature.

Q. Changed from single to double on Saturday?

A. Yes, sir.

Q. What was the admission price was charged before noon?

A. They had a forenoon I think it was fifteen cents, and changed to ten and twenty-five, the same in the afternoon and night.

[fol. 959] Q. Was there any day they ran for ten cents?

A. They put on some ten cent nights, yes, sir.

Q. Any bank nights?

A. Yes, sir, a bank night.

Q. Had you been trying any evening ten cent admissions and bank night before that?

A. No, sir—I had ten cent nights, yes, sir, on Wednesday night.

Q. How about bank night?

A. I had never put in bank—yes, I had bank night when they opened up.

Q. When they opened up?

A. Yes, sir.

Q. Did you have one a week?

A. Yes, sir.

Q. Did they have one a week?

A. Yes, sir.

Q. Then was there any change in that policy after the Rockwood company took over?

A. Yes, sir, they put on two bank nights.

Q. The admission price stayed the same?

A. No, sir, they cut ten cents on Saturday.

Q. Matinee and evening?

A. Yes, sir.

Q. How many bank nights did you play then?

[fol. 960] A. One.

Mr. Waller: Your Honor please, we have a general objection to this testimony, I don't know whether Your Honor has ruled on it or not.

The Court: No, I have not ruled on it.

Mr. Waller: In addition to the general objection, there is nothing in the bills of particulars about that.

The Court: I am not quite ready to rule on it.

Mr. Wright:

Q. During the two seasons before Cumberland came in there, do you remember what feature products you were using?

A. (Refers to memorandum.) I was using Warner Brothers, Paramount, Columbia and Universal.

Q. I am talking about 1934-1935, and 1935-1936?

A. 1934-5 Fox, Paramount, RKO, United Artists, Columbia.

Q. Was 1934-5, and 1935-6?

A. Yes, sir.

Q. Then when the time to buy products for 1936-1937 came around, did you try to buy Fox Pictures again?

A. Yes, sir.

Q. Did the Fox salesman come around to see you?

[fol. 961] A. You know I had another theater at that time.

Q. Where was that?

A. In Sneadville, Tennessee.

Q. Where is Sneadville?

A. Sneadville is the county seat of Hancock County.

Q. How big is it?

A. How big is the county?

Q. How big is the town?

A. Oh about two or three hundred inhabitants. The car number is eighty-seven.

The Court: License plate?

A. Yes, sir.

Mr. Wright:

Q. Did the Fox salesman come around to see you?

A. Yes, sir, he came over to Sneadville.

Q. He came over to Sneadville?

A. Yes, sir.

Q. What was the conversation you had with him there, do you remember what it was?

A. No, I bought some product from him for Sneadville.

Q. Was anything said about buying Fox features for Rogersville?

A. I do not remember just what was said about the pictures at Rogersville.

Q. Did he offer you the 1936-7 pictures for Rogersville?

[fol. 962] A. No, sir, I think not.

Q. Did he tell you why he didn't offer them?

A. He said, I am going back, I don't know whether I will sell you for Rogersville, whether I can get the deal through for the Rogersville situation or not.

Q. Did he tell you why he had doubts about it?

A. Well he said it looked like they were going to lose a big deal with another company, to sell my just one theater, why they would lose quite a few theaters if he sold me, and there is quite a bit of money involved.

Q. Did you see him again after this conversation?

A. I believe my son came in here on that along about that time, he was helping me out with the Rogersville theater at that time.

Q. Did you go to the Fox exchange in Atlanta, to find out about the Fox pictures after you talked to the salesman in Sneadville?

A. Yes, sir, I was in Atlanta and went up to the Fox exchange.

Q. Whom did you talk to in there about it?

A. Well I didn't talk to any one, the manager at that time as well as I remember was on his vacation.

Q. Did you talk to any one else there?

A. No one that had any authority as I remember.

Q. While you were there, did any one offer you Fox pictures, for 1936-7, Fox features for exhibition in Rogersville.

[fol. 963] A. No. There are so many film companies, I sent in some contracts and applications there, I never did get them approved, I don't remember whether it was Fox, United Artists, it is hard to remember those things. The fact of the thing, I had my wife to burn all my letters up, excuse the expression, down in the basement, a lot of trash, a lot of trash that my wife burned up. If I had them I could

tell you more about it. Take three years when you are out of the business, you know, and keeping up with it.

[fol. 964] Q. You know you did not get any pictures, in 1936-1937, for your theatre?

A. No, sir.

Q. You had tried to buy them, hadn't you?

A. Yes, there might have been an application in, I am not sure about that, I don't know that.

Q. There might have been an application for them?

A. Yes. I am not sure about it.

Q. How about United Artists pictures for 1936-1937 season, did you try to buy those?

A. Yes, sir, I bought those.

Q. For 1936-1937?

A. Yes, sir, in other words, I bought—I made application but still I never received the pictures.

The Court: You mean you bought them but never did get them?

A. The contract wasn't approved by the New York Office.

Mr. Wright:

Q. You mean, you tried to buy them?

A. I tried. I made application for them, I don't know whether he even, the salesman, turned them into Atlanta or not.

Q. This correspondence may refresh your recollection; I will show you a letter here signed William P. Miller, addressed to United Artists Corporation, dated July 1, 1936.

A. That is the agreement all right.

[fol. 965] Q. That is the letter that you sent with the application and the numbers of pictures?

A. I signed the application and numbers of pictures, there isn't many pictures named on the application, but the numbers of the release would be so and so and stars around it.

Q. You signed that and they are referred to in your letter of July 1, 1936?

A. Yes, sir.

Q. I will ask you to look at this letter of July 30, 1936, from United Artists to you and ask you if that is the latter you received in reply?

A. Yes, sir, it is, yes, sir, that is the contract.

Mr. Wright: I will ask to have this letter of July 1, 1936 from Miller to United Artists marked as Government's Exhibit No. — and the reply of July 30, 1936, will be the next number of Government's Exhibit.

(Two letters marked, respectively, Government's Exhibit Nos. 66 and 67.)

(Recess.)

Mr. Wright: If the Court please, in order to try to speed up the proceedings, I had all of these exhibits, which I was going to offer marked and had them inspected by the other Counsel, but I haven't had time to get them back in order [fol. 966] and if I can have a few moments, I would like to put them back in the order I had them.

I would like to offer two Exhibits, that were just identified by Mr. Miller, the letter from Miller to United Artists, of July 1, 1936, and the reply by United Artists of July 30, 1936, and marked as Government Exhibits, respectively, Nos. 66 and 67.

Mr. Raftery: May I examine them?

Mr. Wright: I thought you had examined them.

Mr. Raftery: I haven't seen anything.

Mr. Raftery: Are you offering just the two papers, the two letters?

Mr. Wright: Yes. If you want them detached, they may be separated.

Mr. Raftery: We are not going to object to that, but we don't want to be construed as waiving the proposition that these documents are hearsay. That is, the Miller letter is not hearsay, but the letter written by United Artists is hearsay and we reserve the question of the competency of this type of evidence. What Government Counsel has been doing is to co-mingle the rule of law, that the admissions of a co-conspirator may be admissible against that conspirator [fol. 967] and some time later when the conspiracy is proven, they may be admissible against the other parties to the conspiracy. That doesn't relieve them of complying with the rule of evidence, that they must make the evidence competent.

The Court: No, it does not, but as I understand, this is an admission of the Defendant.

Mr. Raftery: Whether it is a defendant or not, they must prove the evidence by competent testimony. But as to these

documents, we are not objecting. I am merely wanting the record to show that there may be a point where we will press the objection, to comply with the rule to make the evidence competent and take it out of the hearsay classification.

Mr. Armistead: Furthermore, as I understand the law, when the effort is being made to prove a conspiracy by the introduction of correspondence, all of that correspondence passing between the parties should be introduced, because some other letter may have changed the situation entirely.

The Court: Well, I just don't know about that. There may be other letters, there may not be other letters. If there are other letters, I assume that you would have the [fol. 968] right to introduce them in evidence.

Mr. Armistead: They would have to be produced by the party calling for this one letter, all of that correspondence would have to be introduced.

The Court: Are you calling for any further correspondence?

Mr. Armistead: I am going to reserve the right to.

The Court: I will allow you to do that. But I don't see that this is in the class of hearsay evidence. It is a letter written by an agent of the defendant United Artists to this exhibitor. I don't understand that is hearsay.

Mr. Raftery: There are things in the letter that are of a hearsay character. I am not objecting to this because I agree with the government and will try to expedite the putting in of any correspondence we have and will avoid calling witnesses, if necessary.

The Court: All right. Go ahead with your letters.

Mr. Wright: A letter from William P. Miller to United Artists, dated July 1, 1936, addressed to Atlanta, Georgia, is as follows: (Reading)

[fol. 969] "Gentlemen:—In agreement with your representative today, I am signeng twenty-seven contracts to cover that number of pictures on your 36-37 product, the total amount of the 27 pictures to be $486.00 four hundred and eighty six dollars. Prices on the several pictures may be allocated as you see fit as long as the total of entire purchase remains the same.

Agreement also covers your series #2 Disneys @ $2.50 and your series #3 and #4 @ $3.00 each, to be played two or more per month as available.

Features are to be played within thirty days after notice of availability. Yours truly——"

Mr. Wright: Now attached to that letter as was taken from United Artists' files, was a salesman's report which Mr. Raftery has objected to and asked to have removed, which we are not offering now but which we will offer later on.

The Court: All right. You can read it when you offer it.

Mr. Wright: The reply from United Artists to Miller, dated July 30, 1936, is as follows: (Reading)

"Dear Mr. Miller: We regret to advise that we have been unable to secure approval of the contract signed by you on July 1st and given to our Mr. Creswell, as the Producers of [fol. 970] the various productions do not feel the rentals are commensurate with the value of the pictures in your town.

Of our 1936-1937 group of releases, you already have under contract the following: The Man Who Could Work Miracles, The Last of the Mohicans and the Chas. Laughton production, the title of which will be Rembrandt.

We are reserving a date on The Man Who Could Work Miracles for you, namely September 30th-October 1st, and as previously advised, you will be advised regarding this date as soon as we hear from the Home Office as to the national release date.

The other two pictures under contract, will be made available for your use just as soon as we have some definite information as to their release dated. Yours truly."

Mr. Wright: It appears from the United Artists' answer to the Interrogatories that of the 1936-1937 pictures that are referred to in the letter, 15 were never played, they were sold to the Cumberland Amusement Company under a blanket deal which covered the 15 pictures to Cumberland and included Rogersville. We have not been able to locate that contract. I have talked to Mr. Hayes about it and he [fol. 971] said he had not been able to find it, and it was not in the file turned over to us. However, we do have a record of the offer of the United Artists in the answers to our interrogatories 15 and 16, which shows the pictures that Cumberland played in the Rogersville Theatre in 1936-1937 season and the rentals paid for them, and I would like to read that into the record at this point.

The Court: All right.

Mr. Wright: During 1936-1937 season, Cumberland played at Rogersville Theatre 15 of the United Artists pictures at a rental of $261.75. The top price was $25.00 and the lowest price was $6.75.

The Court: How many: 15?

Mr. Wright: Yes.

Mr. Raftery: So that the record will be straight, the 27 pictures were offered and there is nothing in the record to show how many of that 27 were made or how many were released during that season. My recollection is that, during that season, we had about 15 pictures, that is all that were made.

[fol. 972] Mr. Wright: In any event, of those released during the 1936-1937 season, 15 were played under this contract with Cumberland in Rogersville. The total rental was $263.75 that was paid.

Mr. Raftery: That is one situation, with the Cumberland?

Mr. Wright: That is right.

Mr. Waller: Did I understand that for 15 pictures the total rental paid was $263.75 and the top price was what?

Mr. Wright: $25.00 was the top price and $6.75 the lowest price.

Mr. Raftery: Is that $6.75 paid for but not played?

Mr. Wright: Paid for but not played. The bottom price of those played was $12.50. The same answer to interrogatories filed by United Artists, if the Court please, shows that the pictures released during the 1935-1936 season that were played at Miller's Theatre, the Palace, 16 were played at a total rental of $295.00 paid for them. That the top price was $30.00 and the bottom price was $12.50. That was the preceding season.

The Court: Played by the witness' theatre?

Mr. Wright: Yes.

[fol. 973] The Court: How many were there?

Mr. Wright: 16 pictures, total rental paid was $295.00 top rental was $30.00, bottom rental was $12.50.

[fol. 974] Q. I will show you two more letters that have been marked Government's Exhibit No. 68, that is, a letter from you to United Artists at Atlanta, dated August 27th, 1926, and ask you if you wrote that letter.

Mr. Raftery: Excuse me, your Honor, for the record, so as to have it straight, the only $30.00 picture showed that

year was Charlie Chaplan's Modern Times, which was special. They other top pictures were $25.00, just the same.

The Court: Were you stipulating?

Mr. Wright: We can introduce the entire tabulation, as far as that goes.

Mr. Raftery: It is right in front of you.

The Court: If that is correct, I will let you put it in. If he doesn't put it in, you can.

Mr. Raftery: I am trying not to cross examine, Judge, if we can get the facts as they are.

Mr. Wright: Then this letter of September 8th, 1936 that is attached to this letter from United Artists to you. Did [fol. 975] you receive that in reply to the first letter?

A. Yes, sir.

Mr. Wright: I will offer these letters as Government's Exhibits 68 and 69 for identification.

(Letters so filed and marked).

The letter from Mr. Miller to United Artists says:

"In reply to your letter of July 30; As the contracts did not go through, I can not understand why Mr. Creswell has not been to see me again. I was in your office in Atlanta several weeks ago, and you and Mr. Creswell were out of town, and your booker stated that I would hear from you or Mr. Creswell soon. I would like to buy United Artists productions, if I could get any co-operation on your part, if you do not want to sell me please let me know, as I want to take the proper course to protect myself."

The reply to Mr. Miller is as follows:

"Received your letter of the 27th concerning United Artists product for next year.

"We are not in a position at this time to discuss product or terms with you for Rogersville, therefore, there is no necessity of sending Mr. Creswell in to see you until we are ready to take your applications.

"Kindest regards."

The Court: What is the date of those letters?

[fol. 976] Mr. Wright: The last letter written September 8th, 1936 and Mr. Miller's letter was written August 27, 1936.

The Court: What is the number of the exhibits, 67 and 68?

Mr. Wright: 68 and 69.

Q. Mr. Miller, here is a letter dated August 14, 1937 from you to Mr. Hays of the United Artists Corporation, Atlanta, Ga. Was that letter written on or about the date it bears?

A. Yes, sir.

Q. It was written about that date?

A. Yes sir, August 14th.

Mr. Wright: Before offering this letter I just had Mr. Miller to identify I want to offer one dated January 13, 1937 from United Artists to Cumberland Amusement Company, which has been marked Government's Exhibit No. 70, and which I just showed to Mr. Raftery. The letter dated January 13th, 1937 says:

"Booking notices have been mailed you covering the feature bookings listed in your letter of January 7th.

"In the last paragraph of your letter, you mentioned that Mr. Oldham wanted pictures of the 1935-1936 season in Rogersville, where we could not fill dates with the new pic- [fol. 977] tures.

"As you no doubt know, for several years prior to the time Mr. Hill bought our product we were serving your opposition at Rogersville regularly and they used every picture of the 1935-1936 releases with one exception, this being The Amateur Gentleman, starring Douglas Fairbanks, Jr. with Elissa Landi."

Mr. Raftery: The other paragraph is important.

Mr. Wright: "If you can use this subject in Rogersville either one or two days, we will endeavor to secure approval of a contract at $12.50. If this will be satisfactory with Mr. Oldham, please advise which date you prefer to use Amateur Gentleman."

The letter Mr. Miller identified reads as follows:—August 14, 1937, from him to United Artists, Atlanta, Ga.:

"Last July 1st, 1936, I signed contracts with United Artists for their 1936-1937 product with your Mr. Creswell. On July 30th, 1936, I received a letter from Mr. W. M. Richardson, stating that he was unable to secure approval of the contracts, as the various producers did not feel that

the rentals were not sufficient with the value of the pictures in this town. But no United Artists representative called again to see me, nor was there any correspondence offering the product again at a higher price.

[fol. 978] "This was very unfair to us, as we have been using U.A. for at least ten years, and instead of trying to sell us your product, you sold our opposition.

"If United Artists product is open for 1937-1938, I would like to try to make a deal with you for them, I can offer you without knowing what you will have, the following deal: 12 pictures @ $40.00 plus $3.00 score with 40% of gross receipts, 12@ $26.00 plus $3.00 score and the remainder at $13.00 plus $3.00 score.

"Please advise at once about this deal, and why you can not serve United Artists pictures to me. Advise as man to man. As you know we have always played all contracts and caused no trouble."

After you wrote that did the United Artists salesman come around to see you?

A. No, I don't remember that they did.

Q. You say you don't remember?

A. No. That was 1936-1937?

Q. This relates to 1937-1938 pictures.

A. No, they never come around.

Mr. Wright: I will offer in evidence a series of four contracts for twenty United Artists 1937-1938 releases made between United Artists and J. L. Davis, manager of the Rogersville Theatre at Rogersville, Tennessee, dated Octo[fol. 979] ber 15, 1937, under which the pictures were sold and played out. That is marked as Government's Exhibit No. UA-1.

By the Court: What do the prices those pictures were given them at, how do they compare with the prices offered in this letter?

Mr. Wright: They are substantially lower. The top license fee in this contract was $32.50 and the bottom license fee specified in the contract is $17.50.

The Court: What is the date of that contract?

Mr. Wright: That is dated October 15th, 1937.

The Court: What is the date of Mr. Miller's letter?

Mr. Wright: Prior to that, August 14th, 1937.

At this time I would also like to read in evidence here the figures on the pictures actually played and the film

rentals paid for them by the Rogersville Theatre for the 1937-1938 season.

Mr. Raftery: Excuse me, your Honor, I don't think Mr. Wright meant to misstate the situation about these con-[fol. 980] tracts. In these contracts you have thirteen at $32.50; you have two at $25.00; you have one at $20.00; you have two at $27.50 and two at $17.50, which, I think simple addition will show, was a better offer than the offer suggested. We don't think that is material in this inquiry because we still have the right to sell these pictures for any prices we see fit but nevertheless that is a fact.

Mr. Wright: I don't think we need to argue the mathematics of it now. We take it the contracts on their face fully compared with his will show that the offer he made is better than the one that they accepted from the Cumberland Amusement Company.

United Artists' answer to the Government interrogatories shows played off at Rogersville for the 1937-1938 season—that they played seventeen and paid a total of $372.50. Those were listed in error in the column "Sold to independents" because it appears that they all played, in the same tabulation, that they played at the Rogersville Theatre, which was the Cumberland house.

[fol. 981] Mr. Raftery: We consider that an independent situation; in fact, we consider every exhibitor involved in this lawsuit as an independent. There is a very definite definition of affiliated exhibitor; that is one affiliated with a producer or distributor. There are not any of that type in this case at all; they are all independents. However, in this situation we classify this as an account separate from Sudekum, because we did our business with two men—Davis and a man named Hill, whom our records showed were not affiliated with Sudekum; but we have checked up since and have been informed by various matters in this case, that there was some affiliation of Hill and Sudekum. However, I would like to go back and straighten out that answer of Mr. Wright's in the 1935-1936 situation. In 1935-1936, the picture "Modern Times," a Chaplin picture, made a $30.00 rental; but the two top pictures were two at $25.00; next to that $30.00, and then they come down very rapidly to $12.30. In the next year, 1936-1937, which was referred to, there are one, two, three, four, five, six at $20.00 and then they come [fol. 982] down the scale the same way to that $12.50.

Mr. Wright: We want to put in a duplication for the 1935-1936-1937-1938 seasons. But what we want to clear up now is this statement that elicited those figures. That is an independent? I take it there is no question about that?

Mr. Raftery: Oh, no; it is an independent—the Cumberland, 17 pictures. The total amount paid for them was $372.50; the top price was $32.50 and the bottom price was $10.00.

Mr. Wright:

Q. Mr. Miller, here is a letter from Mr. Wilson to you on October 3, 1936, I will ask you to read that and say if that was received by you on or about that date?

A. Yes, sir.

Q. And the Mr. Fairchild that is referred to there, do you remember who he was?

A. He was a salesman.

Q. The Fox salesman?

A. Yes, sir.

[fol. 983] Q. That is Government's Exhibit No. 72, a letter of Mr. Wilson, the Atlanta Exchange Manager, to Mr. Miller, and the letter reads as follows:

"DEAR MR. MILLER:

This will acknowledge your letter of October 1st and upon receipt of your previous letters I forwarded them to our sales representative, Mr. Fairchild.

On his last visit into East Tennessee he tried to get into Rogersville but, because of a detour and unfortunately it was raining that day, he was advised that the road was practically impossible and he could not get into the town.

His trip at that time was to advise you that we were entering negotiations with the Hill Circuit for our 1936-1937 product. Since then that deal has been closed and the contract approved."

Now, Mr. Miller, can you say definitely whether Mr. Fairchild, on any of these previous visits, had ever offered you Fox pictures for that season?

A. No, sir.

Q. Well, do you say that you know he did not?

[fol. 984] A. No, sir, I couldn't say definitely.

The Court: He said he couldn't say definitely.

A. If he did I don't remember it.

Mr. Wright:

Q. Well, you would remember it if you got them?

A. I tried to get them, to tell you the truth about it.

Q. I beg your pardon?

A. I tried to get them and I couldn't; even couldn't talk with him; he would drive around town all the time.

The Court: You say he would drive around town?

A. Yes, sir.

Q. Around Rogersville?

A. Yes, sir; drive around the town, you see, around the town.

Q. Oh, he couldn't get there for a detour?

A. (No answer. Witness smiles.)

Mr. Wright:

Q. Now, I will show you a letter dated April 26, 1937, *April 26, 1937,* from you to RKO Pictures, at Atlanta, Georgia, marked Government's Exhibit No. 74. Did you write that letter at or about that date?

A. Yes, sir.

[fol. 985] Q. And then here is a letter from you to the same parties, dated July 4, 1937; did you also write that one at about that date?

A. Yes, sir.

Q. And a letter dated July 6, 1937, from RKO to you acknowledging that letter; did you receive that on or about that date?

A. Yes, sir.

Q. And a letter dated July 29, 1937 from you to RKO; did you write that on or about that date?

A. Yes, sir.

Q. These letters which I have just asked about are identified as Government Exhibits 72 to 77.

Mr. Ballew: You skipped 73.

Mr. Wright: Well, it will turn up later perhaps. The first letter, dated April 26th, from Mr. Miller to RKO in Atlanta, reads as follows:

> "We want first chance to contract your 1937-38 product. We have interduced your pictures and stars in this town, and feel that we should have first choice.

[fol. 986] "Please send your representative, Mr. Salley to see me at once, or advise at once definitely whether or not, your product for 1937-38 will be available for me.

It is very important that we have a definite reply from you at once. Please give this matter your prompt attention."

The Court: Who is that letter from?

Mr. Wright: From Mr. Miller to RKO in Atlanta. The next letter is Government's Exhibit No. 75, also from Mr. Miller to R. K. O. in Atlanta, dated July 4, 1937, reads as follows:

"I have written you several times requesting that you send your representative, Mr. Salley to see me regarding the 1937-38 product. Your excuse heretofore has been to wait after the convention, as the convention is over, I am looking forward in seeing Mr. Salley, in the next few days in Rogersville, with a proposition for me to buy your 1937-38 product."

And a letter of July 6, 1937, which is a reply by RKO [987] to Mr. Miller by R. K. O. as follows:

"Acknowledging receipt of your letter of July 4th, please be advised that we will have Mr. Salley call on you within the next week or ten days."

The next letter is from Mr. Miller to RKO, dated July 29, 1937, as follows:

"Dear Mr. Lyons:

In looking over my correspondence, I find that *that* I have a letter from you stating that Mr. Salley would call on me between July 6th and 20th. At this writing Mr. Salley has not called on me.

You have not even made me a proposition to buy your 1937-38 product.

If you or your representative does not make me an offer for your new product within the next few days, it will — necessary for me to contact your home office."

Q. Now, Mr. Miller, did you hear anything from Mr. Salley after that?

A. Yes, sir, he came in after that.

Q. How much longer was it after that?

A. I don't remember just how long, but he came in and [fol. 988] told me he would sell me half of the product, one-half of the product, that that was the best he could do; that if they sold me any more than that they would be knocked out of the proposition that would make them more money; in other words, they would lose a deal with some other company; he didn't say who it was. He would let them have half of the product and my situation half of the product.

Q. And you tried to buy all of the product?

A. Yes, sir.

[fol. 989] Q. Any discussion of prices?

A. Yes, sir.

Q. What was the price discussed?

A. Price for the product, discussed it.

Q. Was there any objection on his part to the prices you offered for all the product?

A. I don't know about that, about all the product.

Q. I am talking about the prices for all the product?

A. I am a little bit tangled up I think there, there are so many companies I can't remember all of them.

Q. You know you only bought half the product for that year?

A. Yes, sir.

Q. Terms were not discussed for the other theater, were they?

A. No, sir, not as I remember.

Q. You recall you were able to buy Warner for the 1936-7 season after you had lost Fox and United Artists?

A. Yes, sir.

Q. I show you this contract of November 16, 1936, for the exhibition of the Warner 1936-7 features at your theater in Rogersville?

A. Yes, sir.

Q. Did you sign it on or about that date?

A. Yes, sir, that is my signature.

Q. I believe it shows it was signed by you on November [fol. 990] second, 1936, and approved by Mr. Sears on November 16th?

A. Yes, sir.

Q. Then did you try to buy——

Mr. Pepper: How many pictures in that contract?

Mr. Wright: You have here approved pictures offered sixty, approved licenses sixty.

Q. Did you try to buy the Warner Pictures the next year?

A. Yes, sir.

Q. I show you this application for Warner Pictures attached to a letter dated September third, 1937, from you to Mr. Vergesslich, at the exchange in Atlanta; can you look at the application and tell me if that is the application you made?

A. Yes, sir, that is the application.

The Court: For what season is that?

Mr. Wright: That is 1937-1938. That is part of the contract that has just been identified.

Q. And you wrote this letter to Mr. Vergesslich?

A. Yes, sir.

Q. Enclosing the application at or about the date that appears there, September third, was written by you and [fol. 991] you made the application; look at the date on your application, and I think you may be able to answer that.

A. About two or three months.

Q. The applications are dated May 29, 1937; is that at or about the time those were signed and sent in?

A. Yes, sir, just started the selling season, the next year product.

Mr. Wright: I will offer this as Government's exhibit W-3 and the application, the application and letter you have separately marked, this is W— for identification, I think should be placed on the application, we have been marking letters that are not attached with Government numbers, and you can give the letter whatever that missing government number was. The application is marked W-4.

Mr. Pepper: The other contract, the Warner Contract?

Mr. Wright: This is W-3, put the W-4 on the application, and give the government number to the letter, give the letter a government exhibit number.

(Marked by clerk.)

Mr. Wright: I offer in evidence Government's exhibits W-3 and W-4, the contract and application, as government's exhibit number 78 the letter of September third.

[fol. 992] Mr. Wright: The application, I will not read that; the letter from Mr. Miller to the Vitagraph exchange at Atlanta, dated September third, 1937, reads as follows:

"As you know, I signed contracts for your 1937-1938 product several months ago. At this writing I have not had a rejection or approval of the contracts. Last week my son talked with you, and he states that you stated that the matter is entirely in New York's Home Office hands.

"I would appreciate some definite answer as to these contracts, as I wish to buy other product if I do not get Vitagraph.

Yours truly, ——."

I would like to offer that in evidence, contract for Cumberland Amusement Company for the year 1937-8, contract, application dated August 23, 1937, accepted September 8, 1937, government's exhibit number W, whatever it should be, W-5 I think you just marked it five.

And I will show you a letter dated September 6th, from Mr. Vergesslich, branch manager of the Warner Brothers exchange, and ask you if you received that letter, on or about that date?

[fol. 993] A. Yes, sir.

Q. I will offer this letter as government exhibit number seventy-three. The letter I have just offered reads as follows:

"Dear Mr. Miller: Answering your letter of September 3rd, relative to contracts signed for the 1937-38 product, please be advised that our Home Office has turned down your contract, as they have made a deal with the entire Sudekum Circuit, which covers this town.

Yours very truly."

Q. I will ask you after you made this application for the 1937-38 season pictures, if a Warner Salesman called upon you to go over matters there, or discuss prices with you?

A. No, sir.

Q. Mr. Miller, were you able to buy Universal 1936-7 features for your theater?

A. Yes, sir.

Q. I show you this contract, marked Government's exhibit W-1, that is identified with that number, April second, 1937, and ask you if that is a copy of the contract you made?

A. Yes, sir.

Q. Do you remember how you happened to buy that so late in 1936-7 season?

A. Mr. Elliott came in late in the season and sold them to us.

[fol. 994] Q. Had you been trying to buy them earlier?

A. Yes, sir.

Q. Did he tell you why he had not been able to sell them to you earlier?

A. Said they were not able to make the right kind of a deal with my opposition.

Q. That is what he told you when he finally told you?

A. Yes, sir.

Q. What had he been telling you earlier in the season when you had been trying to buy them?

A. Well I don't remember the exact words, but any way I couldn't get the product, the time that I did buy them.

Mr. Raferty: Will you stipulate that this may never apply to Universal, stipulate on the record that this man never played a Universal Picture during that time?

Mr. Wright: I don't know.

Mr. Raferty: You made your investigations of these records.

[fol. 995] Q. Now, after you signed that contract for the 1936-1937 pictures, did you try to buy 1937-1938 product of Universal?

A. Yes sir.

Q. They had some big pictures coming out for 1937-1938 that you were particularly interested in, did they not?

A. Yes sir.

Q. "Magnificent Obsession", "Imitation of Life", and "Showboat"? Do you remember those?

A. Yes sir.

Q. Did they make any offer to sell those to you?

A. I don't remember about those three pictures. They were special pictures, sold under a separate contract, as well as I remember.

Q. Did you try to buy them?

A. Yes sir.

Q. What did they tell you was their reason for not selling them to you?

Mr. Raftery: What year was that?

Mr. Wright: 1937-1938.

Mr. Raftery: What are the pictures you are talking about?

Mr. Wright: "Showboat", "Magnificent Obsession", and "Imitation of Life."

Mr. Raftery: In the answers to Interrogatories of Universal I do not find those pictures mentioned.

[fol. 996] Mr. Wright: They evidently made a contract for them and made a release of some.

Mr. Raftery: I do find several years back the picture Magnificent Obsession was made, in 1934, and it was released.

Mr. Wright:

Q. Were those pictures offered to you?

A. This is kind of a memory test to me. I will tell you, we bought some old pictures in there from different companies because I needed them to operate my shows, right along at that time from Warner and Universal and all of them, anything I could get hold of to fight our competition to try to stay in business.

Q. After you made this deal in April, 1937, for the 1936-1937 Universal pictures, did they offer you any of their 1937-1938 product?

A. I do not remember.

The Court: He says he does not remember.

Mr. Wright:

Q. Did you answer that?

The Court: Yes sir, he said he did not remember.

Mr. Wright:

Q. You remember, don't you, Mr. Miller, that you were [fol. 997] making every effort to get pictures at that time?

A. Yes sir.

Q. Can't you recollect—You recall, don't you, that you were not able to get Universal pictures for the 1937-1938 season?

A. We tried to get them, but I don't remember what they said about it now. I tried to get them, we tried to get them from all of them and it would have been a poor business man that wouldn't; we tried to get pictures to keep the house going.

Q. Prior to the tiie that Cumberland Amusement Company opened the opposition house there, about how much had you been making out of your theater?

Mr. Armistead: We object to that.

The Court: Objection sustained.

Mr. Wright: I think we are entitled to show, Your Honor, what the effect of that was, after the Cumberland bought.

The Court: It might be for a whole lot of reasons. He stated after the opposition theatre opened at Rogersville, that he had a hard time and he was losing money all the time and finally, as a last effort, decided to sell out.

That is right, isn't it?

A. Yes sir.

(Recess to 1:30 P. M.)

[fol. 998] Afternoon Session

The Court: Have you finished with the direct examination?

Mr. Wright: I want to ask one more question.

Q. After your theatre was sold to Rockwood, it was closed, was it not?

A. It was what?

Q. I say, after you sold the Palace Theatre to Rockwood, the Palace Theatre was closed, wasn't it?

A. Yes sir.

Q. It is still closed?

A. Yes sir.

Q. How long after you sold it was that? A few days or a week?

A. Well, it was closed on the night that I sold out.

Cross-examination.

By Mr. Waller, for Defendants:

Q. Mr. Miller, did you own that building, or merely lease it?

A. I leased the building.

Q. You closed that theatre yourself and sold the equipment to Rockwood, didn't you?

A. No sir, they assumed the contract on the lease until [fol. 999] they could move the equipment out of the old Palace Theatre.

Q. In any event, it never was operated after this trade was made?

A. No sir.

Q. You moved into that building—What?

A. I want to change that just a little bit, that isn't right. I had a lease on it and Mr. Stengel asked me to see the owners of the building and see if he could lease the equipment in there, said he would pay the rent until the equipment was moved out, which Mr. Stengel done, or the Rockwood Amusement Company did.

Q. You moved into that building in 1933, did you?

A. Yes sir.

Q. What had that building been used for?

A. It had been used for a furniture store room.

Q. Storage room?

A. Yes sir.

Q. It was an old tobacco warehouse, wasn't it?

A. No sir, it was built specially, it was built for a kind of classy rooms for displaying furniture for a big hardware concern.

Q. It was not built for a theatre?

A. No sir.

Q. When you leased it in 1933, did you move your equipment from the other theatre into it?

[fol. 1000] A. No sir.

Q. Bought new equipment at that time?

A. Yes sir.

Q. What sort of a heating and cooling system did you have in it?

A. I had steam heat with forced air, the same as you have in here, something similar to it.

Q. Was that heating system, what did that consist of?

A. Consisted of a boiler and two large heating units and a 20,000 cubic feet per minute fan driving air through these large heating units to heat the house.

Q. What was the seating capacity of the theatre?

A. I, at first, had four hundred seats, and then I put in more seats, my business increased the latter part of 1934 and I put 50 more seats in.

Q. How many did that make?

A. That made 450 seats.

Q. Now, when you opened that theatre, how many days a week were you running?

A. Running 4 days.

[fol. 1001] Q. What year was it that the Cumberland Amusement Company started building a theatre there?

A. 1936.

Q. Wasn't it 1935 or was it 1936?

A. 1936, as far as——

Q. Now, when you were operating the theatre four days a week what companies were you dealing with? What product were you buying?

A. I was using Paramount, Fox, Columbia, RKO and United Artists.

Q. Now, when you were operating four days a week how many changes was that a week?

A. Four changes.

Q. Changed every day?

A. No, three changes a week.

Q. Was one of those Westerns?

A. Yes sir.

Q. Then there were two changes of these major companies?

A. Yes sir.

Q. And that would be a hundred and four pictures a year fifty two weeks in a year?

A. Well, that is the major companies you are talking about now. I bought some independent pictures at that time. I understand they are not in this at all.

Q. Well, then, that would be less than a hundred and four pictures a year of the major companies that you were using?

A. I used about a hundred and fifty two to a hundred and [fol. 1002] sixty a year.

Q. That is when you were having three changes, wasn't it?

A. Yes.

Q. Now, when you only had two changes a week, plus Westerns, you were only using a hundred and four?

A. Well, most of the major companies made Westerns to-at that time.

Q. Well, leaving out the Westerns, if you were changing twice a week that made a hundred and four?

A. Yes.

Q. Feature pictures, didn't it, a year?

A. Yes sir; that is what it would figure.

Q. Then later on you changed to three changes a week?

A. Yes.

Q. Now, you stated you used Paramount, Fox, Columbia, RKO and United Artists. You don't mean you were using the product of each of those companies every year?

A. Yes sir.

Q. Using part of the product each year then?

A. I used all the product from each company but I would run over into the next year. You see, I would run into the next year with the old product and then buy again from them.

Q. You mean you would make a contract for that season's product and then at the end of the year you hadn't played it off?

[fol. 1003] A. If I didn't play them off I had to pay for them anyway. I paid for some of them and didn't play them.

Q. Didn't you sometimes get a new contract with the understanding that you were to have those others cancelled off?

A. No, I had to pay; very few pictures cancelled. I have had a few; I don't remember what companies. Very few pictures have ever been cancelled off of my contract.

Q. But you would play these pictures in a subsequent season sometimes, is that what you mean?

A. Yes sir, the next season.

Q. Instead of playing them during the current season?

A. Yes sir.

Q. Then the next year when you were playing off some pictures that you had bought the previous year you would have to cut down on your product from the other companies, wouldn't you?

A. No, buy all or none.

Q. Now, what I mean is, Mr. Miller, you weren't using in one year all the product of the five major companies?

A. Well, perhaps I wouldn't buy from all those companies every year, which I didn't, I guess.

Q. Well now, take Fox, for example, what years did you use Fox, starting with 1933? Do you have a memorandum of that?

A. No sir.

Q. Well, wasn't 1935 or the 1935-1936 season the first [fol. 1004] season you had used Fox pictures in four or five years? Do you remember about that?

[fol. 1005] A. I always used Fox at any time that I could buy them reasonable enough to make a profit on them; in any year if they were too high, why, I bought something else.

Q. Do you remember whether or not you actually used Fox product for several years——

A. Yes, yes——

Q. Wait a minute; I didn't finish my question——

A. —For years and years.

Q. I want to ask you——

A. But I missed years.

Q. You missed several years perhaps before 1935?

A. Yes, I missed years where I couldn't get a suitable contract with them and got a better contract from the other man.

Q. Every year what you would do was to shop around and get the best pictures from suitable companies?

A. Yes, sir, if they had suitable pictures for my town.

Q. You wanted suitable pictures for Rogersville?

A. Yes, sir.

Q. And the result was that one year you would have the product of one company and another year the product of another company?

A. Well, not always.

Q. Well, you certainly had Paramount, didn't you, every [fol. 1006] year?

A. Yes, sir.

Q. And what other companies did you have every year?

A. I used Paramount and Columbia.

Q. And then you alternated on these other companies?

A. I used Fox most of the time.

Q. You did use Fox in 1936-1937; you are clear about that—No, I take that back: I think it was 1935-1936?

A. 1935-1936.

Q. It was 1935-1936 you had Fox, wasn't it?

A. Yes, sir.

Q. And that same year you had Columbia?

A. Yes, sir.

Q. And that same year you had Paramount?

A. Yes, sir.

Q. Well, that would make right there 156 pictures?

A. Well, you take 1935-1936: I was running four changes a week along in there, 1935-1936.

Q. How many changes a week in 1935-1936?

A. Four changes a week.

Q. One Western and three other changes.

A. Sometimes on Saturday it wouldn't be a Western; I am looking through my book here, and I notice I didn't run a Western every Saturday.

[fol. 1007] Q. Well, did you ordinarily run a Western on Saturday?

A. Yes, sir.

Q. Did you have some trouble with Fox in 1935-1936 about booking; did you have a complaint against them?

A. I don't remember about that. It seems the shows were going right along here, two every week, sometimes two a week, of Fox.

Q. You don't remember any controversy with Fox about booking pictures.

A. No, sir.

Q. Well, in any event, in 1936-1937 you didn't have Fox?

A. No, sir.

Q. Did you have any talk or conversation with a Fox representative about buying the pictures for both Sneedville and Rogersville?

A. Yes, sir.

Q. Now, what was that?

A. Well, I bought the pictures for Sneedville; we were over at Sneedville, and Mr. Fairchild told me he didn't believe he would be able to sell me 1937-1938—I mean 1936-1937—for the Rogersville situation.

Q. Well, did he tell you he wouldn't sell you for Rogersville unless you also bought for Sneedville?

A. Yes, sir.

[fol. 1008] Q. Now, when was that?

A. Well, that was about the same time; that if he sold us for Rogersville it would have to be for both situations, and I would have to add in one of the company's rules, that I wasn't using some more product.

[fol. 1009] Q. I believe you said that in 1936-37 you bought the Warner Brothers products?

A. Yes, sir.

Q. Had you ever used Warner pictures before that?

A. No, sir.

Q. Had you ever had a full deal in that within the last few years?

A. No, sir.

Q. Were Paramount and Columbia the only two companies with whom you had been making a deal each year for the season's output?

A. Yes, sir, and United Artists, I guess was the pictures I always bought something from the United Artists every year.

Q. You bought a few pictures every year?

A. Yes, sir, they had a system of selling them different from other companies, they would sell you one picture if you wanted it, but later years they got to be all alike, all of them like the other companies and you were not buying the seasons output.

Q. But you were not buying the season's output of the United Artists?

A. No, sir, not every year.

Q. Were you in addition to using current pictures, Mr. Miller, making it a habit there in the operation of your theater of getting some of the older pictures which had [fol. 1010] been good and playing them?

A. I did up to the last, just before I sold out, but I hadn't been in the habit of doing that.

Q. You never had to close your house on account of not having pictures?

A. Well it was coming to a point where I would not have and that is why I got rid of the house, went out of business, I saw I was going to come to it, and there wasn't room for two shows at that time.

Q. In 1937-38 you had a deal with Fox that year?

A. Yes, sir.

Q. That was the last season you were there?

A. Yes, sir.

Q. You had a deal with Paramount?

A. Yes, sir.

Q. You had a deal with Columbia?

A. Yes, sir.

Q. You had half of the RKO pictures?

A. Yes, sir.

Q. So you had the entire output of Paramount, Columbia and a split deal with RKO?

A. Yes, sir.

Q. Did you have independents in addition to that?

A. Yes, sir.

Q. What independents were you dealing with that season? [fol. 1011] A. We were picking up from the Monogram, the Republic, Southern Monogram I believe they call it—Republic.

Q. Well if you had the entire product of three major companies and half the product of RKO in addition to these Monogram pictures and other independent pictures, you had plenty of pictures didn't you, Mr. Miller?

A. I had plenty of pictures at the price.

Q. Price was too high?

A. Yes, sir, but I had to buy them, I was up agin it; in other words when I didn't have competition I could go around and play, I could make it over and come down right you see, make them get down right, and if they didn't I could buy from the other company; after I got competition I had to buy from them, and all my letters and correspondence here shows that I did, that I was trying to buy anything that I could, and pay any kind of a price to get pictures to keep my house open.

Q. In other words, when there are two theaters in a town bidding against each other, it means that the price goes up?

A. That is what it done.

Q. Did you ever trade horses?

A. No, I never traded in horses.

Q. What is the seating capacity of that new Rogersville theater you are managing now?

A. Around six hundred and fifty.

Q. You said that your management contract there pro- [fol. 1012] vided for a fixed salary and then a percentage?

A. Yes, sir.

Q. Over and above what was it, what was the percentage?

A. Over two hundred and fifty dollars a month, plus bank night and state tax.

Q. You mean you take out the bank night prize?

A. Yes, sir.

Q. Before you figure your percentage?

A. And the state tax.

Q. And the state tax?

A. Yes, sir.

Q. But you got your percentage on your seats for every night, you didn't call it bank nights, that is your percentage contract?

A. Yes, sir.

Q. And that has been the trade you have had all along?

A. Yes, sir.

The Court: Still having bank nights?

A. Yes, sir.

Mr. Waller:

Q. You mean you are having bank nights up there, when there is only one theater in the town?

A. Yes, sir, one bank night.

Q. Did you ever have a bank night before the Rogersville theater opened?

[fol. 1013] A. Yes, sir.

Q. That Cumberland Theater?

A. Yes, sir,

Q. Did you ever have a dime night before you had opposition?

A. Yes, sir.

The Court: He has testified to that.

Mr. Waller:

Q. That kind of attracts them to the theater?

A. Yes, sir.

Q. Now getting back to your theater, how much did you spend on remodelling that back in 1933, fixing it up as a theater?

A. Fifteen hundred dollars.

Q. Your heating system, were there not some thresher boilers you put in there for a heating system?

A. My heating system is separate from the building.

Q. Separate from the building?

A. Yes, sir, and far apart from the house? It is in a fireproof building.

Q. Sir?

A. It was in a fireproof building twenty-five feet from the main auditorium of the house.

Q. Just explain what that heating system consisted of?

A. My boiler was a twenty horse power threshing machine boiler, high steam pressure gauge taken off, low steam pressure gauge put on for twenty-five pounds.

Q. You rigged that up yourself?

[fol. 1014] A. Yes, sir.

Q. Did you have any rest room facilities?

A. Not right in the house, not right in the theater, when I bought it and put it in condition I had no sewerage pipe next by the theater, runs right by the theater, but I couldn't get a connection. That was why it was not put in. Next door.

Q. That Rogersville theater you are managing, now, that is an up to date theater building and built for a theater?

A. Yes, sir.

[fol. 1015] Cross-examination.

By Mr. Frolich, for Defendants:

Q. You made a contract each season for Columbia Pictures, didn't you?

A. Yes sir.

Q. From 1931-1932 down to 1938-1939, with the single exception of 1934-1935 season, you took the full product of Columbia for each of the seasons, didn't you?

A. I don't remember about that, I am not sure about that, I haven't the contracts.

Q. Suppose I show you these contracts. Will you be good enough to tell us whether it bears your signatures and whether they are the contracts you made with Columbia, commencing in 1932, down to 1938?

Yes sir, that is my signature. Of course, some of them was signatured by my son in my name, I gave him the right to do that.

Q. Does that refresh your recollection as to whether those are the contracts you had with Columbia?

Mr. Frolich: I would like to offer these as Collective Exhibit No. 36.

The Court: All right.

(Contracts marked Collective Exhibit No. 36.)

Q. Did you ever have any trouble getting Columbia's product?

A. A little bit, the last contract was a bit higher. They would sell me all right, but they boosted them up a little [fol. 1016] bit more than——

Q. But you signed the contract, didn't you?

A. Yes sir, I did.

Q. Then after you signed the contract, you sold out your theatre?

A. Yes.

Q. And you never played that contract through at all?

A. No sir.

Q. And you never paid Columbia a cent on that last contract, did you?

A. No sir.

Cross-examination.

By Mr. Raftery, for Defendants:

The Witness: There is one thing—can I say this?

The Court: Yes, go ahead.

A. There is one thing I left out, I didn't state, on that sale there, that Mr. Stengel received all of my old contracts, and that is in the deal, and I have a copy of the sale, he assumed all contracts.

Mr. Frolich:

Q. You didn't play it did you?

A. No, but I sold my theatre to him and he assumed the contracts, that is written in the contract, he is to take all, to assume all contracts that I haven't played. I didn't bring [fol. 1017] that down with me on account of I didn't think to bring it. I am going to have to pay that contract.

The Court: What?

A. I am going to pay that contract.

The Court: You say you are still operating that theatre?

A. Yes, for Mr. Stengel.

Mr. Raftery: Mr. Wright, did you offer in evidence that Universal contract that you were examining the witness about?

Mr. Wright: Yes.

Mr. Raftery:

Q. By the way, Mr. Miller, are British pictures, with English actors, popular up in your part of the country?

A. No sir, they are not.

Q. Getting down to this letter of August 14, 1937, you stated in this letter:

"This was very unfair to us as we have been using United Artists for the last ten years and instead of trying to sell us your product, you sold the opposition."

Is that your best recollection of the facts with regard to your dealings with the United Artists?

A. We had used some United Artists every year.

[fol. 1018] Let's see what you did use. If I showed you a list of United Artists releases for each year, would you recognize it? Let me try it, anyway. Starting with 1930-1931 season?

A. Let's start at 1933, when I went in business; Huh?

Q. When did you go in business?

A. 1933.

Q. How many pictures of United Artists did you buy in 1933-1934?

A. July 20 to July 4—I mean, July 1934 to July 4, 1935—

Q. I beg pardon?

A. From July 20, 1934, releases to July 4, 1935, we used, I believe I have used every one of those pictures, as well as I remember.

Q. As a matter of fact, didn't you state on your direct examination you started in that town in the theatre business in 1917?

A. Yes sir.

Q. And you were in the theatre continuously in that town from 1917 to 1933?

A. Yes sir.

Q. Isn't it a fact that for the calendar year or theatrical year of 1930-1931, when you were operating a theatre in that town, out of 15 or 18 releases of United Artists, you played 4 pictures. You played "Whoopee"—Look up [fol. 1019] there and see if you didn't play that?

A. I played "Whoopee" and "Abraham Lincoln".

Q. As a matter of fact, you didn't play "Hell's Angels" or "Bat Whispers"?

A. I played it but I didn't play "Bat Whispers", "One Heavenly Night", "Devil to Pay", "Reaching for the Moon", "City Lights", "Front Page"—I played just about all of those.

Q. You played all of those?

A. Just about, as I remember.

Q. That is your best memory?

A. But I don't know whether I played them all that year or not.

Q. Isn't it a fact in that year you played four pictures? When I say that year, I mean from that program, from that date, down to this date, only four pictures of that group that was released in that town, and they were "Whoopee", "One Heavenly Night", "Moulin Rouge", and "Hell's Angels"?

A. I haven't any record book that far back.

Q. You haven't got a record?

A. No sir.

Q. The next year you didn't play a single picture, did you, 1931-1932?

Mr. Wright: I thought that was the year you were just asking about?

Mr. Raftery: The next year, 1931-1932—Not a single [fol. 1020] picture?

A. No sir, I couldn't get together with them.

Q. You couldn't make a deal?

A. No.

Q. The next year, 1932-1933?

A. Oh, I played a part of those pictures, at the Palace Theatre, it might be later.

Q. Are you sure of that?

A. In later years.

Q. Are you sure of that? Isn't it a fact, Mr. Miller, that you never at any time, from the first date mentioned, down to today, played a single one of those pictures in the town of Rogersville?

A. I am going to turn that over to my son.

Q. Well, turn the page before you turn that one over to your son. Let's have the next year. What is the date of that?

A. August 4, 1932.

Q. 1932-1933, isn't it a fact you never, from that first date of release, down to today, played a single one of those pictures in Rogersville?

A. I will turn that over to my son.

Q. All right. The next year, on the 1st, which is all the releases of the United Artists for 1933-1934, isn't it a fact that the only one out of that entire group that you showed in [fol. 1021] that town was "Looking for Trouble"?

A. I don't think I played it. My son might remember about that.

Q. What is that?

A. My son might remember about that picture, if we played it.

Q. You might have been exaggerating a little bit in this letter about playing all the United Artists down in that town when you said for ten years you had been such a great customer, isn't that a fact, Mr. Miller?

A. I will turn over to 1934-1935, I always used United Artists, some United Artists.

Q. You didn't play some United Artists pictures in 1934-1935, isn't that the fact?

A. I played United Artists before that.

Q. Well, you played one in four or five years.

A. I played more than one in five years.

Q. Now, in this letter you also stated that you would like to buy the 1937-1938 program. Will you look over onto that page. I would like to call your attention to the fact that there are 23 pictures, plus 2 re-issues, that is the group of pictures you made the offer for in this letter, is it not?

A. Yes sir.

[fol. 1022] Q. You see here, "12 at 40 plus $3.00 score with 40 per cent of gross receipts." Which of the 12 in that group were you willing to pay $43.00 guarantee, against 40 per cent of the gross for?

[fol. 1023] A. Will you let me look at the signature on that letter, please?

Q. Sure. You are not going to turn that over to your son, are you?

A. He has authority and I told him to buy the pictures. My son signed the name to this, my name. Here is my signature and there is my son's. That is the way he writes it. You see the difference, I guess. I will turn it over to him.

Mr. Raftery: Then at this time we are moving to strike out all evidence—first, to strike the exhibit, and secondly, to strike whatever the evidence has been regarding this subject that is now turned over to the son.

By Mr. Wright:

Q. Isn't it a fact, Mr. Miller, that this letter which is dated August 14, 1937, which has your name to it, was sent at your instructions?

A. I told my son to make a deal with them. I discussed it with him and told him to make the deal with them.

Q. Is that the deal as set forth in that letter, the deal that you told him to make?

A. Yes sir. I told him not to pay over $40.00 and they would surely accept that; not to pay over $40.00 for their top pictures; for him to pick out the top pictures. I don't [fol. 1024] remember what pictures he picked out.

Q. This exhibit Mr. Raftery showed you contains the titles. Now, at the time the pictures were offered to you nothing like this was shown you?

A. No sir.

Q. What was offered you was just a list of in many cases untitled pictures, is that true?

A. Yes sir.

Q. And the actual pictures that are included in the deal later appeared in that talisman memorandum that is attached to that letter, is that correct?

A. Yes sir.

Mr. Raftery: Now, that Mr. Wright has testified, I am going to move to strike out all of it. In the first place, this letter, on its face shows it is just a letter written from Rogersville, Tennessee, not in response to any offer made by United Artists, as presumed by Mr. Wright, but a blanket offer made in the dark for United Artists' pictures, and I have asked this witness——

Mr. Wright: That is the way every offer for United Artists pictures is made.

Mr. Raftery: I beg your pardon; it is not, and I move to strike out the questions propounded by Mr. Wright [fol. 1025] and the answer made by the witness regarding this particular document as to the pictures offered by United Artists. There is no proof here that any pictures were offered by United Artists. It is just the opposite. The pictures weren't offered to this witness or to his son.

Mr. Wright: We will agree to that, if all the questions Mr. Raftery asked may be stricken relating to that docu-

ment, which has not been identified in any way or described prior to his——

The Court: Well, just strike it all out.

Mr. Raftery: Now, let me have the answers to the interrogatories you were examining him about. These were names of pictures taken from the answers to the interrogatories which Mr. Wright used, and for convenience, I gave it to the witness.

The Court: Well, if the letter is stricken out there is no use——

Mr. Wright: I wasn't referring to the letter. I was referring to the questions asked about this document here, this blue paper. I agreed that my questions on that document would go out if his questions relating to that document [fol. 1026] went out with the letter.

The Court: The witness didn't write the letter anyway.

Mr. Wright: The witness has stated that the letter contains the propositions that he instructed his son to make. Now, we can put him on the stand and have him testify that he wrote it, if that adds anything. I don't see that it does.

The Court: Let me see the letter. (Letter handed to the Court). I don't pay so much attention to the letter anyway. It looks like it is a proposition making a very attractive offer. It says: "I can offer you without knowing what you will have the following deal; twelve pictures at $40.00 plus $3.00 score." What does that mean "$3.00 score".

A. A $3.00 score charge is put on by the film companies to take care of this society of authors or composers or whatever it is—it is about a foot long. I don't believe I can tell you what it is. I guess you understand though.

Q. What was your purpose in having this letter written?

A. Well, Sir, I was just scared I wasn't going to get any pictures to operate the house.

Q. Did you know you were offering more than the pic- [fol. 1027] tures were worth?

A. Yes sir. And I wanted to stay in business if I possibly could and that is why I offered this proposition; I wanted to get pictures. I thought by offering them a price I could buy the pictures. Always before that they wanted the price and I paid the price.

Q. Did you instruct your son in writing this letter as to the amounts to offer for the pictures?

A. I told him not to offer over $40.00 tops and percentage.

Q. Did you tell him to offer $40.00?

A. Yes sir.

The Court: Well, I will overrule the objection to the letter and the rest of the evidence relative to or the questions relative to the program that were asked by Mr. Wright—I don't see that it makes much difference either way because this letter states itself "I offer you without knowing what you will have"—I don't see that the questions asked either by Mr. Raftery relative to which twelve pictures he meant or the questions asked by Mr. Wright in that connection, neither of them are material because the letter itself shows that he didn't have any particular twelve pictures in mind.

Mr. Wright: I think that is right, your Honor. I agree to that. I only wanted to be sure that this document here [fol. 1028] that he offered, which contains a list of pictures released wasn't used to give the impression that at the time United Artists' pictures are sold and offered that they are titled because they are not. In many cases they offer pictures that haven't even got a title.

The Court: I sustain your objection to his questions and I sustain his objection to your questions.

Mr. Raftery: I only have one question to ask.

Q. You never offered $40.00 apiece in all the years you were there for a picture, did you?

A. No sir, but I had used United Artists pictures and they made some pictures and I had bought some pictures that made me some money before that and I knew we could afford to pay that much money for the pictures because they had the reputation of making real pictures, twelve or fourteen a year, and I knew I could make money on their pictures is why I told my son to send in the order.

Q. Did you ever offer $40.00 for a United Artist picture before that letter.

A. No sir.

Q. As a matter of fact, $25.00 was the top price you ever paid for a United Artist picture on a flat rental contract, is that not the fact?

[fol. 1029] A. Yes sir.

Q. Except Charlie Chaplan's Modern Times, which you paid $30.00 for?

A. Yes sir.

Q. Is that the fact?

A. Yes sir, that is a fact because I could buy them for that price.

Q. And the British pictures you didn't want at all, did you?

A. No, I didn't want the British pictures.

Q. You knew a great portion of the releases for 1937-1938 of the United Artists were British pictures, did you not?

A. No sir.

Q. Well, you knew that before the season was over, did you not?

A. You mean this contract that I was writing about?

Q. Yes.

A. No, I didn't know what——

Q. Would you pay that kind of money for British pictures? I mean the lowest offer, the lowest amount in that letter, would you offer that for the British-made pictures?

Mr. Wright: If your Honor please, the letter speaks for itself; he made the offer without knowing what the pictures were. I don't see how his further testimony is going to enlighten us any more on that point.

[fol. 1030] Mr. Raftery: We didn't take the letter seriously. Your Honor, I would like to move to amend the answers to the interrogatories in connection with the town of Rogersville for the season of 1937-1938 so as to show that twenty three pictures, seven of which were foreign-made, played under the contracts of J. L. Davis in the Rogersville Theatre and the total film rental paid United Artists on the twenty three pictures for that season, that is, that particular season, was $496.00.

The Court: What does the answer show?

Mr. Raftery: $496.00 but shows it in two separate columns. It shows $123.50 in one column and $372.50 in the other. I have added the two together and checked it with the original records under the J. L. Davis contracts, who was the buying agent for a man named Hill. These contracts, these pictures played in that theatre and the total film rental paid was $496.00.

Mr. Wright: The Hill you are referring to is R. T. Hill, president of Cumberland Amusement Company?

Mr. Raftery: That is right.

The Court: Let it be amended.

[fol. 1031] Mr. Wright: We don't have any objection to his amendment if that is a fact but we would appreciate it in the future if he would make any amendments he wants to make to the answers before we put the situation on the stand.

Mr. Wright: I would like to ask him one question to clear up this matter of Sneedville.

Q. I believe you testified that you did buy the 1936-1937 Fox pictures for Sneedville, did you not?

A. Yes sir.

Q. You tried to buy them for Rogersville also and you couldn't, is that the fact?

A. Yes sir.

Further this witness saith not.

[fol. 1032] Afternoon Session

E. R. Perdue, called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Please state your name and address?

A. W. R. Perdue, Gadsden, Alabama.

Q. What is your occupation?

A. They call me a banker, I believe. I am President of a bank down there.

Q. Of what bank?

A. East Gadsden Bank.

Q. You are also President of the Etowah Amusement Company, are you not?

A. Yes sir.

Q. That is the Company that operates the Dixie Theatre there?

A. Yes sir.

Q. This map is an enlarged copy of Exhibit 82 of the City of Gadsden, a map that was produced by you?

A. Produced by the City.

Q. You got it from the City?

A. Yes sir.

Q. That is, as far as you know, an accurate map of the City?

A. Yes sir.

[fol. 1033] Q. I call your attention to the section in the Southeastern corner of the map with the red bar there, and the word "Dixie" is that the location of your theatre?

A. Yes sir.

Q. What is the area surrounding that called?

A. That is a mile and a half, I guess——

Q. I say, what is this area called?

A. It is called East Gadsden.

Q. East Gadsden, Alabama?

A. It goes by that name, yes sir.

Q. It is separated from Gadsden, the down-town part of Gadsden by the Coosa River?

A. That is right.

Q. Is this, those three red bars that are on the central section of Gadsden, marked Capitol, Princess and Gadsden, the respective locations of those three theaters?

A. Yes sir.

Q. Are those three theaters operated by the Crescent Amusement Company?

A. That is my understanding.

Q. I call you attention to the Western side of the map with a red mark, is that the location of the Ritz Theatre?

A. Yes sir.

Q. And the area surrounding the Ritz Theatre goes by what name?

[fol. 1034] A. Alabama City, it is called.

Q. And the city limits of Gadsden are those shown at the extreme edges of the map, are they not?

A. That is right.

Q. And both East Gadsden and Alabama City sections are inside the limits of Gadsden, proper?

A. Yes sir.

Q. Who else is interested in the Etowah Amusement Company besides yourself?

A. There are 14 stockholders.

Q. Who are they, where are they from?

A. From Gadsden, all of them.

Q. Employes of the Goodyear Plant there?

A. Ten are Goodyear officials and employes.

Q. How did you and these other people happen to build a theatre there?

A. Well, at the beginning, the theatre on that side—There was boys got interested and interested some parties in remodeling an old building of the theatre that was burned, and after it burned, then they got interested, themselves. The people kept insisting that there ought to be a theater on that side, so the Goodyear boys took it up and invited four outside men.

Q. When was this other theatre burned?

A. About, I guess, about two or three months before they started the move to put up a new building.

[fol. 1035] Q. When was that?

A. It was burned on January 21st.

Q. Had it ever operated as a theatre?

A. No.

The Court: What year was it burned?

A. 1939.

Mr. Wright:

Q. Had you ever had a theatre before in East Gadsden?

A. No sir.

Q. Go ahead then?

A. So, this one was burned and the move was still on, in other words, the people called for a theatre, and so then the Goodyear boys took the matter up and invited four outside men to join them. They invited me and a contractor, who did most of the contract work for the Goodyear Company, small contract work in their building, and a manufacturing Company there, the head of it, and the assistant City Engineer. In a sense, I was drawn in since most of the Goodyear men were banking with me and I could hardly deny taking some stock and going with them and, naturally, I was interested in having a theatre on our side of the town for the service and convenience of the people.

Q. When did you start work on the theatre?

A. The excavation began, I believe, about March or April.

[fol. 1036] Q. When did the theatre open?

A. September 2nd or 3rd, I believe.

Q. In 1939?

A. Yes sir.

Q. How much was put into that theatre property?

A. Our investment there is $21,600.00, approximately so.

Q. Will you tell us how you figure that?

A. Well, the building and lot and paving cost us, I believe, $11,160.00—I mean, $1160.00—I mean, $11,160.00 for the building and lot, too. The lot was $1160.00 and the building was approximately a little more than $10,000.00. Then our projection equipment was about $3800.00 I believe. The sound equipment was $2800.00, including using the equipment which we traded in at about $1,000.00. And the curtains and the screen, I believe, was $575.00 approximately. I don't know those figures just to the exact dollar.

Q. Now, can you tell us what the distance is from the Dixie Theatre to the down-town section of Gadsden?

A. It is between a mile and a half and two miles.

Q. How much farther is it from the down-town section of Gadsden to where the Crescent Theatres are and the East Gadsden Theatre?

A. I would say it is about two and a half to three miles.

Q. The total distance from the Western part, between [fol. 1037] the Ritz and the Dixie is about 5 miles?

A. Yes.

Q. Is there transportation facilities between them?

A. Yes sir, a bus line.

Q. You can go from one part to the other by bus?

A. Yes.

Q. How long does it take to go from the Dixie to the Ritz?

Mr. Waller: It would depend on how fast you went.

A. It would depend on the traffix.

Mr. Wright:

Q. Approximately, within what limit can you make it?

A. I would say from 20 to 30 minutes.

Q. Why was it that you and these other people got together to build that Dixie Theatre?

Mr. Waller: He has answered that.

The Court: He said there was a demand for a theatre over there in East Gadsden after the old theatre burned.

they still continued it and they got together, as I understood him.

A. I didn't get the question?

The Court: He asked you why it was that you all went into the theatre business over there, how did you get together—why did you get together?

A. There was a demand there. They claimed it was cost-[fol. 1038] ing too much to go to the Princess and it was too far to go over to the other theatre. They wanted something closer home that they could patronize.

Q. How many people live in that section of East Gadsden?

A. What is that?

Q. How many people are there in that area there?

A. Approximately 7,000, between 6,000 and 7,000.

Q. About what is the population of the whole town?

A. Of the whole town of Gadsden?

Q. Yes?

A. I believe they claim 40,000.

Q. What sort of residential area is East Gadsden as compared to Alabama City?

A. I don't understand your question?

Q. Can you tell us what the two residential areas that are respectively known as East Gadsden and Alabama City are like, what is their character?

A. Alabama City is made up of textile, cotton mill and steel plant employes and East Gadsden is made up of Goodyear employes, Goodyear Tire and Rubber Company employes mostly.

Q. Do most of those employes have cars?

A. What is that?

Q. Do most of them have cars?

A. I would say approximately 48 to 50 per cent have cars. [fol. 1039] Q. How about that situation with respect to those over in Alabama City?

A. I would think pretty much the same, possibly a little smaller number have cars, but pretty much the same.

Q. Did you have anything to do with the efforts to buy film for the Dixie Theatre after it opened?

A. I didn't understand you?

Q. Did you have anything to do with the attempt to buy films for the Dixie Theatre after it opened?

A. No sir. I have only been President since January 1st of this year.

Cross-examination waived.

Further this Deponent saith not.

Mr. Wright: Call Mr. Currey.

Mr. Waller: I take it the Government is proposing to go into the question of buying films for this theatre, which opened in September 1939, a month after this suit was filed, and we object to anything about it as being outside of the scope of the issues in this case.

The Court: Well, the same thought had occurred to me. Ordinarily a conspiracy ends, in a criminal case with the [fol. 1040] return of the indictment. Unless you wish to prove that a conspiracy was carried on, how can this be competent?

Mr. Wright: Certainly we are going to insist that a conspiracy continued right on down to the present time, so far as that is concerned and we gave them express notice we were going into the Gadsden situation.

The Court: Giveing them notice wouldn't make it competent from a legal standpoint.

Mr. Wright: No. I was just referring to any question of surprise that might be expressed. In the pleadings, we allege a conspiracy and a continuing one, that is why we ask to enjoin the defendants and we are entitled to charge the same sort of things are going on, before the suit was filed and has continued and is going on right now. That is what we are seeking to enjoin.

Mr. Waller: That is the most astounding thing in any criminal or civil case, that you can go into matters that occur after the bill was filed. Sometimes a supplemental and amended bill can be filed to bring the matters that occurred after the filing of the original bill. That is done in equity cases.

[fol. 1041] The Court: Do you have any authorities on this question?

Mr. Wright: I hadn't prepared any, I had assumed that that question would be raised after the filing of the bill of particulars, that there might have been some sort of motion to strike the Gadsden situation from the bill.

Mr. Waller: We did, in the interrogatories, where they asked for information in the interrogatories about matters happening after the filing of the suit. There are some recent federal cases on that.

The Court: Well, I think there is a distinction between the situation that existed before the filing of the bill, then certain matters relative to that situation that continued after the filing of the bill, a situation that did not exist at the time of the filing of the bill, coming in after the bill was filed.

[fol. 1042] Mr. Wright: Yes, but this is sufficient—we propose to show specifically here what the effect of the conspiracy that is alleged between Crescent and Paramount and between Crescent and Fox and between Crescent and Warner Brothers was on this particular situation. Now, that continued right on through the time that they were operating under the Paramount franchise, for example, which affects this particular situation, which was executed in July 1938 and November, 1937. Similarly, the other franchises were in force at the time the suit was filed and they continued thereafter and we are certainly entitled to show what the effect of these agreements that we claim were illegal between the other companies and the co-conspirators were both before and after the suit was filed.

Mr. Frolich: There can't be any injunctive relief against them.

Mr. Waller: Your Honor, the authorities are—fortunately Tennessee is one of the two states in the Union that still has the distinction between equity and law and we have one of the best books on equity practice in Tennessee, I suppose, that has ever been written, namely, Gibson's Suits in Chancery, with which your Honor is [fol. 1043] thoroughly familiar, of course; that unless an amended and supplemental bill or complaint is filed, everything that transpired or occurred after the original suit is filed—that they are not within the scope of the pleadings. That is a very fundamental proposition and the one that we rely on.

The Court: Ordinarily that would be the rule. In conspiracy cases the rule is somewhat different.

Mr. Wright: I think, your Honor, that would clearly be the rule in a criminal case where you were merely punishing for past offenses but in connection with a suit of

this type where you are attempting to enjoin a continuing violation, I don't think there can be any question but what we are entitled to show the continuance of the conspiracy which we are complaining about right up to the date of the trial. The only possible question would be one of prejudice arising out of surprise or failure to give the defendant proper opportunity to meet that situation. Now, there is no question of that at all because we informed them expressly in the bill of particulars that we were going to put these people on and go into that Gadsden situation.

The Court: Well, it seems like there certainly should be [fol. 1044] some authorities on the subject.

Mr. Waller: We have some authorities but we haven't got them down here.

The Court: Well, they don't do me any good at your office.

Mr. Waller: We have two or three cases where the Government and the plaintiff in the case asked for interrogatories to be answered where the matters occurred after the suit was filed and each case the court held they were outside the scope of the pleadings and didn't have to be answered.

The Court: Well, I think probably the evidence might be admitted for the purpose of showing there was a conspiracy between the defendant exhibitors and the co-conspirators against whom the bill has been dismissed but in view of the fact there is no general conspiracy alleged and no acts alleged to be continuing acts on the part of Columbia, United Artists and Universal such as franchises, etc., I don't see that the evidence would be competent against them.

Mr. Wright: Well, if your Honor please, we allege a continuing conspiracy also against those three. There is no [fol. 1045] difference in the charges. The difference would be in the proof. It is true that we wont be able to offer continuing franchises in the case of Columbia, United Artists and Universal but we have alleged a continuing conspiracy with respect to the other two.

Mr. Raftery: You have alleged nine conspiracies here. The first conspiracy is between the exhibitors, then eight separate ones between each individual exhibitor. As I understand the evidence you have offered, when you offer evidence against the Paramount and Sudekum defendants,

you are not offering that against Columbia or any of the other there.

Mr. Wright: That is right.

Mr. Raftery: Of course, I am not entirely apart from Mr. Wright on whether this should go in or not. We don't want any error in this record any more than your Honor does and just as a suggestion, leave Gadsden alone for the afternoon and give all of us an opportunity to search for law and go ahead on some other evidence.

Mr. Wright: Well, if your Honor please, these people have been here for four days and I don't think that would [fol. 1046] be quite fair to them. Now, if your Honor later decides that any evidence should be stricken, I assume that may be done at any time.

The Court: (To the witness) You can have a seat there just a minute until we can decide this question.

Mr. Dobey: May it please the Court, in the Aluminum case in New York, that case started several years ago and I recall some evidence put in by the Aluminum Company of America near the close of the trial a few months ago or several months ago and it had to do with this new Reynolds aluminum plant which had just begun.

Mr. Wright: I might say, your Honor, that this evidence is sufficiently important to us so that we will make an elaborate effort of proof on it even if your Honor finally decides to exclude it, and I think it would be just as bad if we went ahead and put in the testimony subject to your Honor's later ruling on a motion to strike.

The Court: I don't find it expressly alleged in the bill of complaint filed in this cause that it was a continuing conspiracy. The allegation seems to be upon the past five years. However, no preliminary injunction was issued [fols. 1047-1048] in this case and I assume that the act complained of in all probability is to be followed by the defendants until the methods were declared to be in violation of the Sherman Act.

I think under the circumstances the evidence is competent and I will admit it at this time, subject to the exception, and if you can present me any authorities tomorrow to the contrary, why, I will hear you on them.

[fol. 1049] ROBERT L. CURREY, called as a witness in behalf of the Plaintiff, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wright, For the Plaintiff:

Q. State your name and address, please?
A. Robert L. Currey; Gadsden, Alabama.
Q. What is your occupation?
A. I am a moving picture machine operator,
Q. Were you formerly employed as manager at the Dixie Theater?
A. Yes, sir.
Q. In East Gadsden?
A. Yes, sir.
Q. Over what period?
A. July 8, 1940, to September 1, 1940.
Q. By whom were you employed prior to that time?
A. Crescent Amusement Company.
Q. Where?
A. At the Gadsden Theater at Gadsden.
Q. In what capacity?
A. Assistant to Mr. Butler, the Manager.
Q. How long?
A. A year and seven months.

[fol. 1050] Q. Are you familiar with the characteristics of all of the theaters in Gadsden?
A. Yes.
Q. Can you describe the Dixie Theater?
A. The Dixie is a small suburban house, with, I imagine around 500 seats; some seats have been installed since I was there. It was modern with respect to the building, and so forth.
Q. Can you tell us what kind of prices it was operated under when you came there as manager?
A. Yes, sir; the admission was 5 and 10 cents matinee until 5 o'clock; after 5:00 o'clock it was 10 and 20.
Q. Can you describe the Ritz in Alabama City?
A. The Ritz in Alabama City, well I imagine the seating capacity there would run less or equal to the Dixie; it is a somewhat older theater; however, the equipment isn't as new as the Dixie, or the building itself; it is quite an old building.

Q. About how old is it, do you know?

A. No; I would say approximately 15 years old, I guess.

Q. And what sort of prices was it operating under when you were managing the house?

A. Beg pardon?

Q. What sort of prices was it operating under when you were managing the Dixie?

[fol. 1051] A. Well, this is approximate; it is pretty nearly accurate anyhow: it was 5 and 15 cents matinee, 10 and 20 cents at night; and they had a bargain day on Wednesday, I believe of ten cents.

Q. Ten cents day and night. Can you describe the Princess Theater there?

A. The Princess is the largest theater in Gadsden, having I presume, around 1500 seats—1200 anyway; and it is located in down-town Gadsden, and it is the largest theater.

Q. What prices was the Princess operated under while you were managing the Dixie?

A. The Princess' admission prices were 10 and 25 cents, any seats, until six o'clock; after six o'clock it was 10, 25 and 30.

Q. Can you describe the Gadsden Theater?

A. The Gadsden Theater is on the edge of the business district of Gadsden; it is an old opera house type theater, I imagine about thirty years old, has a seating capacity—when I worked there, had a seating capacity of 817.

Q. And what sort of prices had this theater while you were managing it?

A. That was a combination vaudeville and picture house, running vaudeville every day except Sunday. Admission prices then were 5 and 10 cents matinee, 10, 15 and 20 cents [fol. 1052] at night; and the bargain day was on Wednesday, and Thursday 10 cents all day.

Q. Can you describe the Princess?

The Court: He has already described that.

A. I think I have already described that.

Mr. Wright:

Q. The Princess was the first run house. The Capitol? I beg your pardon.

A. The Capitol compares in size, I imagine, compares in size between the Gadsden Theater and the Ritz Theater. It is a very small theater.

Q. And how old is it?

A. I don't know; I couldn't say; it is about 15, I imagine, 15 years old.

Q. What sort of condition is it in?

A. Well, it is hard to say; it is just about what you would call, I guess, a second-class theater.

Q. How does it compare with the Dixie in East Gadsden?

A. Well, the Dixie is more modern in every respect than all of the theaters except the Princess.

Q. And what prices was the Capitol operating under while you were managing the Dixie?

A. They were 10 and 20 cents all the time except on Thursday; on Thursday they had a bargain day—ten cents straight.

[fol. 1053] Q. You say you became manager of the Dixie on July 8, 1940?

A. Yes, sir.

Q. What sort of pictures was the Dixie playing then?

A. They were playing third and fourth run pictures, with some re-issues.

Q. Well, did you attempt to get some better pictures for the Dixie?

Objection by defendants, Sustained.

Q. What efforts did you make to license films for the Dixie?

A. Mr. Butler, the first time I discussed the situation with him about getting some more current films to run, he wasn't able to offer any information on the subject at that time; he said at that time they were negotiating with the first run houses; that is, the Crescent Amusement Company, for, I think, a five-year contract, and he didn't know just how the situation was at that time; he couldn't give me any definite information on that.

Q. What season's Metro product were you talking about?

A. 1939-1940 product.

Q. Had any of those been run in Gadsden at the time you are talking about?

A. No, sir; that product hadn't been run.

[fol. 1054] Q. The season had about a month to run then?

A. Yes, sir.

Q. Then did you have any further conversation with Mr. Butler or any one in Atlanta, about getting Metro pictures?

A. Not at that particular time. I went over to Atlanta a few days later and got in touch with the branch manager, and he came and talked the situation over with me, and he told me more or less about what Mr. Butler did, that they were negotiating for a five-year contract with Crescent Amusement Company and he didn't know when this product would be available, but, that when they did get that contract approved they could start serving me regularly subject to clearances, etc.

Q. Did he offer you any films at all?

A. Yes, he offered me four or five re-issues, which I bought at that time.

Q. How old were they?

A. Four to six years old.

Q. Did he offer you anything else?

A. No.

Q. I will show you some correspondence here: A letter dated July 15, 1940, from you to the Metro office at Atlanta [fol. 1055] and their reply of July 18th. Another letter from you, dated July 19, to the office manager there, and his reply to that letter of July 26th. Will you tell me whether those letters were either written or received by you on the dates stated there?

A. Yes, this is; the first letter I wrote him was just a short while after I visited Atlanta. He said at the time I was over there he would let me know just as soon as he could because I had preference to Sunday showing pictures, and I didn't get any current to run on those days; and he said he would let me know within a short while yes or no; and so this is a letter I wrote him, because I was really hard up. I indicated a definite answer—

Q. You are referring to the letter of July 15, 1940, which has been marked Exhibit 83, for identification?

A. Yes; this is the letter that I received from Mr. Avey in reply to that letter of July 15th.

Q. This letter of July 18th?

A. Yes. And this is a second letter that I wrote him, a letter dated July 19th, and this was his answer to that.

Q. That is a letter dated July 22nd.

A. Yes.

Q. I will offer these four letters in evidence. If there is no objection, I will read this, the first letter, from Robert

[fol. 1056] L. Curry to the branch office at Atlanta (Reading):

"Dear Sir:

Not that we are trying to rush you to a decision, but have you any information to offer regarding the availability of your 1940 product for our use in the Dixie Theatre?

When I was in Atlanta the other day, I explained that we were badly in need of some new product to run on our Sunday, Monday and Tuesday programs. The situation is really more acute than even I realized. Since we are the only ones running your product in Gadsden this year, it should not seem odd to anyone that we think we are entitled to such product as you have released on your 1940 program.

We are well aware of the fact that you must cater to whichever exhibitor will or can use the greater volume of your product, and we can readily appreciate your position, but don't you think that if nothing is agreed upon between you and our competitors in the very near future that the year will have been almost expired and that you will have gone through an entire year of releasing without having collected any revenue from your 1940 product in this city?

[fol. 1057] Too, I am almost sure that Mr. Sudekum has waited long enough that even if he should buy your product he would not want that product which is practically second run in this trade area. I KNOW: I worked for him nearly two years and I KNOW that he is much too shrewd a business man to do otherwise.

We are not in business to put our competition out of the theatre business, but only to make a living. We believe that there is quite enough product on the film market to supply them and us too.

The writer appreciates your personal attitude in this matter and I could be nothing less than very complimentary toward your very fine salesman, Mr. Butler, but I cannot be so foolish as to agree with anyone to the fact that this situation is at all fair to us or to you. I do not ask you to try to sympathize with us as I'm sure you already do. All I ask you to do is to tell us something definite about this thing at least by the first of August. Whether we are favored with the release

of your 1940 product for our use or not, a definite statement from you will set our minds at ease and we can act accordingly.

We would like to again request that you let us spot [fol. 1058] a few of your late product or contract for some pictures with the special waiving clause which I explained to you. At any rate please let us hear from you at your very nearest convenience.

Hoping that you will give us your very kind assistance in this matter and that you WILL find it very plausible to release to us some 1940 product;

We remain

Yours very truly, Dixie Theatre, Robert L. Curry."

[fol. 1059] Mr. Wright: What was the special waiving clause?

A. I told Mr. Avey if he would go ahead and let us buy some of these pictures under that signed contract, and they would want those pictures, we would automatically relinquish our first run contract.

Q. What did he say to that proposition?

A. Said he couldn't do it.

Mr. Wright.. The next letter from Mr. Avey to Mr. Curry, dated July 18, 1940, is as follows:

"Replying to your letter of July 15 regarding our product for first run in Gadsden, Ala., the writer informed you when you visited our office last week that we were negotiating with our regular established account in Gadsden for the placing of our product in that town, first run. I thought I made our position in this matter clear to you, as you went so far as to go over our records and you selected some pictures from a list of many that were available for use second run. Therefore, I am at a loss to understand why you wrote us your letter of July 16. Sincerely, Loew's."

Q. What was your list available for use second run?

A. There were about six reissues and I bought four of them.

[fol. 1060] Q. Were there any others that were not reissues that were on the list?

A. No, sir.

Q. The pictures were during the 1938-1939 season, were 1938-1939 product?

A. Most of them had been played too.

Mr. Wright. Mr. Curry's letter to Mr. Avey, manager of the Loew's Branch, Atlanta, Georgia.

"According to your letter of July 18, you evidently mis-understood the purpose of mine of July 15. I did not ask for a first run contract in Gadsden on Metro product, but merely was trying to get some definite statement from you as to the possibility or impossibility, as the case may be, of your running any 1940 product from you in the near future.

"I thought if I could get a definite statement from you, whether it be pro or con, I could prepare to cope with either situation resultant of your definite statement. You see, I am not nearly as interested in running your product *first* run as I am in merely running your *newer* product—whether it be first or second run in Gadsden. In fact, I wish that the Princess in Gads- [fol. 1061] den was running your '40 product first run now so that I may have the opportunity to get some Metro pictures which are not in the old group.

"What I really want to know is this: will I be able to get *any* 1940 Metro pictures for use in the Dixie theater either first or second run by August first, or can you give me any definite statement by that date regarding same? If I can get these pictures I will be no less than delighted. If I can not get them I will not be so happy, but I can seek another product for our use that will not be quite as old as the product we are now playing from your exchange.

I do not regret having bought the pictures I am now being served from you as they are good pictures for my week-days, but as I explained to you, I have not even one contract at the present time from which I may select to run on my Sunday-Monday-Tuesday programs. None of the pictures from you or others are suitable for these days. You can see now why I am so terribly anxious to get a definite answer from the question, "Will I be able to get your newer product either first OR second run anytime in the near future?" It is very unpleasant for me to be held in such terrific

[fol. 1062] suspense for a very long period. I *want* new Metro product for my house if it is ever available. That is why I have not even considered taking the matter up with another exchange. I am sure that there are others from whom I can get new second run product, and I very likely shall buy such product from them, but I would like very much to have some new Metro product for my Sunday-Monday-Tuesday programs.

"Perhaps I am going to too great a length to try to explain the purpose of my letter of July 16, but I want to feel sure that you understand it and accept it in the proper light. In fact, I think that the trouble with you and me is that we really do not quite understand each other.

"I am holding all my Sunday-Monday-Tuesday playdates open past August 4th in view that something may become final from you by August first. That is why I requested a definite statement from you by August first.

"Hoping that thi*d* clears up the purpose of my letter of July 15 and that you will enjoy the privilege of doing a great amount of business with you in the very near future, I remain, Very sincerely yours."

The next letter is July 26, 1940, to Mr. Curry, from Mr. Avey.

[fol. 1063] "Replying to your letter of July 19th, with further reference to our product for your theatre,—

"There is nothing I can add to what I told you when you visited with me in my office two weeks ago and also what I told you in my letter to you of July 18th, and that is that we are negotiating with your established account in Gadsden, Alabama, and certainly under the circumstances we would not think of selling our product to your theater located in the suburban mill section of Gadsden and forego prior runs that we should have in Gadsden.

"We will do everything we can to continue to find product available for your use and you know that we have many pictures that you can use, and why you continue to try to push us to give you an answer regarding our new product we can not understand.

Yours very truly."

Q. By the way, is the Dixie in the suburban mill section in Gadsden?

A. Yes, sir.

Q. And the Ritz at Alabama City is also in the Suburban section of Gadsden?

A. Yes, sir.

Q. Then after that final letter of the 26th, did you have any more conversation with him, or with any salesman?

[fol. 1064] Q. No, sir, I did not have any more conversation with any salesman.

Q. Did you go in to Atlanta?

A. I went into Atlanta the week after I got that final answer, that was final, it was what I was trying to find out, so I went into Loew's exchange and dated all that old product that had been given out, and I haven't been back in the exchange centers.

Q. Did you see the picture exchanges?

A. Yes.

Q. Did you go to other picture exchanges?

A. Yes, sir, went to Twentieth Century Fox.

Q. Who did you talk with?

A. I talked to Mr. Crocy, and he assured me that they would look after me, turned me over to Mr. Mitchell, Mr. Mitchell was a salesman, and I sent Mr. Mitchell word to come by and see — at his convenience, which he did.

Q. When was that?

A. Oh that was about a week and a half or two weeks after I sent him word to come to see me.

Q. What was the conversation you had with him?

A. I asked Mr. Mitchell, if it were possible for us to get any current releases, second run or what could we get from him in current releases, and he got with me on a contract there whereby we would run 1939-1940 Fox pictures.

[fol. 1065] The Court: Second run?

A. Subsequent run.

Mr Wright:

Q. That was after the season that was just ending?

A. Yes, sir, that was the season that was just ending.

Q. And is this contract marked for identification, Government's exhibit F-6 for identification, dated August 1, 1940, the contract you made with him?

A. That is it.

The Court: What technical difference is there between second run and subsequent run?

Subsequent run include the third run?

A. Subsequent run, your Honor, is after first and second run.

Mr. Wright:

Q. The reference in here, Mr. Curry, to the statement in this letter, with *RH*spect to clearance and run, first run in East Gadsden, second run Gadsden, Alabama City, did you have any discussion about the clearance at the time you negotiated the contract?

A. Yes, sir, I did. Mr. Mitchell and I discussed Alabama City as a part of Gadsden, a suburb of Gadsden, a suburban theater, and that city or that town, the Alabama City theater, Alabama City has first run, and that [fol. 1066] Alabama City was not considered by them to be even a part of Gadsden, so I argued the subject with him, and he gave me what he called the subsequent run contract, and then I said, why can't I run first run pictures in East Gadsden, what is the difference, and he said I will put it in the contract so far as I was concerned I was just playing those pictures, but he was just pulling my leg. First run in East Gadsden had no meaning, inasmuch as there were no other theaters in East Gadsden.

Q. There wer- no other theaters in East Gadsden anyway, is that right?

A. That is right.

Q. What was said at that time if anything with reference to the current pictures, 1940-1941?

A. Mr. Mitchell told me that if I would go ahead and use any of the product that was available immediately, that it would be an open run, on that product.

Q. By that product, you are referring to the 1939-1940 product?

A. Yes. He sa-d that if I would do that in a hurry and go to playing as soon as possible, he would give me a nice set-up on the 1940-1941 product.

Q. How were those pictures that were played under this Fox contract made available to you, with reference to the date they were played in the other Gadsden houses?

A. There was no clearance in there because as I ex- [fol. 1067] plained before, most of the product had already played Gadsden.

The Court: It had already been played before you made your contract?

A. Yes, sir.

Mr. Wright:

Q. Who else did you have any negotiations with?

A. I didn't negotiate any other contracts.

Q. Did you try to get any other major product?

A. No.

Q. Try to negotiate with Paramount?

A. No, I didn't feel like I could get anything from Paramount because it was well understood that the Crescent Amusement Company had a first run franchise an- second run option, so I didn't even have the heart to go to see them.

Q. He had a second run option?

A. Yes. My position was that Alabama City has first run clearance and before I could get any picture like that and it would be fourth run, and most Paramount pictures I would not consider of enough value to run on fourth run.

Q. That is Paramount pictures were played in Alabama City, in this order, at the Princess in Gadsden, then the Ritz in Alabama City and then the Capitol in Gadsden, before you got them?

A. That is right.

[fol. 1068] Mr. Waller: You mean in that order, Mr. Wright? The lawyer is testifying, and I am not sure.

The Court: I understood the witness to say that first and second runs went to Gadsden and Alabama City, then back to Gadsden for third run and he got the fourth runs.

Mr. Wright: You may cross-examine.

Mr. Waller: Your Honor, this is a little bit out of the ordinary, and before we go ahead, may we have a short recess to confer about this matter?

(Recess.)

[fol. 1069] Cross-examination.

By Mr. Waller, for Defendants:

Q. Mr. Curry, as I understand it, this Dixie Theatre is what is known as a suburban or neighborhood theatre, is that correct?

A. Yes sir.

Q. And was built for the purpose of taking care of the people of East Gadsden, who had no theatre?

A. I don't know anything about that, I don't know why it was built.

Q. At the time it was built, there were three theatres inside of Gadsden, proper, and one theatre in Alabama City, operated by the Crescent Amusement Company.

A. Yes sir.

Q. There has been no theatre started by the Crescent Amusement Company since this Dixie Theatre was built in East Gadsden?

A. No.

Q. The patronage of the East Gadsden Theatre comes from the people of that community?

A. The majority of it does, yes.

Q. And the policy of a suburban or community house, neighborhood house of that kind, is to play first class pictures but to play them subsequently to the playing of those [fol. 1070] same pictures in the down-town sections?

A. Do you want m- to affirm that? I don't know.

Q. The down-town theatres, other than the Princess, played B pictures, sensational pictures, outside pictures?

A. Most of the time.

Q. The Princess Theatre played these high class, first class films?

A. Yes.

Q. And as Manager of the Dixie Theatre, what you wanted to do was to play the same type of films that they were playing, and, of course, play them after the Princess Theatre played them?

A. Yes.

Q. In other words, you didn't want to play this sensational type of pictures that were played in the B houses in the down town section?

A. Right.

Q. The patronage of those down-town theatres is, to a certain extent, transient trade, is it not?

A. The down town theatres?

Q. Yes?

A. No.

Q. The down town theatres in any community cater to transient trade, as well as local trade?

A. As well as local trade, yes.

[fol. 1071] Q. And for that reason, they have to play pictures pretty currently, play them soon after they are released?

A. Yes.

Q. Whereas, in the neighborhood or suburban house, the idea of the management is—Take your house, because that is the only one you know about, is to play better pictures late rather than to play B pictures early?

A. I wouldn't say that, no. My idea was to get good and later pictures than what they were running when I went over there.

Q. What was it about my question that you didn't agree to?

A. I didn't know anything about playing B grade pictures. All I wanted was good pictures. We were running good pictures but they were too old.

Q. I say, you would rather play a good picture late than play a bad picture early?

A. Yes, yes.

Q. Your complaint was that you wanted to play these good pictures sooner than you were playing them?

A. Yes.

Q. When you became manager of the theatre, you were able to get a subsequent run product from the major producers, except Metro, were you?

A. Yes.

Q. And you wanted to get the 1939-1940 Metro product, [fol. 1072] which had not been shown in the Princess Theatre?

A. Yes.

Q. The Princess Theatre is a theatre which has a larger seating capacity than the Dixie Theatre and charges higher admission prices?

A. Yes sir.

Q. So, of course, the film rentals for those pictures in the Princess Theatre are considerable more than in your Theatre?

A. I presume so.

Q. You don't think you could afford to pay the same prices as the Princess Theatre paid?

A. No, I don't entertain any such idea.

Q. And when you took the matter up with Loew's or Metro, you were informed that they were negotiating for the sale of these pictures which had not been run?

A. Yes.

Q. Have you kept up with the showing of pictures in the town since that time, as to whether they have Metro pictures, or a substantial part of them, being shown in the Princess Theatre?

A. No, because I haven't been interested in any theatre since that time.

Q. You spoke about——

The Court: You left there in September, 1940?

A. Yes sir, September 1st.

[fol. 1073] Mr. Waller:

Q. You spoke about this theater in Alabama City, that is in a community on the other side of town, somewhat similar to that community in East Gadsden, did you say?

A. Yes.

Q. And that theatre was there and had been operating for some time before the theatre in East Gadsden was built?

A. Yes.

Q. The people of East Gadsden didn't want to patronize that theatre, they wanted one of their own?

A. I don't know, I don't know anything about that.

Q. Alabama City was a separate corporation until a short while back, was it not, I mean, a separate municipality, it was recently taken into the city of Gadsden?

A. It was taken in within the past ten years.

Q. Wasn't it considerably less tiie than ten years ago?

A. It has been right nearly ten years.

Redirect examination.

By Mr. Wright:

Q. You have referred to the East Gadsden being in the city of Gadsden, and a part of Alabama City being outside. Since Alabama City was taken in, there has been no difference between the two communities insofar as their relation to the city of Gadsden is concerned?

A. No, they are both under the same city government.

(Further this deponent saith not)

[fol. 1074] H. T. BAILEY, Called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you tell us your name and address, please?
A. H. T. Bailey, East Gadsden, Alabama.
Q. What is your occupation?
A. I am a theatre manager.
Q. Of what theatre?
A. The Dixie Theatre in East Gadsden, Alabama.
Q. How long have you managed it?
A. Ever since September 19, 1940.
Q. After you became the Manager, did you write the Loew's Company to obtain some of their pictures to show there?
A. Yes, immediately after I became Manager, I wrote Mr. Avey, Branch Manager Loew's, a letter with regard to obtaining the product for the Dixie Theatre.
Q. Is this the letter, dated September 20, 1940—is that a carbon copy of the letter you wrote? Exhibit No. 87?
A. Yes that is the letter.
Q. Did you again write them on October 2, 1940?
A. Yes sir, I wrote them on October 2, 1940 also.
Q. This letter is marked Government Exhibit No. 89, is [fol. 1075] that a copy of the letter you wrote?
A. Yes.
Q. The letter of September 20, 1940, Government's Exhibit No. 87, addressed to Loew's, Atlanta, is as follows: (Reading)

"Gentlemen: I have on this date been appointed as Manager of the Dixie Theatre in East Gadsden, Ala. I am in full authority and have the right to make any decisions, contracts, or bookings which I may see fit to make for the good interest of this theatre.

In checking over old correspondence, I find that, in the past, this theatre has faithfully run 100% MGM product, and has carried out all its contract obligations to the last letter. As the bookings now stand, all product originally bought from you is now dated, the majority of same having been played and paid for.

We are running short of newer product, which our Sunday-Monday dates demand. We need new MGM

product, and that is the reason for this letter. According to all records we now carry, and, according to all I can learn, the 1939-40 product has neither been run, or contracted for in this locality. I am not asking for a first-run contract, but for an arrangement whereby we could run this product second run to the Princess Theatre, here.

[fol. 1076] "According to the fair trade practice code, which I understand all distributors follow, if one concern does not accept or reject product made available to them within a certain length of time, the very fact that they did not render a prompt answer to the av-il-ability notice constitutes a rejection of the product, automatically making same available to any other concern who might desire it. It seems to me that this is the situation existing here, and we should have a chance at this product, since Mr. Sudekum does not seem to want this product. After all, does it seem fair to give a small, struggling theatre old product, for this theatre to run all this old stuff, and then, after they have faithfully fulfilled their contract, to be denied decent product, simply because a chain cannot make up its mind what it want- to do?

We are asking you to look at this matter from a fair and unbiased standpoint, and to see what you can work out.

We would accept a contract whereby we could start on the product, and, if at any time Sudekum decided to take the product, our contract would automatically become a second-run arrangement, and the Princess [fol. 1077] would have priority and clearance over us.

I honestly believe, that if you consider this application, you can work out some arrangement with us to our, as well as your mutual advantage.

I am planning to get over to Atlanta shortly and try to work out something with you, provided you cannot arrange something immediately. Let's get together on this thing, and go to town. We frankly need your product, and I feel sure that you could put our little rental money to some good use. What about it?

Trusting that this will fall under favorable eyes, and anticipating an early yes, or no reply, I remain,

Yours very truly * * *"

Q. Did you get any reply to that letter?
A. I received no reply to that letter.
Q. This letter is written on October 2, 1940, from Dixie to Loew, and is as follows: (Reading)

"Gentlemen: Previously to this date I have written you two letters with regard to obtaining MGM product second run, for the season of 39-40. In these letters, I have made only reasonable requests, and have reiterated my willingness to comply to any of your wishes [fol. 1078] with regard to any *of your wishes with regard to any* possible future arrangement you might see fit to affect, in order that you could properly service the Princess Theatre in Gadsden. You stated in a former letter in reference to this same matter, that this Theatre was located in a "small Mill Section" of Gadsden. We would like to inform you that the Dixie Theatre is well located in the best section of East Gadsden, where is located the Goodyear Tire and Rubber Plant. The residential section is prosperous, and over 5000 persons, potential patrons reside in this section. In addition, the Government is closing plans to build a $25,000.00 shell and munitions plant in this section, not three miles from the Theatre. This will give us a vast drawing field, without interfering with Crescent territory at all. MGM new product played here will make money for you, as well as ourselves.

"The Ritz Theatre, a Sudekum property, in Alabama City, Ala., has "First Run"--Alabama City" contracts. We maintain that this theatre is located in as well populated and richer community, has its own Post Office and business houses, and boasts as good, or better status than Ala. City. It is with these circumstances in mind that we again request that you [fol. 1079] give us these pictures with no Theatre having clearance over us except the before mentioned Princess Gadsden. This is a fair and square business proposition and should not be held up because someone else can not, or will not make up his mind.

Please grant us the courtesy of an early answer.

Thanking you, we remain, Yours very truly * * *"

[fol. 1080] Q. Did you get an answer to that letter?
A. I received no answer to that letter either.

Q. Then did you go into Atlanta?

A. Shortly after I wrote that letter I went into Atlanta, made a trip into Atlanta.

Q. Who did you see there?

A. My main object in going into Atlanta was to try to work out some kind of deal whereby we could get the newer product of Metro as well as some of the other distributors over there. When I got in Atlanta I found that Mr. Avey, the manager, was on a trip, I don't know exactly where, but he was out of town and would be out of town for some-time to come. I talked to the booker, Mr. Beavers, who was our booker in the office and asked him if there was any product I could date or if there was any arrangement that I could make whereby we could get a little bit better product because we were really getting in need because our Sunday and Monday dates were almost without pictures. He told me that with the authority that he had it was impossible for him to let us have any further pictures and that as I already had all the pictures which were contracted for at that time dated, there was absolutely nothing he could let us have.

Q. Then did Mr. Butler come to see you later?

A. Shortly after that, which was in December, I believe, Mr. Butler, representative of Metro, called on us at the [fol. 1081] theatre and he told me that at that time he was ready to make us a deal for the 1940-1941 Metro product.

Q. Did he say anything about 1939-40 pictures?

A. He said that he didn't know the situation on the 1939-40 pictures well enough, that is, that there had not been a satisfactory arrangement worked out yet with the Crescent Amusement Company but as soon as such arrangement was made he would come back and make an arrangement for us to get the 1939-40 product.

Q. I show you this contract dated, acceptance date December 13, 1940, and application date November 28, 1940, between the Dixie and Loew's for the exhibition of the 1940-1941 product, marked Government's Exhibit No. L-10, for identification and ask you if this is the contract that you made?

A. Yes sir, that is the contract for the 1940-1941 product.

Q. I call your attention to the November 28th, 1940 date. Does that refresh your recollection as to when you made the contract?

A. Well, yes. I couldn't make a definite statement as to the exact date but this is the contract, this is the application for contract that he drew up.

Q. It was on or about November 28th?

A. That is correct.

Q. Now, had any of the 1939-1940 Loew's pictures then been played in Gadsden?

[fol. 1082] A. At that time to my knowledge none of the 1939-1940 had been played although some of the 1940-1941 were beginning to play at the Princess.

Q. I call your attention to the language of this contract following the word "Rental", "and subsequent follow Ritz Theatre Alabama City section of this town not earlier than sixty days after first run Gadsden, Alabama."

Did you have any conversation with Mr. Butler about that?

A. Yes sir, we had a conversation regarding that clause. I pointed out to him the fact that the Dixie Theatre was as well situated, was as good a theatre and had as many advantages as the Ritz Theatre in Alabama City, and for that reason I saw no reason why Alabama City Theatre should be held over us.

Mr. Raftery: Now, we are in the period of the consent decree. Metro is a party to the consent decree. All clearance questions may be arbitrated under the terms of that decree. If this man thinks that the clearance is too long he can go and get that straightened out.

Mr. Wright: Mr. Raftery is entirely in error because this contract happened to state clearance "none". It is so set out that this man and this theatre had no chance of obtaining any relief whatsoever in any clearance proceed-[fol. 1083] ings under the decree. That was one of the things that we expect to show, that this deal was deliberately set in such way that he has no opportunity to obtain relief against the situation that confronts him, that is, the Ritz being given clearance over him.

The Court: Why is it incumbent upon the Court in this case to construe that consent decree?

Mr. Wright: I don't think it is at all. Mr. Raftery made the suggestion. He happens to be wrong about it. I don't think your Honor needs to construe it.

Mr. Raftery: As a matter of fact, I am not wrong. You have read a provision here a minute ago that the man

played sixty days—would you be good enough to read that?

Mr. Wright: The run provision is: "Subsequent follow Ritz Theatre Alabama City section of Gadsden—not earlier than sixty days after first run Gadsden, Alabama. Clearance none."

Mr. Raftery: Sixty days, very definite. That provision is very clear. Whether it is marked "Clearance" or not, the arbitrator is going to look at it.

[fol. 1084] The Court: I think that "clearance none" means he doesn't have clearance over any theatre.

Mr. Raftery: That is right.

By Mr. Wright:

Q. Now, can you tell us, Mr. Bailey, just how pictures were made available to the Dixie Theatre under this contract?

A. They were made available to us approximately sixty days after they had made their downtown run but——

Q. That was the run at the Princess you refer to?

A. Yes sir, but between times that the picture was running at the Princess Theatre and our availability date the picture was run at the Ritz Theatre in Alabama City and it usually followed the Princess Theatre, the run at the Ritz Theatre of Alabama City usually followed the run at the Princess Theatre by from fourteen days to three weeks, which made us run from thirty days to, around forty five days behind the run at the Ritz Theatre in Alabama City.

The Court: That is the trouble with letting in or allowing evidence in this case on matters that have arisen since the original bill was filed. I can't see where anything that has happened since the entry of that consent decree is competent in this suit.

[fol. 1085] Mr. Wright: I don't understand that, your Honor. If it is something that the consent decree doesn't—

The Court: You have settled the complaint against these five big producers.

Mr. Wright: No, we didn't.

The Court: You have entered a consent decree dismissing this suit as to them. Now, anything that has happened under this consent decree will have to be taken up in the court at New York where the consent decree was entered. What has this court to do with that?

Mr. Wright: If your Honor please, this doesn't happen to be a situation where there is any relief available under the consent decree.

The Court: If the Government couldn't stipulate sufficiently to protect themselves and make a consent decree, that is their fault.

Mr. Wright: If your Honor please, there was not any understanding; in fact, the understanding was expressly made at the time the consent decree was entered that this [fol. 1086] suit in the other circuits would proceed to trial with the defendants who consented to that decree left in those cases as co-conspirators with the defendant exhibitors. All that we agreed to do at the time we entered the consent decree was with respect to them and all that we did do was to dismiss the charge that they had conspired with each other and to dismiss them as defendants in this proceeding. Now, it was explicitly understood that they were to remain charged in all of these circuit cases as co-conspirators with the defendant exhibitors in those cases. The consent decree, of course, was not able to touch the problem or give any relief against the exhibitor defendants that are parties to this suit because none of them, of course, were a party to the New York suit at all, and the mere fact that a decree was entered to which they consented had nothing to do with the question of whether or not the Crescent and the other defendant exhibitors in this case combined and agreed with Loew's or anybody else who signed that decree to monopolize the exhibition of pictures in the Crescent towns.

Mr. Raftery: Judge, here is a contract that is made after the entry of the consent decree by Metro, a party to the decree, and the exhibitor and this exhibitor is complaining [fol. 1087] that he has to follow the Ritz Theatre in East Alabama, or whatever the name of the town is, and he plays sixty days after first run.

The Court: Well, that is what I said.

Mr. Raftery: Clearly a clearance proposition.

The Court: This exhibitor is not a party to this suit and if he has any complaint against any of these distributors pertinent to any of their acts that have taken place since the entry of that consent decree it looks to me like that is a matter for the District Court in New York.

Mr. Wright: Well, if your Honor please, that consent decree is not all-embracing and it is not an adjudication in any sense of the word.

The Court: I left my copy at home. Do you have another copy there of that consent decree?

Mr. Wright: That decree doesn't, of course, undertake to declare anything illegal or legal. It merely represents an agreement on the part of——

[fol. 1088] The Court: It is a settlement of the lawsuit. That is what it is.

Mr. Wright: It is a settlement of the lawsuit in which the parties made an agreement to, among other things, to arbitrate certain types of disputes which might arise.

Mr. Frolich: All over the United States.

The Court: Under Section 8 it says "Controversies arising on the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable are subject to arbitration under the following provision", and there is a note there that says that clearance means a period fixed by agreement between a distributor and an exhibitor prior to the expiration of which a theatre licenses for a prior situation, the theatre may not be subjected to any other theatre or theatres.

Mr. Waller: Suppose your Honor were to take jurisdiction of this matter and find there was something wrong being done, the only thing your Honor could do would be to enjoin the Crescent Amusement Company from playing [fol. 1089] pictures before this man played them. Now, how could that injunction become effective? You couldn't enjoin Metro from giving them to us sooner. We have got to take them when Metro gives them to us. You would have to enjoin us in a negative sort of way from giving them to us before the other people played them. It just couldn't be done.

Mr. Wright: If your Honor please, your Honor suggested—if we are going to go into the question of how that decree is to be construed and what it means, we are in a very complex field and quite far from this lawsuit. Now, the Appeals Board, which is set up under that decree has just handed down a decision a few days ago or rather about a month ago, in which they held that where you state a prior claim position in terms of run, as it is stated here, then there wasn't any arbitration under Section 8 because there

was no clearance involved and it was only a question of run; that you couldn't arbitrate run under Section 8, and that is why I say the evidence in this suit or Section 8 of that decree doesn't touch it.

By the Court:

What is the difference between clearance and run?

Mr. Wright: Well, a distributor will tell you that clear-
[fol. 1090] ance is something that is merely an interval of time that lapses, as stated in the contract, that if it don't state in the contract that B is to follow A by thirty days but if it merely states in the contract that A is to have first run in one location and then they sell another run to B in another location, that the mere fact that they may actually work B behind A thirty days, it doesn't mean clearance. They are just selling different runs and they can, of course, sell any run for playing at any time without any let or hindrance from that decree.

Mr. Raftery: If what Mr. Wright says is true about the Appeals Board, it is a sorry commentary on the appeal statute that has been set up indeed.

Mr. Wright: It is indeed.

Mr. Raftery: That is the main reason we didn't go into it. However, a run, your Honor, you let a man run, say first run, the time that elapses between that showing and the next showing in the same competitive area is the clearance period. Now, as I understand arbitration in the ordinary sense, they cut through or try to cut through legal entities and go to the justice and right of a situation. Here is a contract, which, in effect, says that this man's avail-
[fol. 1091] ability is sixty days after the downtown run, which means the Princess Theatre.

[fol. 1092] The Court: Well, that looks to me like a down-town theater would have a sixty days' clearance one over the other.

Mr. Raftery: A sixty day clearance one over the other.

Mr. Wright: That is not what he complains of at all.

Mr. Raftery: He says the same interest that owns the down-town theater owns another theater on the other end of the town, and he puts another run in the middle, so he plays not sixty days after Princess but 60 days after Ritz and Princess. Now, the arbitrafors will look at the situation and will adjust it if it is right or justice demands it be

adjusted. Now we say this decree is entered in November, just after the first Thanksgiving last year; the contract with the government is taken on the 28th of November; the proof in December; right immediately after the decree; I say that this is the proposition; that if East Gadsden is right, but——

The Court: Well, it would seem the decree is a settlement [fol. 1093] of all matters and claims that the Government had against these producers at that time.

Mr. Wright: Well, I don't think that that just is correct, your Honor.

The Court: On the complaint set out in that suit.

Mr. Wright: At the time the decree was entered, it was expressly understood that they would remain in these cases.

The Court: Is there anything said about that in the decree?

Mr. Waller: Not a word, your Honor.

Mr. Wright: Well, that decree does not pretend to deal with this litigation.

The Court: I think it covers other actions in the United States and expressly says only the United States and not foreign countries.

[fol. 1094] Mr. Wright: That is true, your Honor, but the mere fact that they signed a consent decree, that doesn't mean—that decree does not say anything about conspiracy.

The Court: Well, it is just forgiving them of all violations of the law, is that it?

Mr. Wright: That decree does not forgive them of conspiracy with anybody. But I think we are getting far afield.

The Court: I think so too.

Mr. Wright: And we are entitled to show whether Mr. Waller is correct, that all you could do would be to issue an injunction, and if Mr. Raftery is correct, there would be relief under the decree. In either case, we are entitled to show in this case law violations arising out of conspiracies between these distributors and defendant exhibitors; that is certainly a proper part of our case; and if they do discriminate against this exhibitor in this town; that is, if all the defendant exhibitors act together and agree to discriminate [fol. 1095] against him in serving their pictures, there was a clear law violation; and this is what we propose to show in this suit, when we get to that type of violation. When we get to what relief is to be granted will be plenty of time to

consider a consent decree, but I don't see how that enters in the case at all at the proof stage.

Mr. Raftery: By the way, your Honor, there is one other point I forgot to mention: That consent decree was not entered on the original bill of complaint filed by the Government. In the original bill of complaint the attack was only against the Big Five. On the morning of the offering of the consent decree, a motion was made by the Government, returnable on the same morning that they presented the decree, asking leave to file a supplemental bill of complaint. In the supplemental bill of complaint they alleged that the Big Five had conspired with so-called independent circuits —meaning circuits like the Sudekum circuit—in these preferences and priorities and all these catchwords that were invented when the original one was filed. Then the Big [fol. 1096] Five came in and filed five answers to this new and supplemental bill, and then a decree is presented so as to take care of that situation; that specifically brought in all these cases like the Schine case, the Griffith case and this case into that case, and then entered the relief. Now, when you get down to the relief part, what remedies do the exhibitors have, and what remedy does the Government have. So, the only remedy of any exhibitor in the country is to file a complaint in arbitration against the consenting five. The only time a commitment proceeding can ever be filed is when some member of the Big Five fails to obey the ruling of the arbitration board. So then they have amended the complaint against us in New York, with the permission of Judge Goddard, and that case is to be tried some time in the future, but the independent circuits were brought in for the first time in that case when the decree was presented.

The Court: Mr. Wright says this evidence is offered not for the purpose of obtaining relief against the distributors, but for the purpose of obtaining relief against the exhibitors who are not a party to this consent decree. Do I state it [fol. 1097] correctly?

Mr. Wright: Yes, your Honor.

Mr. Raftery: Well, if that is the case, if they feel there is anything wrong, if there is any force in that argument at all, they could have kept the Big Five in this suit.

Mr. Wright: That decree does not legalize anything.

Mr. Raftery: I agree with you in that.

[fol. 1098] The Court: Would you mind telling me, Mr.

Raferty, what is the objection of your client to United Artists in signing this decree?

Mr. Raferty: I can't tell you that in less than three hours. In the first place we took the position we had not violated the law in any respect and should not have been in that lawsuit. That lawsuit was directed primarily at those Companies, and they directed this litigation originally against the five of them. As Mr. Williams said that was not in issue in the litigation, and he explained it in the opening before Judge Goddard. We object to it first as fundamental, we thought it was an attempt to prove the connection with them, an attempt on the part of the Government materially to interfere with private business, and consequently we were opposed to goinf into any arbitration efforts, we could not afford to, it was an expensive proposition, and in the second place; and the third place we wanted to reserve to ourselves the right to sell our own customer, select our own customers and deal with them or not deal with them, and the result was that we had to do that because of this matter of [fol. 1099] selling, as we did not have a flock of theaters to take care of our products, we know there is an impression of that kind, when they have to sell them in blocks of five, for instance there is the Paramount, it has theaters af-iliated with it, and you can sell or not, but the little independent distributor with a handful of pictures like we have, we would have to go out and sell in blocks of five.

The Court: That was what I had in mind, you made some such statement.

Now this contract you seek to offer now at this time, was the contract made after the entry of this decree in this case in New York?

Mr. Wright: That is right, Your Honor.

The Court: For what purpose is that contract here?

Mr. Wright: To show that by this contract the defendant Crescent, and the co-conspirator, Loew's, Inc., entered into an agreement whereby they agreed to serve the Loew films to the Crescent's Gadsden theaters and the independent theater in East Gadsden in a discriminatory manner, and [fol. 1100] an unreasonable manner; that, we say, is a violation of the Sherman Act in itself, and we are entitled to have it and prove it in this case, along with the other violations we are seeking to examine. As far as the decree is concerned, Your Honor, it is perfectly obvious, we do not think that decree would serve any purpose here, of course

it couldn't in the absence of the makers, and what is being done here, there would be no point or purpose of any of us appearing in th-s lawsuit, this decree which was entered in New York, which only affects certain selling methods of these five, was regarded as a solution as no solution of all the ills of the modern picture industry.

The Court: Well, apparently, it seems to me that the fact that this case was dismissed against the five distributors probably in effect would cure any question coming up about the entry of this decree, because you are not seeking any relief against them, they were parties to the decree, the exhibitors were not parties, and on the other hand the Government was a party. Now of course if you are seeking any relief against the distributors, I think the Government would be bound by the terms of this decree, that is only as against any distributors who are parties to the decree, and [fol. 1101] the Government would have to proceed according to the terms of the decree, but this relief as I understand it, is being sought against the exhibitors?

[fol. 1102] Mr. Waller: I want to say this, that meeting Mr. Wright on his own ground, that he expects to prove (1) contains unreasonable and arbitrary provisions and (2) that because the contract does contain unreasonable and arbitrary provisions, it is evidence of conspiracy. Now, before you can get to whether or not the contract is evidence of conspiracy, you have got to show that the provisions are arbitrary and unreasonable. I am informed by Mr. Raftery that in the Westway case, which involved a similar contract, a similar question, whether it was unreasonable or arbitrary, that it took two weeks to try the case. In other words, if your Honor ever gets to Mr. Wright's proposition, we have got to decide whether there was anything unreasonable and arbitrary. If we go into whether that was unreasonable and arbitrary, we can't do that on the testimony of one witness.

The Court: Well, I think that the consent decree will reflect somewhat on the question of what is unreasonable and arbitrary, because the Government is a party to this consent decree and there is a matter of policy set forth in the consent decree it is stated in there, it is recognized [fol. 1103] as to time and area and it is essential in the distribution and exhibition of motion pictures, etc. Of course, the Government can't insist on that in a case in New York, and insist on something directly opposite in

the State of Tennessee. And in determining whether any clearance complaint is unreasonable or arbitrary, there must be taken into consideration, and then it goes on and gives a list of things. That is merely setting forth a matter of policy.

Mr. Waller: We would have to go into every one of those items in each instance and go into the history of the different communities and of the different towns and the character of the community. It sets that out in Section 8, all those things that must be considered.

Mr. Raftery: Mr. Hayes, who was in charge of this consent decree, when he was selling such decree to Judge Garland, Page 368 of the record: "I may say, in that connection, that it has long been felt both by exhibitors and by distributors, that there is no fairer way to handle and dispose of complaints concerning clearance, than to have the clearance fixed by some impartial arbitrator and this is [fol. 1104] precisely what is accomplished by Section 8." And he closed Section 8 on that note, and went on to Section 9.

The Court: All right. I will overrule the objection.

Mr. Wright: Q. Will you tell us, Mr. Bailey, what the discussion was that you had with Mr. Butler at the time the contract was made with reference to that subsequent run provision?

A. The contract stated subsequent run, as I understood it and as I interpreted it, a subsequent run meant a run after the actual second run in the city of Gadsden. Now, Alabama City is approximately four and a half miles from the Dixie Theatre and the Ritz Theatre in Alabama City. Mr. Butler told me that for years the Alabama City account had been set up as a first run account and it must be preserved that way, as far as the distributor was concerned. And he told me that because of that, he would have to have a subsequent run clause in our contract, which automatically gave Alabama City the right to run the pictures ahead of the subsequent run, that the subsequent run has to run after the first account. Pictures run by the Princess Theatre on approximately the release date, then thereafter there was a period of sixty days between the showing by the Princess Theatre before it would become available to the Dixie Theatre in East Gadsden, and in between the [fol. 1105] time, approximately two or three weeks after

playing the Princess Theatre, the picture would be run at the Ritz Theatre in Alabama City and after a period of approximately 30 days or 45 days, after it was run in the Ritz Theatre in Alabama City, it was available to us. I brought up the point that that picture should be made available in East Gadsden right after going to Alabama City, that all other considerations were about equal and that we would be willing to pay a film rental on a par with the Ritz Theatre in Alabama City. Mr. Butler told me then that it was the policy which had been set up and that he was not allowed to withdraw it, and if I wanted the pictures, I would have to get them subsequent run after Alabama City and it was take it or leave it and under those circumstances, I took them.

The Court: I think that would be covered under Section 8, whether the clearance is reasonable.

Mr. Wright: It certainly is.

Q. At the time you had this conversation with him about the 1940-1941 pictures and signed the contract for those pictures, was there anything said about the 1939-1940 product?

A. Yes, I asked him if it wasn't possible for us to get any part of it, of the 1939-1940 product, and at that time Mr. Butler said he was not in position to make any terms or come to any conclusions regarding his product, that some time would have to elapse until a deal was worked out for Crescent Amusement company and after that time had passed and they had made a satisfactory arrangement, he would come back, we would see if we could work out a deal [fol. 1106] on the 1930-1940 product.

Q. Did he come back to see you?

A. Yes, I believe it was in March, he came back and offered me a contract on the 1939-1940 product.

Q. Is that the first time he offered you 1939-1940 pictures?

A. Yes.

Q. You made a contract with him for them?

A. Yes.

Q. And he gave you Exhibit L—This contract dated March 11, 1941, accepted March 26th, is that the contract you made with them?

A. Yes, that is the contract.

Mr. Wright: Will you mark that as Exhibit L-1.

(Document marked Exhibit L-1)

Q. At the time you made that contract in March, had the Metro 1939-1940 product then begun to run?

A. Yes, in between the time I made the two contracts, it had begun to run.

Q. Then did you have any discussion with them about that same subsequent run clause that appears in that contract at that time?

A. I attempted to take up a discussion with him on it, but he told me that it would have to be approximately under the same conditions as the 1940-1941 contract, that he had [fol. 1107] been instructed that there was to be no change in the policy in the offering of the product, and that is the way I did it. I wanted it.

Q. Then did you have any negotiations for Fox product?

A. Yes, about the same time, along about the same period of time that we were negotiating with Metro, I was contacted by Mr. Mitchell of the 20th Century Fox Films, and he told me that he was in position to offer me a contract for Fox films for the season of 1940-1941.

Q. Now, I show you this contract dated November 12, 1940, marked Government Exhibit F-7 for identification and ask you if that is the contract you made with Fox?

A. Yes that is the contract.

[fol. 1108] Q. I call your attention to the language after the printed words "Clearance in run", "Subsequent, not less than three per month as available ninety days after first run Gadsden." Did you have any conversation with him about that clause?

A. Yes, sir, we had practically the same conversation as I did with Mr. Butler about it, bringing out the circumstances with regard to the position, quality and the size and other advantages of the two theatres, and I brought up the point that I felt strictly as a matter of right or wrong that we should have pictures made to us on a par with the Ritz Theatre in Alabama City. He told me, he gave me the same answer that Mr. Butler did on that practically; that that was the policy under which the contracts had to be drawn or written and that if I wanted pictures I would have to take them on a second run basis, which meant actually third run in the City of Gadsden and ninety days after first run at the Princess Theatre.

Q. Now, how long after they played the Ritz Theatre at Alabama City were those Fox pictures made available to you?

Mr. Waller: I object to that. That is too general, and different times probably with each picture.

The Court: What was the question?

(Question read).

[fol. 1109] By the Court:

Q. Well, can you tell generally?

A. I can tell generally. I can't give you any specific instances because I didn't watch it that close, but it was usually after, two months after they ran at the Ritz Theatre in Alabama City that they became available to us.

By Mr. Wright:

Q. That would be about a month after they played the Princess?

A. Yes, run on an average about a month after they played the Princess they run at the Ritz in Alabama City.

Q. Did you have any negotiations with Warner?

A. Yes, sir, along about the time some of the 1940-1941 product was being made available from the other companies Mr. J. H. Black of Warner Brothers Pictures called at the theatre with the purpose of selling the Dixie Theatre Warner Brothers' product for the 1940-1941 season.

Q. Did you make a contract with him?

A. Yes, sir.

Q. Is this the contract for the 1940-1941 product dated, application November 26th, 1941 and approved December 6th, 1941, the contract you made with him?

A. This is the feature contract. There were other contracts made for short subjects but that is the contract on features.

Q. That is the feature contract?

A. Yes, sir.

[fol. 1110] Q. I call your attention to the words "Under run" carrying the designation "Sub." That stands for subsequent?

A. Yes, sir.

Q. Under clearance "Pictures are to be made available fourteen days after second run."

A. That was explained to me that the pictures were actually to be first run downtown at the Princess Theatre, that is, a large number of pictures. Naturally some pictures they wouldn't care to run at the Princess, but that second run as specified in that contract meant under one of the downtown theatres, either the Gadsden or the Capitol Theatre, which were located within a few blocks of each other in downtown Gadsden; that the pictures would come to me after they had made a second downtown run. Now, in effect, the way the thing worked was that the picture was run at the Princess Theatre, then shortly after, approximately fourteen days after, two weeks or three weeks, it would run at the Ritz Theatre in Alabama City, constituting actually in the City of Gadsden a second run, then the picture would be run back downtown and would be run for a third time in the City of Gadsden at either the Capitol or Gadsden Theatres, then fourteen days after the actual third run the pictures would be made available for the Dixie, actually the fourth run in Gadsden.

Q. Was anything said with reference to the playing position of the Ritz Theatre at the time this contract was made?

[fol. 1111] A. Mr. Black said that the Ritz was set up on their books as a first run account and there was nothing he could do about it; that they had served that account there as a first run account for a number of years and that was the policy on which they sold pictures.

Q. Was there any discussion of film rental?

A. Well, we made—I told him at the time that if I could get the feature pictures on a par with the Ritz Theatre in Alabama City that I would be willing to pay film rental on a par with the Ritz Theatre.

Q. What did you mean by getting pictures on a par?

A. I mean available day and date play-off with the Ritz Theatre in Alabama City.

[fol. 1112] Q. Can you explain what day and date of availability is?

A. Well, for instance, if a picture becomes available on the first of a certain month, the date of availability to another theater would be that it would automatically become available to another theater in another town on the same date.

Q. Now, this contract with Warner Brothers also contains a provision where any picture is played, the exhibitor may substitute other pictures?

A. I explained to Mr. Black at the time that by the contract that certain pictures that were played at the down-town theater, the smallest house in Gadsden, would be subject to be played in my theater; and we made a commitment that I didn't want to run them at the Dixie, that I could pick up pictures out of the older product to be run at the Dixie Theater, and then pictures I picked up would be played again to that contract.

Q. Now, those pictures that you picked up were exhibited in what run in the City of Gadsden by you?

A. Well, that depends on how many times they had been run down-town; if they had been run down-town, it would have been fourth run; and some pictures of Warner Brothers might have been run as many as four times in Sudekum theaters.

Q. It might be a fourth or fifth run?

[fol. 1113] A. It might be a fourth or fifth run, yes.

The Court: All right; it is time to adjourn at this time. I am not at all satisfied about this proposition. Of course, if the Government contends that the Crescent Company in this case has violated the Sherman Act by entering into a conspiracy with these exhibitors to do these acts, well, the distributors are just as guilty of violating the Sherman Act as the exhibitors are.

Mr. Wright: That is right, your Honor.

The Court: And that the Government has not waived its right to proceed against the distributors in this decree except under the terms of this decree.

Mr. Wright: I think if your Honor will read the second paragraph in section one of the decree, that that point is cleared up, because that states expressly there that this Court has not determined or adjudicated, and by this decree does not determine and adjudicate to the effect that any of said defendants has violated or is now violating any [fol. 1114] such laws or any other statute. Now, the question of whether or not these defendants who consented to this decree are or are not law violators, was left entirely outside of that decree. All that was done was that a simple agreement was made in effect to dismiss the suit against them, and this suit, in return for their agreeing to set up an arbitration system which would deal with certain grievances, and adopt a new method of selling which the Government hoped would make the parties more competitive and

give a greater opportunity for actual competition to ensue in licensing films. Now, the fact that that agreement was made, of course, did not give any party to it any immunity from any claim of law violation simply because he abides by that agreement, because the agreement on its face does not purport to cover all violations of law as such.

The Court: Well, it, however, appears now, it would be the insistence of the Government, then, that the exhibitors and the parties to this agreement have not kept the agreement in good faith, does it?

Mr. Wright: There was no relief granted to any exhibitor in the decree.

[fol. 1115] The Court: I mean distributor. Did I say exhibitor; I meant distributor.

Mr. Wright: There is no contention that the distributors are not living up to the agreement made, in so far as the agreement goes, but the agreement on its face don't purport to cover all possible violations that might occur; if it had, we would, of course, have dismissed this suit at the same time we entered the decree. There would have been no point in pursuing any of these circuit cases any further, if we had felt that by this decree that we were disposing of all future violations in connection with circuit violations.

The Court: I say, though, it is the insistence of the Government now, in presenting this evidence that it is presenting to the Court at this time, that these distributors who have been dismissed from this suit and who are parties to this decree, are not living up to the requirements of the decree, and in fact, are violating the terms of it?

[fol. 1116] Mr. Wright: We don't allege they are violating the terms of the decree; we do allege they are violating the terms of the Sherman Act; the decree does not purport to deal only with the Sherman Act violation; in some respects it goes much further, and in other respects it doesn't go as far as the Sherman Act does. This decree does not enjoin any two or more defendants from conspiring together to do anything; and for that reason, it is not inconsistent at all, as I see it, for us to take the position that the exhibitors who consented to this decree have since that violated the act at the same time they were performing the obligations that they assumed in the agreement.

[fol. 1117] That case, Your Honor, that goes to the merits of the decree, would be to go into it, I do not think the de-

cree should be gone into here. Of course Mr. Raferty would prefer it to be a private consent decree, we are trying to try this lawsuit here and the Government has been trying to try this as a matter of judgment, we have tried this new method of selling and the arbitration system, what we are trying to do, we are attempting to make possible competition in the industry, we may not wholly succeed, but in any event the agreement was made in good faith to protect ourselves, although there was a trial period provided there, that in the event we are mistaken as to the effect of the provisions, and the future results, and they do not agree, the whole thing can be thrown out of the window and we proceed with the original divorcement suit. That trial we thought was worth dimissing these defendants from the suit for and settling this litigation. Now that obviously, that agreement that was made certainly did not give anybody any immunity from any charge of law violation, any more than the effect that it did not establish at the same time that any one had violated the law at all, we are leaving that [fol. 1118] for determination in the three circuit courts that we purposely left open, we left an opening at the time we made this agreement. In effect it was said, you can go out as parties, you will not have to incur the expense of defense, we will eliminate the charge but you are left in as having conspired with the exhibitor defendants.

The Court: This is in not just as a decree, the Court will undertake to get it in his mind. You all know more about this lawsuit.

Mr. Raferty: I would like for the Court to read Section 12.

Mr. Wright: If your Honor is going to read that degree, I would like to give Your Honor a copy that is readable, that fine print I think is not very good.

The Court: I will read it tonight. Adjourn Court.

(Court thereupon adjourned.)

[fol. 1119] Exhibit Correction

In connection with the testimony of E. W. Dozier on July 15th, 1941 the eighteen contracts offered as a group by Mr. Frolich and identified ad Defendant's Exhibit 35, have now been marked as Defendant's Exhibit C-35.

In connection with the testimony of W. P. Miller on July 15th, 1941, the seventeen contracts offered as a group by

Mr. Frolich and identified as C-36 have now been marked as Defendant's Exhibit No. C-36 (a).

[fol. 1120] Volume VIII

Thursday Morning, July 17, 1941

H. T. Bailey, Resumed. Direct Examination, continued.

By Mr. Wright:

Q. Mr. Bailey, after you had the discussion with the Warner representative and signed the Warner contract that was referred to yesterday, did you have a discussion with any United Artists representative about their product?

A. Yes, I had a discussion with Mr. Barnes, who represented United Artists in that territory.

Q. When was that?

A. That was about the same period of time that the other contracts were offered.

The Court: You mean 1940-1941 contract?

A. Yes sir, the 1940-1941 contract.

Mr. Wright:

Q. I will show these series of contracts, dated December 2, 1940, between Dixie Theatre and United Artists Corporation and ask you if those are the contracts, collectively marked Government Exhibit UA-3?

A. Yes sir.

Q. I call your attention to the provisions as to clearance, "Run subsequent clearance," the "Special arrangement to be applied as available." Did you have a discussion [fol. 1121] with Mr. Barnes at the time the contract was made?

A. I asked him exactly what that meant, as far as our running time was concerned. And he told me that the clearance, although that was not specified there, our clearance period between the down town theatres, Princess, and the Dixie would be a period of 90 days, and he said that the reason it was important for him to put "subsequent Run" in there on our run specification was in order that the Ritz Theatre in Alabama City might have the pictures before we

got them because the word "subsequent" as he explained to me means a run after second run in some other town.

Q. How long before United Artists pictures were made available to you, under that contract?

A. On an average of three months after they were run at the down town Princess.

Q. How long after they were run at the Ritz in Alabama City?

A. From a month and a half to two months, usually.

Q. What did you have to say about that?

A. We asked him why it was absolutely necessary that that contract be written giving the Ritz Theatre in Alabama City priority over the Dixie Theatre and I went into the matter of location of the other theatres and the Dixie [fol. 1122] Theatre with regard to the Ritz, and he told me at that time that he was not personally acquainted enough with the situation in Alabama City to be able to give me a concrete reason why that subsequent run had to be in there, but he told me that those were his instructions to sell the pictures subsequent run to Gadsden and if I wanted the pictures that is the way I would get them.

Q. Was there anything said about or with reference to making any United Artists Pictures available to you first run?

A. He told me at the time he sold us the contract that in the event the Princess Theatre, or Crescent Amusement Company, didn't wish to run any one of the United Artists Pictures, which were sold in that season, that after a certain period of time those pictures would become available to the Dixie Theatre first run.

Q. And have some of the films been available to you?

A. None of the pictures of the 1940-1941 season have been run first run. However, of the previous contracts that were sold there, there have been about 4 first run pictures shown since the theatre opened.

Q. How long after the Ritz did they become available to the Dixie?

A. Actually about six months after release.

Q. Did you have any, did you make any attempt to get a run of the current Paramount product for the Dixie?

A. Yes, I made a trip to Atlanta and went into the Para- [fol. 1123] mount office and talked to Mr. Folger, who was

the Booker there and told him that I would like to have a few Paramount pictures to fill in with, and he told me that I would have to make a contract for the entire year.

Q. That was for what year?

A. That was 1940-1941 season. And I told him that I would not be interested in writing the full contract, signing one for a year because many of the pictures on the contract were second rate pictures to start with, that we would not want to run, and in addition, they would already have had two or three runs in Gadsden before we got them, so I made a spot book arrangement with the office in Atlanta whereby I would get ten pictures out of their whole year's product.

Q. Was there anything said as to why Paramount product would have two or three runs in Gadsden ahead of you?

A. He said Mr. Sudekum had the first run contract, first run franchise and second run contract in down town Gadsden, and first run contract in Alabama City and told me that the picture would run first at one of the larger down town theatres, then if the picture merited it, it would be returned some time later to one of the other down town theatres, that is the Capitol of Gadsden Theatre, and in between times it would be returned to the second run theatre after it would be run first run in Alabama City first run. That would actually constitute fourth run when we got the picture.

[fol. 1124] Mr. Wright: If the Court please, I want to offer in evidence the contracts between Crescent and Distributors that have been previously given numbers here. The first is a contract——

The Court: What distributor is that?

Mr. Wright: Loew's; a contract dated November 5, 1940, between Loew's, Inc., for exhibition at the Capitol Gadsden, Belle and Princess, referring to the 1940-1941 product. That is marked Government Exhibit L-12, for identification.

Another contract, dated January 2, 1941 between Crescent and Loew's, for the exhibition of the Loew pictures for the 1939-1940 season at the Capitol, Gadsden, Princess and Belle.

Mr. Armistead: What is the date of that, January 2, 1941?

Mr. Wright: This is the second one; January 2, 1941. He asked also for contracts made between Crescent and Loew's for Alabama City, and in response—They were

included, of course, in subpoena and in compliance—We specified records that were in the file, in the subpoena, and we received the following statement from Loew's with respect to Alabama City: "Alabama City, Alabama, pictures were spot booked during 1939-1940 and there is no contract."

[fol. 1125] The Court: What exhibit is that, now?

Mr. Wright: The letter—If your Honor prefers, I will have to show the letter to Loew's and Loew's answer to us. They refer to other situations, is the reason I didn't offer them.

The Court: You haven't offered that in evidence yet?

Mr. Wright: I was just reading it, I will read the correspondence into the record, I think that would be proper, I want to keep these copies, it refers to two or three situations. I think it would encumber the record unnecessarily, to offer both of those bulky letters. I will do it if you want them.

[fol. 1126] The Court: Well, I just wanted to keep track of these exhibits because when it comes time for me to make a finding of facts it is going to be quite a job to search through all the exhibits and find what I want.

Mr. Wright: Well, I think we had better——

The Court: You mean just make part of it an exhibit?

Mr. Raftery: This is a unique way of having Loews testify to the manner in which they sell their pictures to the Ritz Theatre.

The Court: Yes.

Mr. Wright: This is, of course, subject to explanation. If anyone is produced from Loews to show that Mr. Thompson was wrong when he made that statement, of course, they are entitled to do it.

The Court: Who is the letter to?

Mr. Wright: The letter is dated July 5th, 1941, addressed to E. Stanley Thompson, Esquire, connected with the legal [fol. 1127] department. You see, we served a subpoena first and made a general subpoena covering all the contracts in the case, and then we made an arrangement whereby we would notify them as to the specific situations we were going into just like we have with defendant's counsel and they then would produce the contracts relating to those situations, and this is the letter that we wrote on July 5th specifically requesting contracts for this and a number of other situations, and in response they produced

the contract I just identified and explained the non-production of any contracts for the Ritz Theatre at Alabama City by the statement in the letter I previously read to you.

The Court: Now, what is that statement?

Mr. Wright: To get the whole thing, I will read our letter of July 5th: "Pursuant to instructions contained in your letter of July 3rd, 1941, we are hereby requesting you to furnish us all contracts subpoenaed for the following towns for the motion picture seasons indicated." Specified there are East Gadsden, Alabama, 38-39, 40-41; Alabama City, Alabama, 38-39, 40-41, inclusive; Gadsden, [fol. 1128] Alabama 38-39, 40-41, inclusive. Then their reply of July 9th, 1941:

"Enclosed herewith you will find all the contracts which you requested in your letter of July 5th, 1941, except the following:" It says: "East Gadsden, we have been unable to locate any contract for this town." We were able to produce the contracts obtained from Mr. Bailey.

"Alabama City, Alabama pictures were spot booked during 1939-1940. There is no contract."

Mr. Armistead: Now, may it please the Court, I respectfully submit that the Crescent Amusement Company is entitled to cross-examine the writer of that letter.

The Court: Yes, I sustain your objection.

Mr. Raftery: Not only that, the writer of that letter is one of the lawyers for Loews writing to the other lawyer.

Mr. Waller: I think the same proposition.—

The Court: I have already sustained the objection. There is no use arguing.

[fol. 1129] Mr. Wright: I think it is a question of how we are going to establish the non-existence of these contracts. Now, of course, we can call Mr. Stanley Thompson down here and I suppose Mr. Thompson will say that he had Loews records searched in order to comply with the subpoena and the contracts weren't found. Now, if that will add——

The Court: That is apparently what you will have to do.

Mr. Wright: If that adds anything to the letter, I don't know what it is.

The Court: They have objected.

Mr. Waller: You have got the district manager subpoenaed. He can testify to it. They have got a whole lot of other things in the record just like that, if your Honor please.

The Court: Well, I have admitted these various contracts to go in with the different distributors. I don't think I [fol. 1130] have permitted any letters that are in this same category to go in.

Mr. Wright: Well, we withdraw the letters and will make that proof if they prefer it.

The Court: All right. Except letters either addressed to the witnesses or to the Crescent Amusement Company. I have permitted them to go in.

Mr. Wright: We would also like to offer at this time the franchise agreement between the Crescent Amusement Company and Paramount Pictures Distributing Company, Inc., dated July 28, 1938 as of November 1st, 1937, which has been marked Government's Exhibit No. T-24 for identification, and I want to call attention to the fact that this franchise covers the Alabama City and Gadsden, Alabama situations, and paragraph 8-(e) of the franchise at page 13 contains this second run option which made it impossible for the Dixie at East Gadsden to get earlier run of this Paramount product.

The Court: That franchise was specifically exempted from this consent decree, wasn't it?

[fol. 1131] Mr. Wright: That is right.

The Court: All right.

Mr. Raftery: There is no claim that that franchise is illegal per se.

Mr. Wright: There certainly is.

Mr. Raftery: Let me ask this: if the franchise were made with the Dixie Theatre would it be the Government's contention that it would be illegal per se?

Mr. Wright: We haven't.

The Court: That is really not on the facts of the case.

Mr. Raftery: If your Honor please, just observe that all these franchises are exempt from the consent decree and are given a blessing.

The Court: Well, it is like the old expression of Rube Goldberg, it is different when it happens to you.

Mr. Raftery: It depends on whose ox is being gored.

[fol. 1132] The Court: Go ahead.

Mr. Wright: This clause 8 (e) in the franchise reads as follows:

> "The exhibitor may at its election exhibit for a repeat exhibition any of the feature photoplays li-

censed hereunder at any theatre covered by this agreement upon the same terms and conditions applicable to the Hopalong Cassidy feature photoplays in respect of such theatre, as set forth in the annexed Schedule A, and the Exhibitor agrees to pay as license fee for each feature photoplay during each such repeat exhibition the license fees payable hereunder for the said Hopalong Cassidy feature photoplays."

[fol. 1133] Mr. Wright: I would also like to offer a letter dated May 25, 1939, from Crescent Amusement Company to Paramount Film Distributing Corporation, with an acceptance noted thereon by Paramount Film Distributing Corporation, which purports to modify that second run option. I don't like to remove this from the folder containing our modifications, because we will eventually offer the franchise complete as modified by all the leases contained in this folder. I have had this particular letter marked as Government Exhibit No. P-25 and I will offer that at this time without detaching from the folder.

The Court: That is all right. That Exhibit No. P-25 is in your folder?

Mr. Wright: P-25 is contained in a folder which modifies the franchise made in P-24.

Now, Mr. Waller has asked me to read the schedule of rentals which appears in the franchise, Government's Exhibit P-24. That states that for each of the five years 1937-1938 through 1940-1941, inclusive, the rental shall be $10.00 plus a recording charge of $2.50 for the films at Alabama [fol. 1134] City; and the prices at the Princess and Capitol at Gadsden is $12.50 for each of the five seasons, plus a $2.50 recording charge. The modification as set out in detail, reads as follows:

"It is hereby agreed that the agreement between us dated July 28th, 1938 as of November 1st, 1937, covering theaters in the States of Alabama, Kentucky, and Tennessee, and all riders thereto, be amended by adding to Article Eighth, subdivision (c) of said agreement the following as though the same were originally contained therein:

"'With respect to each theatre licensed hereunder the Exhibitor shall notify Paramount in writing of its election to exhibit any feature photoplay for repeat exhibition at such theatre not later than thirty (30) days after the conclusion of the initial exhibition of each such feature

photoplay at any such theatre, and such repeat exhibition shall be held within one-hundred and twenty (120) days from the conclusion of the initial exhibition of such photoplay. It is agreed that Paramount will have prints for each such feature photoplay available for booking by the Exhibitor for such repeat exhibition during the aforesaid one-hundred and twenty (120) days. If no such prints shall [fol. 1135] be available on the dates selected by the Exhibitor, then the time of the Exhibitor to exhibit shall be within fifteen (15) days after such prints shall become available. If the Exhibitor shall fail to so notify Paramount in writing of its election, then and in such event, upon the expiration of thirty (30) days following the conclusion of the initial exhibition of such photoplay the Exhibitor's license to exhibit such photoplay for a repeat exhibition shall thereupon forthwith terminate and revert to Paramount and Paramount may license the exhibition of such photoplay when and where desired by it.

"'If the Exhibitor shall have elected as aforesaid to exhibit for repeat exhibition any photoplay and shall fail to so exhibit such photoplay within the aforesaid period of one-hundred and twenty (120) days, the license fee for each such photoplay shall thereupon forthwith become due and payable to Paramount and the Exhibitor's license to exhibit such photoplay for repeat exhibition shall forthwith terminate and revert to Paramount and Paramount may license the exhibition of such photoplay when and where desired by it without accounting to or crediting the Exhibitor for any sums received therefor.'"

[fol. 1136] "As herein modified, the aforesaid agreement and all riders thereto shall be and remain in full force and effect and is hereby ratified and confirmed. Kindly signify your agreement hereto by signing underneath the words "Agreed to" at the bottom of this letter.

Very truly yours, Crescent Amusement Company, by Tony Sudekum. Agreed to: Paramount Film Distributing Corporation, by Morgan."

Mr. Wright: I would also like to offer at this time, if the Court please, two documents that I believe are known as Deal Sheets, which were a part of the Warner Brothers franchise. The first covers the Ritz Theater at Alabama City, Alabama, dated March 1, 1940, and carries a rider dated March 14, 1940, marked Government's Exhibit W-6. And

a similar Deal Sheet covering the Princess and the Capitol and the Gadsden at Gadsden, Alabama, bearing the same date. And a rider dated also March 14, 1940. The contract dated March 1, 1940, for the Ritz at Alabama City contains [fol. 1137] a rider which reads as follows: "Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Alabama City, Ala., and in such event the Exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly.

Exhibitor shall have the right to exhibit any reissues, except Westerns, at the lowest allocated rentals, and in such event the Exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly.

Should Exhibitor's playing time be reduced by reason of the closing of said theatre, then Exhibitor's commitment shall be reduced proportionately."

The Court: What is the number of that exhibit, please?

Mr. Wright: That is No. W-6. The same exhibit also contains the following rental provisions: "Clearance; 14 days over Attalla, Alabama; however, all features must be cleared 60 days after NRD." which, I presume, is National Release Day.

[fol. 1138] The Exhibit W-7, which is the contract covering the contract and rider, covering the exhibition of Warner product at the Princess, Capitol and East Gadsden, and reads as follows:

"The twenty (20) features licensed for second run exhibition shall be selected by exhibitor from the features licensed, first run, for each of the motion picture seasons 1939-40, 1940-41, 1941-42, and 1942-43, in the following manner:

"Within thirty (30) days after the last date of the exhibition of any feature, first run, exhibitor will notify distributor in writing whether exhibitor selects such feature for second run exhibition. Failure on exhibitor's part to so advise within said period with respect to any feature shall be regarded as a rejection by exhibitor of such feature for second run exhibition. Any feature rejected as herein provided may be disposed of by distributor elsewhere as and when it deems advisable.

Exhibitor shall have the right to exhibit any reissues, except Westerns, at the lowest allocated rentals, and in which event the exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly.

"Should exhibitor's playing time be reduced by reason [fol. 1139] of the closing of a theatre, then exhibitor's commitment s-all be reduced proportionately."

This contract provides with respect to run and clearance, first and second, twenty-one days over Attalla, Albertville, Guntersville, Center, Piedmont, Jacksonville, Boaz, and Coleyville; however, all pictures must be cleared within 45 days after N.R.D. I suppose that is National Release Day, or date.

Anyway, Mr. Bailey, with respect to Attalla, with reference to downtown Gadsden, where is Attalla with reference to downtown Gadsden?

Q. Attalla is about seven miles due west of Gadsden.

Q. And that is about three miles from Alabama City?

A. Yes, about three or three and a half miles.

Q. And how far from your house in Gadsden?

A. It is about eight miles.

Mr. Wright: I also offer in evidence the contracts which were made between twelve corporations, including the Crescent Amusement Company, Rockwood Amusement Company, Cherokee and most of the other defendants in this case, for the exhibition of these United Artists' pictures on seventy-three runs, first runs all with the exception of Nash- [fol. 1140] ville are first run, that is correct in something like seventy-three or more than a hundred theaters specified as operated by twelve different corporations in various towns in Alabama, Kentucky and Tennessee, including the town of the Ritz in Alabama City, and the Capitol Princess, East Gadsden and Gadsden, Alabama, the rental terms are simply the blanket amount for each picture for the exhibition in all of the seventy-three situations controlled by these twelve corporations.

The Court. Does it say what that amount is?

Mr. Wright. The first picture I believe it is two pictures of the seventy-three runs, eleven hundred dollars each.

The Court. Eleven hundred dollars each?

Mr. Wright. Eleven hundred dollars each for the two pictures the next one is for the seventy-three runs, twelve hundred dollars, that is the twelve hundred dollars to be paid to the United Artists by the twelve corporations for

the privilege of running the picture in the seventy-three situations covering two or three days each, except in one [fol. 1141] theater in Nashville where the run will be three or four days.

The Court: What is that? W-A-4?

Mr. Wright: W-A-4, that is marked U. A. 4 collective exhibit.

The Court: What is the date?

Mr. Wright: The contracts have a date of abrogation, November 22, 1940, and there is a statement I believe as to approval, approved in accordance with wire from Mr. Paul Lazareth, dated November 20th, 1940.

Mr. Raftery: May I see it? (Passed to Counsel.) The contract speaks for itself, Mr. Wright didn't begin to mean there were seventy-three runs because you find there may be different times, you have to analyze that contract.

Mr. Wright: As specified on its face.

Mr. Raftery: This is a bulk deal, where you sit down and sell a number of the Sudekum circuit, for instance, your [fol. 1142] product, and instead of fussing about each individual situation, whether you pay ten dollars or twenty dollars, you arrive at the bulk figure and you pay all right, and say I will sell you these towns for these prices specified, for example, I will go on with the producer and he sells United Artists, he sells seventy-three runs and these runs are specified, the two pictures are on a basis of eleven hundred dollars apiece; on the third picture he got twelve hundred, on the fourth he got thirteen hundred, on the fifty film or picture he got fifteen hundred. Then you know you *know you* haven't got to go into the next situation, where you get a particular picture from another producer, he sells the Westerns for seventy-three runs for eighteen hundred dollars. Wuthering House eleven hundred dollars, that is an older picture, and come down to where it will correspond to Good Voyage, may be these three the third he gives thirteen hundred and fifty dollars. Now each of these pictures has seventy-three runs, it goes on that way for around twelve or fourteen pictures involved in the whole thing, and each price is separate for each picture, and each producer's contract is a separate document, until they have [fol. 1143] the deals pretty much dealt with. Each of these riders is attached to each of these transmittal sheets, deals, runs and towns, and there is no allocation of prices to any

town. Now the Ritz theater at Alabama City were are talking about now, is some part, not allocated.

The Court: A one-seventy-third.

Mr. Raftery: We do not sell them that way.

The Court: I say it is one-seventy-third.

Mr. Raferty: May be an illustration of it.

Mr. Wright: These as I understand it, are all the contracts providing that they are put in seventy-four theaters, followed by Crescent at Gadsden, Alabama, for the 1940-1941, pictures, that have been produced. Is that correct, Mr. Raftery?

Mr. Raftery: That is correct, and also Mr. Stengel reminds me I did not know this, not being in the cashier's department, when they ran the first of the seventy-three [fol. 1144] they paid the whole consideration.

The Court: Are you testifying now?

Mr. Raftery: Well—it is in the contract.

Mr. Waller: Your Honor please, we are somewhat in the dark as to the purpose of these exhibits.

The Court: I suppose it will come out before long.

Mr. Wright: I would like to offer at this time purchases for this time, dated July 20, 1940, covering the period of 1940-41, to 1941-42, covering that product, between 20th Century Fox Film Corporation and Crescent Amusement Comapny and Lyric Amusemtnt Company which has been *gotchter* identified, marked for identification as Government's Echibit F-A. This has attached to it the so-called deals, in, which will show the individual sit-ations which are all included in the Branch for the various situations in Alabama, Tennessee and Kentucky, and the deal sheet too for Alabama City, Alabama, is dated June 27, 1939, and that for Gadsden, Alabama, bears the same date. [fol. 1145] The Alabama City provision with respect to run, first clearance after Attalla, Alabama, provided pictures are played within twenty-one days of the National Release date, that the clearance provided the first run over East Gadsden provided they were played twenty-one days after National Release Date. Then there is a further statement as to clearance date over other towns.

Mr. Raferty: Your Honor, I do not mean to testify. I merely want to call attention to the provision in there as to the date of those things.

The Court: All right.

Mr. Waller: Your Honor, we object to all these exhibits for the purpose of finding out the purpose for which they are offered.

The Court: In this last exhibit it looks like it refers to Attalla, Alabama, more than it does to East Gadsden; what connection does that have with it?

Mr. Wright: We simply want to show that so far as [fol. 1146] these distributors are concerned that was all one trade area there, it was no excuse for granting clearance over Mr. Bailey, unless you recognize the fact that Attalla, Alabama City, Gadsden and East Gadsden are all in the same competitive area, and so recognized by the distributors themselves at the time they made the agreements, and pushed the Dixie out of East Gadsden, and the Ritz at Alabama City, is not competitive and the Dixie, and that is the result of it there.

Mr. Waller: We object to that, is that something new put in there or was this set up before the Dixie was built?

The Court: Well I guess you will have the opportunity to show they were in there before, if they were.

Mr. Waller: We say that evidence is immaterial unless the Government makes that competent, I am basing it on the ground of immateriality.

The Court: He said he had been doing this for a long period of time.

Mr. Waller: He says we did that to squeeze this fellow [fol. 1147] out; the fellow wasn't there.

Mr. Wright: Obviously he couldn't squeeze him out when he was not there, but the point is if they did keep on doing it when somebody came in there, the whole set up was expressly designed for that purpose, prevent any one opening a theater when he stayed there, he could not get the films to which it was entitled, based on the rental time, he could afford to pay, they attempted by these franchise agreements to freeze the entire distribution set up in the towns where they might have competitio or where any competition might arise in periods of from three to five years. We say that any agreement has that purpose and effect, it is obviously an attempt to do this, and the section with respect to these second runs put in the Warner and Paramount agreements was to prevent anybody else who might come into a situation from getting a second run of the pictures Crescent did not even have to buy a second run to keep them out of there, so all they had to do was

to make this option so then if it appeared anybody else wanted the run, they would exercise their option and take it, there wasn't any effort obviously, didn't appear of course, [fol. 1148] because they would not violate those agreements, for other means that were illegal so certainly those are to the effect that I have just illustrated here in this Alabama City, East Gadsden, and Gadsden situations, where a theater is put up, that is plainly entitled to secure films second run at least in the city of Gadsden, and can't possibly get because of this agreement.

If there are any of those documents that have been identified that I have not offered, I will offer them all now. And that is all.

I believe there was one other letter here from Loew's Inc., written to Mr. Bailey under date of September 26, 1940, marked Government's exhibit 88 was that letter received by you, Mr. Bailey, on or about the date it bears?

A. Yes, sir.

The Court: From whom?

Mr. Wright: From Loew's, Inc., to Mr. Bailey, it says:

> "We have your letter of September 25 asking whether or not our records indicate that your 1938-39 contract was completed. Our records indicate that both the feature and the Junior Feature contracts have [fol. 1149] been completed with the bookings which we now have set.

Mr. Frolich: The exhibits have been absolutely confused, we have no exhibit number 88, we have no such exhibit.

Mr. Wright: I think that letter is in evidence already and the numbers, it bears a different number, 89.

The Court: What is the number, Mr. Clerk?

Mr. Wright: I believe you have Government's exhibit 87.

The Clerk: Letter of September 20th, 1940, to Loew's, Incorporated to Mr. H. T. Bailey, Jr., and here is 89 from the Dixie Theater, of October second, 1940, to Loew's incorporated.

Mr. Wright: Well that is what I thought. I want these marked collectively.

Q. That letter that is referred to there, did you have a copy of that letter, Mr. Bailey?

A You mean the copy of the letter that I wrote to Loew's, incorporated?

Q. Yes?

[fol. 1150] A. Yes, I had a copy of the letter, and turned it over to an F. B. I. agent, along with some other correspondence.

Mr. Wright: We have not been able to find the letter of September 25th.

Q. Can you tell us anything about it?

A. I wrote to Loew's incorporated and asked them if we had fulfilled our contract as far as what pictures, and what I supposed had been bought previously.

Q. The letter of September 25th didn't have anything to do with film negotiations then?

A. No, I was just asking them to see if we had anything left of their product coming, if we should do anything and we would do everything we could to get it and also make sure we had fulfilled our obligations, and to be sure there would not be any misunderstanding about these contracts w-en we made an at-empt to get newer product.

Mr. Wright: I will offer that letter of July 27, 19— that has been identified in evidence.

Mr. Waller: Your Honor that letter simply brings up the proposition that the letter from Loew's stating what the records show, even if it was addressed to the witness, it is heresay testimony.

[fol. 1151] The Court: What difference does it make?

Mr. Waller: I don't think it makes any, only it is not competent evidence.

The Court: I do not see how it bears on the suit, just says they fulfilled their contract.

Mr. Wright: I do not think it ma-es any difference particularly, but there was a suggestion here the other day that went into the correspondence, that all of it ought to go in.

The Court: Don't pay too much attention to that suggestion.

Mr. Wright: I take it that if these contracts as well as that letter ha-e been received in evidence, it should be noted.

The Court: All right.

Mr. Raftery: That all you have here?

Mr. Wright: Yes, I am now offering all the contracts we [fol. 1152] identified here today and yesterday.

The Court: Identified by this witness during his testimony?

Mr. Wright: Yes.

Mr. Raftery: Do you offer the United contracts?

The Court: Yes, let them be admitted.

Mr. Wright: Cross-examine him.

Cross-examination.

By Mr. Waller:

Q. What is the population of East Gadsden, Mr. Bailey?

A. Just as an estimate at the present time it is around five thousand persons.

Q. And when this theater was built it was about seven thousand?

A. I don't know how much it was when the theater was built, because I was not there.

Q. You knew nothing about the purposes for which this theater was built?

A. I knew nothing about the purposes, there are a good many rumors gone out but all I know is since I came there.

[fol. 1153] Q. Your first connection with the theater then was in September, 1940?

A. Yes.

Q. So far as the purpose of the theater is concerned, I suppose you would accept the testimony of the president of the corporation that it was built because he believed the people of East Gadsden did not want to pay the prices charged at the Princess theater, and did not want to go that far to get to the Alabama City theater?

A. Yes, I think that is about true.

Q. You think that is about it?

A. Yes, sir.

[fol. 1154] Q. It is about a ten mile trip over to Alabama City?

A. I would say about 9 miles over there and back, the round trip.

Q. Your complaint is that some of those people in East Gadsden are still going over to Alabama City to see pictures?

A. That is correct.

Q. You don't have any objection to the proposition that the Princess Theatre has a 60 day or 90 day clearance over your theatre?

A. No, I couldn't expect to show without any clearance there. In fact, the way the pictures are shown down town, they run so close to release date, we would still get pictures within a reasonable time to run. Our objection is the Ritz Theatre in Alabama City, which isn't near as good a theatre so far as construction is concerned, not so many seats, can have priority over us and show pictures which we are entitled to.

Mr. Waller: I object to the answer as not responsive to the question.

The Court: Objection overruled.

Mr. Waller:

Q. Let me understand you, then. Is your argument which you make, if there was no theatre in Alabama City, if that theatre didn't exist there, your clearance would be all right, that is correct, isn't it?

[fol. 1155] A. If a theatre didn't exist in Alabama City?

Q. Yes.

A. If there wasn't any theatre in Alabama City, there would be no clearance with regard to Alabama City.

The Court: He says he has no objection to the Princess Theatre clearance, his only objection is the clearance of the Ritz at Alabama City over him.

Mr. Waller:

Q. Your objection is really to the existence of a theatre in Alabama City?

A. No; the objection is to that theatre, with no better facilities than ours, can get clearance over us.

Q. Your objection is that you have got a 60 day clearance over your theatre, the Dixie, by the Princess Theatre, and there is no 60 day clearance of the Princess over the Ritz?

A. They are running pictures in less than two weeks after the Princess.

Q. You know those two theatres are owned by the same corporation and operated by the same corporation?

A. Yes.

Q. Your contract doesn't provide that Alabama City, the Ritz, has any clearance, and if the Ritz in Alabama City played two weeks after the Princess, you couldn't play them

anyway until 60 days after the Princess, so that wouldn't make any difference?

[fol. 1156] A. Yes it does make a difference, too.

Q. In other words, that doesn't delay you; as soon as the sixty days is up, you get the pictures?

A. That is correct.

Q. Your complaint is, before the sixty days is up, they are played at Alabama City?

A. That is correct.

Q. You don't like it because some of the people in East Gadsden go over across town to Alabama City to a theatre that was there long before the Dixie opened, or was ever built?

A. Well, I wouldn't say that I don't like it so much, except for the fact that we should have an equal chance. I don't like that, anymore than the managers of the Ritz like the other people to come over to the Dixie.

Cross-examination.

By Mr. Raftery:

Q. Do you draw from the whole city of Gadsden?

A. Our biggest drawing area is in the section of East Gadsden, East of the Coosa River,. East Gadsden, proper, we draw to some extent from the other parts of the town.

Q. You draw from the whole city?

A. Yes, a small part of our draw comes from over in Gadsden.

Q. Capt. Barnes was the United Artists salesman?

A. Yes sir, that is his name.

[fol. 1157] Q. Cap told you that he had first run sold to the Princess?

A. Yes.

Q. And second run out at the Ritz?

A. He didn't make any specific statement about the Ritz Theatre, in Alabama City. He said he personally was not well enough acquainted with the contents of the Ritz contract to give me a definite reason for it.

Q. You knew at the time you sent your applications for contracts, that you have identified today, that a run would be had of those particular pictures at the Ritz Theatre before you showed them in East Gadsden?

A. Yes, I did.

Q. You were not misled at all about it?

A. No, we were not misled.

Q. Then you signed up these applications for contracts to show the United Artists Pictures in East Gadsden?

A. Yes.

Q. By the way, how many pictures did you buy?

A. We bought 17 pictures on 11 contracts.

Q. What was your playing time?

A. Ninety days behind the Princess.

Q. No, how many days did you play?

A. Two days.

Q. So the maximum amount of your playing time was used up in approximately 34 days on United Artists pictures?

A. Yes.

[fol. 1158] Q. What is your complaint? Do you want to play day and date with the Ritz?

A. Yes. What our main objection is, to have the same basis on which we could get films as the Ritz Theatre in Alabama City.

Q. In other words, you want to have a print of each picture available to your house and a print over at the Ritz on the same day?

A. Not necessarily a print, but just an available date where within that close period we could get the picture.

Q. You want to play pictures day and date with the Ritz?

A. No.

Q. You would want to play ahead of the Ritz?

A. Not necessarily.

Q. Would you want to play immediately after the Ritz?

A. We are willing to play within three or four days of the Ritz.

Q. But you don't want to divide the audience on the same day?

A. It wouldn't divide the audience on the same date as the Ritz.

Q. Don't you draw from Gadsden?

A. I told you the biggest part of our drawing area was here in East Gadsden where we are located; we have got enough people and we don't really need to draw from Gadsden.

Q. You have been making statements of the crowd going [fol. 1159] from your house across the river, several miles,

down to the Ritz Theatre. Have you checked the audience at the Ritz?

A. I have gone over there a few times. I have had people tell me they went over there.

Q. Have you found any of them, yourself, over there?

A. Yes.

Q. How many?

A. Only a few at a time.

Q. Three or four?

A. No, more than that, several cars, I wouldn't try to say how many.

Q. How many?

A. I would say five or six, every time I was over there.

Q. How many would you see over at your house on a particular night from the other part of the city?

A. You mean, from Alabama City sections?

Q. Yes.

A. Very few, if any.

Q. As a matter of fact, you don't consider the two houses competitive at all, do you?

A. No. They are competitive as long as they have the pictures so far ahead of us and can advertise those pictures so far ahead of us.

Q. Let me ask you this: In the 17 pictures, have you [fol. 1160] played any of those 17 United Artists pictures?

A. Yes, just as soon as they became available.

Q. Did you play the "Thief of Bagdad"?

A. No, it isn't available.

Q. What have you played?

A. I can't call the names of the pictures right off hand. I have had so many in my mind in the last few days. We played "The Westerner," "Foreign Correspondent," and along in there. "So Ends our Night" and other pictures like that.

Q. Isn't it true, Mr. Bailey, that the attendance at your theatre wholly depends on the particular picture you are playing?

A. No, not necessarily.

Q. Did you play "Boom Town," a product of Metro?

A. Yes.

Q. How late did you play that?

A. We played the picture after it was played at the Princess, and from the Princess down to the Ritz in

Alabama City, about two months after the Princess and about a month and a half after the Ritz.

Q. How long after the national release date?

A. I don't know. It was released in the 1939-1940 season, it had been released a long time.

Q. You played it a year and a half after the release?

A. Yes.

[fol. 1161] Q. You did a pretty good business with that?

A. We did a fair business.

Q. In fact, you do a good business when you have a good picture?

A. Yes.

Q. And if you have a bad picture you find that your business isn't so good?

A. Sure.

Q. Mr. Bailey, one other question: Saturday is your best day?

A. No.

Q. What do you play on Saturday?

A. Western and action pictures.

Q. You do pretty well on Saturday?

A. Fairly well.

Q. You do very well?

A. We do pretty well.

Q. Considering what you pay for your program, you do very well?

A. No, not considering what we pay for a double feature and a serial and shorts.

Q. That is what your public demands on Saturday?

A. Yes.

Q. You cater to your public, then, on that?

A. Yes, naturally.

[fol. 1162] Redirect examination.

By Mr. Wright:

Q. With reference to the good pictures that Mr. Raftery questioned you about. Does it make any difference to you whether you play a good picture 40 or 60 days behind the Ritz in Alabama City?

A. Yes sir, it does.

Q. It makes a bad picture that much worse, to have to play it 30 or 60 days behind the Ritz?

A. Yes, because by that time all the people that have seen the picture in Alabama City, they generally broadcast the fact that it is a bad picture.

Recross-examination.

By Mr. Raftery:

Q. You said you didn't consider buying any of the bad pictures, you only wanted to pick from Metro and the other big Companies like that?

A. I didn't make the statement I wanted to pick.

The Court: I take it from what the witness said, if he got a bad picture and if he got it soon enough so that the public didn't find it out soon enough to advertise it, that was all right.

Mr. Raftery:

Q. Did you play "Rebecca"?

[fol. 1163] A. Yes sir.

Q. Well, how did you do on that?

A. We did a very good business, but we were very much disappointed, it wasn't what we expected.

Q. Did you ever play a picture that was really satisfactory to you?

A. Yes, we have.

Q. What picture was that?

A. There were several that were satisfactory.

Q. Tell us one?

A. Well, "Boom Town" was a very satisfactory business there.

Q. That you played a year and a half late?

A. But there is another point there, the fact that the other theatres in Gadsden played them a year and a half late, almost a year and a half late. In 1939-1940 the product wasn't run in Gadsden on release.

Q. You played it after the Ritz?

A. Yes.

Q. You played it after the Capitol?

A. No, not——

Q. After the Princess?

A. Yes.

Q. And after Gadsden?

A. No.

Q. After Attala?

[fol. 1164] A. Attalla had played it eight or nine months before even the Princess ran it, because they were running the 1939-1940 product when it wasn't being run in Gadsden.

Q. But you never had much trouble with good pictures, no matter, really, when you play it.

A. No, we don't have any trouble.

Q. You think you could make more money if you could play them sooner?

A. I don't think we could make more money, I knew that we could make more money.

Further this deponent saith not.

[fol. 1165] TIM W. SMITH, next witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dobey:

Q. Will you state your name and address?

A. Tim W. Smith, Knoxville, Tennessee.

Q. What is your occupation, Mr. Smith?

A. Pictures, moving picture shows.

Q. Where are you operating theaters?

A. Knoxville and Fountain City, Tennessee.

Q. How long have you been operating theaters at those points?

A. Oh about fourteen or fifteen years.

Q. Are those theaters owned by you *u*ndividually or are they owned *v*y corporation?

A. Corporations.

Q. What?

A. Peerless Enterprises, Inc.

Q. What interest do you have in the company, what stock in. .st?

A. I own fifty-five per cent.

Q. Fifty-five per cent of the stock?

A. Yes, sir.

Q. On or about March 26, 1937, did you or not open a theater at Morristown, Tennessee?

[fol. 1166] A. Yes, sir.

Q. And on or about December 13, 1938, did you close that theater?

A. Right about that date I guess.

The Court: When was that?

Mr. Dobey: December 13, 1938.

Q. On or about June 17, 1938, did you open a theater at Harriman?

A. Yes, sir.

Q. And on or about December 13, 1938, did you close the theater there, at Harriman?

A. Right around that date, yes, sir.

Q. On or about September 2, 1938, did you open a theater at Newport?

A. Yes, sir.

Q. On or about December—no; on or about November 19th, 1938, did you close the theater at Newport?

A. Yes, sir.

Q. Now on or about January 28, 1939, did you reopen the theater at Newport?

A. No, sir.

Q. Did you ever—beg your pardon; On or about January 28, 1939, did you reopen your theater at Harriman?

[fol. 1167] A. Yes.

Q. Did you continue operating that theater until on or about February 10, 1940?

A. Yes, sir.

Q. At the time you began constructing theaters at Morristown first Harriman, second and Newport third, were there any other theaters already located in those towns?

A. There was a theater in each town.

Q. Who owned those theaters?

A. Crescent Amusement Company.

Q. Now with respect to the theater at Newport, was that theater owned by the Crescent Amusement Company, or by the Newport Amusement Company, affiliated with the Crescent Amusement Company?

A. I think it was the Newport Amusement Company affiliated with the Crescent Amusement Company.

Q. In August 1938, after you had opened your theater at Morristown, something over a year before that, sometime about March 26, 1937, did the Crescent Amusement Company open a third theater at Morristown?

A. Yes, sir.

Q. And the name of that was what?

A. Let's see, I believe the name of it was the Ritz.

Q. Now at Newport, I believe you stated your theater was opened at Newport on or about September 2, 1938?

[fol. 1168] A. Yes.

Q. Did the Newport Amusement Company open an additional theater in that town on or about August 30, 1938, a few days before yours opened?

A. Yes.

Q. At Harriman, Tennessee, after you closed your theater, on or about December 13, 1938, did the Crescent house there burn down?

A. Yes, sir.

Q. And did you then reopen your theater?

A. Yes.

Q. And did you continue to operate it until about February 10, 1940?

A. Yes, sir.

Q. What did you do with it then?

A. I sold it out to the Crescent Amusement Company.

Q. When the Crescent theater at Harriman burned, did the Crescent open another theater?

A. Yes, sir, they opened another theater.

Q. How long was it after that theater burned before it opened another?

A. I imagine it was around three weeks.

Q. Did they then begin the rebuilding of the old one also?

A. They waited I guess thirty days, then they started building on it, something like that.

[fol. 1169] Q. Did they complete the rebuilding of the one that burned down?

A. Yes.

Q. In about how long?

A. Well it seemed like it was about five or six months, I couldn't say for sure.

Q. After the old one that had burned down was rebuilt, did they continue to operate the one they had constructed immediately, as well as the new one they had rebuilt?

A. Yes, sir, they continued to use it.

Q. Did they still operate two theaters there?

A. Yes, sir.

Q. At Morristown, Tennessee, I believe you said you opened a theater there on or about March 26, 1937?

A. Yes, sir.

Q. What was the seating capacity of that theater?

A. Let's see, I believe it was three hundred fifty-two.

Q. What admission price did you charge?

A. Twenty cents, ten and twenty.

Q. Now with respect to the theater was that then operated there by the Crescent Amusement Company, what was the approximate seating capacity?

A. Well I imagine the seating capacity of that theater would be about seven hundred to seven hundred and fifty seating capacity.

[fol. 1170] Q. And what was their admission price for adults, at night?

A. I believe that was twenty-five or thirty cents.

[fol. 1171] Q. You were cheaper than they were?

A. Yes, sir.

Q. When they opened that third theatre in Morristown, on or about in the month, on or about August, 1938, what admission price did they charge at that third theatre, the Ritz?

A. 10 and 15.

Q. Ten and fifteen cents?

A. Yes, sir.

Q. That was less than you were charging?

A. Yes, sir.

The Court: How many seats did it have, the third theatre?

A. I think it had around 350, I wouldn't say for sure; close to that.

Mr. Dobey:

Q. Now, when you opened your theatre at Harriman, Tennessee, on or about June 17, 1938, well, what was the seating capacity of your theatre?

A. I believe it was 625, as well as I remember.

Q. What admission prices were you charging for adults?

A. Ten and twenty cents.

Q. At Harriman?

A. Adults 20 and children 10.

Q. What was the seating capacity of the Crescent Theatre that was operating there at that time, approximately, if you know?

[fol. 1172] A. The old theatre or the new?

Q. The old, the one that they operated when you first went there?

A. I think it was about the same seating capacity.

Q. As yours?

A. Yes.

Q. What admission prices were they charging?

A. I couldn't say for sure but I believe they were charging 30 cents, when I first went down there.

Q. Were you cheaper?

A. Yes.

Q. Now, with respect to the theatre that was opened at Harriman when their other theatre burned down in the latter part of December or January, 1939, what were their admission prices?

A. Well, I couldn't hardly say for sure, but I believe it was 20 and 25 cents.

Q. Was it under your admission prices, or about the same?

A. Well, about the same admission price. Well, this new theatre, the old theatre was burned down, you see.

Q. After they completed their new theatre, was it still the same admission price?

A. I think he brought it down to 10 and 15 cents.

[fol. 1173] Q. Was that under your price?

A. Yes.

Q. At Newport, Tennessee, when you opened your theatre there on September 2, 1938, what was your admission price?

A. Ten and twenty cents.

Q. What was the seating capacity of your theatre?

A. I believe it was 415.

Q. What was the seating capacity of the Winston Theatre that had been operated there by the Crescent Amusement Company for some time, approximately, if you know?

A. Well, I imagine it was around 600 or 650 seats.

Q. What was their admission price for adults at night?

A. I believe it was 25 cents.

Q. What was yours?

A. 10 and 20 cents.

Q. Your price was less as to that theatre?

A. Yes.

Q. The third theatre or the other theatre that was opened in Newport on August 30, 1938, what was the seating capacity of that theatre, approximately?

A. I think it was around 400.

Q. What was their admission prices for adults at night?

A. 15 cents.

Q. That was less than your admission prices?

[fol. 1174] A. Yes, sir.

Q. You were boxed up in every one of those situations, weren't you?

Objection by Defendants.

The Court: Objection sustained.

Mr. Dobey:

Q. What is the approximate population of Morristown, Harriman, and Newport?

A. Well, I imagine Morristown is around 10,000; Harriman is around 5,000 or 6,000, and Newport about 4,000.

Q. About 4,000?

A. About 4,000.

Q. What were the circumstances that led you to open the Palace Theatre at Morristown on or about March 26, 1937?

A. Well, I was up there once or twice and I seen these other theatres doing a big business, they were standing out waiting to get in and it looked like there would be room for another theatre there, so I went down and looked at a building over there and took a lease on it.

Q. Well, at the time did you consider the town was large enough to support two theatres?

A. Yes, it was plenty large for two.

Q. Did you know Mr. Sudekum then?

A. No. I wasn't acquainted with Mr. Sudekum at that time.

Q. Never met him?

[fol. 1175] A. Not at that time.

Q. You leased and remodeled a building there at Morristown?

A. That is right.

Q. Mr. Smith, after you started with remodeling the building at Morristown, about how long was it before Mr. Castleberry came around?

A. Well, I imagine it was about maybe a week or two weeks, until he came around.

Q. What did he say?

A. He wanted to know if I wanted to sell this theatre. He first made himself acquainted as Mr. Castleberry, of the Crescent Amusement Company and asked me if I wanted to sell.

Q. Had you ever seen him before?

A. I don't believe I ever seen him before. I told him I would sell most anything I had but I wasn't anxious to sell, that I wanted to go in the theatre business up there. And he said that Mr. Sudekum had sent him up to see what I would take for the place, and I gave him a price on it. He said, "Well, I will have to let you know in two or three days." I said, "all right". So he went away and didn't come back, I didn't hear anything from him. Then after I put the theater up at Harriman——

Q. Just a minute. Did you plan to operate the theatre at that time?

A. Oh yes, sure.

[fol. 1176] Q. Is that why you went into Morristown?

A. That is why I went into Morristown, yes, sir.

Q. You felt that the town was large enough for two theatres?

The Court: He said that.

A. It was plenty large for two.

Mr. Dobey:

Q. When did he come back, how long after his first visit?

A. Well, after I got the theatre started in Harriman, there was about sixty days until he came back again.

Q. Was your theatre open at that time?

A. Yes, it was open at that time?

Q. What did he say?

A. Well, he says, "Mr. Tim, I have come back to see you again, to see if you wanted to sell." "Well," I said "I don't know as there would be any use to give you a price on it." He said, "Yes, Mr. Sudekum had sent him back to see me; and I gave him a price again. He says, "I will let you know." So that was the last time I had seen Mr. Castleberry for about around eight months, six or eight months.

Q. All right, just a moment. About six or eight months later did you take a lease on a building at Harriman for the purpose of opening a theatre there?

A. Yes.

The Court: I thought this all happened at Harriman? [fol. 1177] Mr. Dobey: No, this is Morristown, now. We are now moving on to Harriman.

Q. These conversations between you and Mr. Castleberry were all at Morristown?

A. Yes.

The Court: I misunderstood him, I thought he said the theatre at Harriman was doing a big business?

A. No, I said after I started at Harriman building a theatre, then Mr. Castleberry came to see me.

The Court: After you started at Morristown?

A. No, I said, after the theatre got started and under way at Harriman, Castleberry came back again to see me, that is where you got mixed up.

The Court: Where are you then?

A. I might have been in Knoxville, I wouldn't say for sure. I believe it was Knoxville, when he came back to see me.

The Court: I thought you said Castleberry came to see you two or three weeks after you opened the Harriman Theatre and wanted to know if you wanted to sell and you made him a new price, you made him a price and he left and said he would let you know in two or three days, then he came back in sixty days.

A. No, I said at Morristown, he came there when we first [fol. 1178] began working, after working two weeks, and he said he would be back in two or three days, he didn't say he would be back, he said he would let me know in two or three days. After sixty days, after the theatre at Morristown got to going, he came back.

The Court: Was that with reference to buying the theatre at Harriman or Morristown?

A. Morristown.

Mr. Dobey:

Q. After this last visit just mentioned, he didn't come back again, not until you had taken a lease at Harriman?

A. That is right.

Q. Would that be the early part of 1938?

A. Yes sir, about.

Q. Were you making any preparations to open a theatre at Harriman?

A. I believe that we was working on a building at that time.

Q. Why did you decide to open a theatre at Harriman, a second theatre?

A. Well, Harriman has always been a good town; I started to go into Harriman about four years before I did get into Harriman. I looked at a lot up there, pretty close to the Sudekum house.

Q. Did you think the town was large enough to support [fol. 1179] two theatres?

A. I thought it was plenty large enough for two theatres.

Q. What was said by Mr. Castleberry at the time he came back after you had taken the lease on the building at Harriman, Tennessee?

A. He came back and said Mr. Sudekum had sent him back again and he would like to buy a half interest in the enterprise in Harriman, Newport; and Morristown, all the theatres I had. I told him, well, was he sure of that. He said, yes, that Mr. Sudekum wanted him to see me. I said, well, I will tell you what you do, you call me up and let me know what day you want me to come down there and I will go. So, he called me up over long distance and told me to come on down. So I went down and saw Mr. Sudekum.

Q. What was said on that occasion, between you and Mr. Sudekum?

A. Well, I told him that Mr. Castleberry told me that he wanted to see me about buying out the theatre. He said, Well I hadn't told Lee a thing about it. Well, I said, I am sorry, I wouldn't have come down here if I had known you didn't want to buy. They he got to talking and kept talking; in Mr. Sudekum's office and he wanted to know what I was paying for pictures at these places, and I told him what I was paying. Well, he said, I believe I can save you some money on pictures if we got together. And he said, it would be kind of hard to get pictures.

[fol. 1180] Q. Hard for him?

A. It would be hard for me to get pictures. And he went along and wanted to know what I wanted for a half interest. So I told him. So he didn't offer me enough

money for it and we just turned that deal down. He said, you can ask the boys that is in with Mr. Earl Hendren, what he thinks of the deal or Mr. Baird at Newport, he said they all seem satisfied with it. I told him I thought it would be if I got enough money for my part. So that was about all there was said there, between me and Mr. Sudekum.

Q. And then did you open your theatre at Harriman on or about June 17, 1938?

A. Yes sir.

Q. Then you opened a theatre at Newport on or about September 2, 1938?

A. Yes sir.

Q. The Crescent opened a theatre at Newport on or about August 30, 1938?

A. Yes sir.

Q. To your knowledge, at the time you began preparations for opening a theatre at Newport, did you begin to prepare first, or did the Crescent begin preparations first, if you know?

A. Well, I believe I began to start work first, but they beat me to the draw; they opened theirs before I did.

Q. At the time you talked with Mr. Sudekum prior to [fol. 1181] the time you opened the theatre at Harriman, did Mr. Sudekum express any opinion as to whether or not Morristown or Harriman were large enough to support two theatres?

A. Well, he said he didn't think those towns were large enough to support two theatres.

[fol. 1182] Q. At the time you opened the Palace Theatre at Morristown on or about March 26th, 1937 were you able to obtain any Paramount product?

A. Well, we got a few pictures from Paramount.

Q. Was this letter received by your office?

A. Yes sir.

Mr. Dobey: I offer this letter in evidence as Government's Exhibit No. 90.

(Letter so filed and marked.)

I don't think it is necessary to read this. Well, perhaps I had better. It is to Miss Zella Dyer, Peerless Enterprises, in Knoxville, Tennessee, dated August 14, 1937. The first paragraph; "We are enclosing confirmation of bookings

requested in your letter of August 12th for Morristown and Fountain City."

There are some other paragraphs. I am simply offering this for the purpose of showing at this time Mr. Smith was able to obtain Paramount product.

Q. Did you buy the pictures shown on this document? (Handing paper to witness.)

A. Yes sir.

Mr. Dobey: I offer this document in evidence as Government's Exhibit No. 91. It is dated August 14, 1937.

(Paper so filed and marked.)

[fol. 1183] The Court: What is that, statement of the films he bought?

Mr. Raftery: Was it two or four pictures he bought?

Mr. Dobey: It is neither two nor four.

Mr. Raftery: What is it? Will you tell us?

Mr. Dobey: Six or eight. I beg pardon; it is five pictures.

Now, at this time I would also like to offer in evidence the play-off sheets of Paramount for the 1936-1937 season. You recall he opened on March 13, 1937 and was able to obtain some Paramount product; that is, the play-off for the Crescent house at Morristown, Tennessee. This should be Government's Exhibit P-26. This Exhibit shows that of the 1936-1937 Paramount product the Crescent Princess Theatre played sixteen pictures, all of which were spot booked.

The Court: At Morristown?

Mr. Dobey: At Morristown.

[fol. 1184] Q. Did you write Paramount Pictures Corporation a letter, of which this is a photostatic copy under that date?

A. Yes sir.

Mr. Dobey: I offer this letter in evidence as Government's Exhibit No. 92.

(Letter so filed and marked.)

The Court: Can any of you gentlemen tell me if the case of Jetton vs. Warner Brothers in the District Court for

the Eastern District of Pennsylvania, whether or not that appeal has been decided?

Mr. Raftery: Yes sir, it was reversed.

Mr. Wright: It was reversed entirely on technical grounds. The merits of the case were not considered on the appeal at all.

Mr. Raftery: It was an interlocutory motion. The Court granted a temporary injunction pending the trial, it went up on appeal, reversed and sent back to be tried on the merits and the defendants in the case, the defendant exhibitors soiled everything by forming a combination and putting the competing theatres together, and everybody was happy after but the distributors.

[fol. 1185] Mr. Dobey: I will read this letter dated February 12, 1938 from Mr. Smith to Paramount Pictures Corporation:

"Please book us Mountain Music for Fountain City, Feb. 5th. and Easy Living for Mar. 10th.

"We have so much old product to play, it is impossible for us to play these up for some time, and this was our reason for asking that these be transferred to Morristown. However, you state that the other exhibitor has this product bought. We could change these for older product which he has already played in exchange for the remaining six pictures at Fountain City. You would get your money out of these sooner, and we would be getting closer to playing our newer product."

The sentence there of any importance is: "We could change these for older product which he has already played in exchange for the remaining six pictures at Fountain City."

Mr. Raftery: Well, is Fountain City involved in this litigation in any way? No.

Mr. Armistead: I think, may it please the Court, in order that this will be understandable, that that previous letter should be read. Frankly, I don't quite understand.

[fol. 1186] Mr. Dobey: We tried to find it and haven't been able to locate the previous letter. They are in that letter asking to be permitted to play some Paramount product second run in Morristown.

Mr. Waller: He bought them in the small town and wanted to play them in the large town, is that the idea?

Mr. Raftery: You see evidently there is some difference, —judging from what you just read, there were quite some differences on this town of Fountain City.

The Court: Some what?

Mr. Raftery: There are quite some *quite some* differences in Fountain City. What he is trying to do in this letter is settle some differences he has in Fountain City, Tenn. by transferring playing time of his other theatre in Morristown, something I can't quite see where it is helpful in this litigation.

Mr. Dobey: You will see just as soon as I read this letter; helpful to us, not to you.

[fol. 1187] Q. Did you receive this letter in reply?

A. Yes, sir.

Mr. Dobey: I offer this letter in evidence as Government's Exhibit No. 93.

(Letter so filed and marked).

From Paramount Pictures Distributing Company to Mr. Tim W. Smith, signed by A. H. Duren, Booking Manager.

"Dear Mr. Smith:

We have your letter of February 12, in which you request that we book Mountain Music on February 5, and Easy Living for March 10 in the Palace Theatre, Fountain City, Tennessee.

We are taking for granted that you mean March 5 on Mountain Music; however, we are unable to fill either of these dates with the pictures requested, but we are taking the liberty of booking two other features, which we trust will meet with your approval.

With reference to playing the remaining six pictures on your Mountain City contract, in Morristown, as we stated before, we will be unable to do this, since our service has been sold to another exhibitor in Morristown for both first and subsequent runs. * * *"

There is another paragraph that is immaterial.

[fol. 1188] Q. Now, you received that letter shortly after that date?

A. Yes, sir.

Q. Now, how long after you received that letter was it before the Crescent Amusement Company opened the Ritz Theatre at Morristown?

A. Well, I imagine that was around four or five months, something like that.

Mr. Dobey: Now, in order that this may be apparent to your Honor as we go along, I call your attention to the fact that the Paramount franchise was dated July 28, 1938, about four or five months after that letter was written but that it was executed on that date as of November 1, 1937, I think that the correspondence, inter-office correspondence subsequently introduced will show that during this period of time they were negotiating about the franchise.

Mr. Waller: We object to the statement of Mr. Dobey about that.

The Court: Well, he is not testifying; just pointing out the materiality of the evidence, how the evidence will be made competent in connection with other evidence, or how it will be made pertinent in connection with the other evidence.

[fol. 1189] Mr. Dobey: The franchise, it is already in evidence. The original franchise executed July 28, 1938 shows on its face that the Crescent Amusement Company was given the right to second run pictures, to exhibit the Paramount product second run when, as and if the Crescent Amusement Company ever decided to exhibit the product second run.

Mr. Waller: We object to that statement.

Mr. Raftery: I think the franchise would speak for itself.

The Court: I might say, gentlemen, that when it comes time to argue this case I am not going to limit you to thirty minutes. When the time comes you may take just as long as you want to argue this case.

[fol. 1190] Mr. Dobey: And that franchise was not modified in that respect until May 25, 1939, at which time it was stated that Mr. Sudekum was to exercise option whether he would take 90 days over the second run. At that time there was no option whatever as to whether he was going to take the second run, or give any notice as to whether he was going to take it.

At this time I would like to offer in evidence the Paramount play-off sheets for Morristown, Tennessee for 1937-1938 season with the Crescent Amusement Company, as Exhibit P. 27. (So marked by the Clerk).

Now, you recall the letter that was introduced, dated February 15, 1938, showing the product, both first and second run, Paramount, as going to Crescent Amusement Company.

Now, these play-off sheets for the 1937-1938 product show that the Crescent Amusement Company, with respect to the Princess Theater at Morristown, and also the Ritz Theater that was opened in August, 1938, about five months after that letter was written, played a total of 4 pictures of the [fol. 1191] whole season's product, second run, and the earliest date I see any picture of Paramount for the 1937-1938 season was played, second run, was September 6 and 7, 1938. (Referring to Ex. P. 27)

Now, I would like to introduce in evidence the play-off sheets of Paramount in Morristown, with respect to Ritz and Princess theaters and with respect to 1938-1939 products, as Government Exhibit No. P-28. (So marked by the Clerk)

The 1938-1939 Paramount product, the play-off sheets, Paramount, for Morristown, Tennessee, show that Crescent Amusement Company, with respect to both the Princess Theater and the Ritz, was open in August, 1938, and played a total of 10 Paramount pictures, second run.

At this time I would like to offer in evidence two contracts between Crescent Amusement Company and Paramount, both respect to the Ritz Theater at Morristown, Tennessee. Now, these contracts, dated March 30, 1939 with Crescent for the Ritz Theater at Morristown; it is called Paramount Spot Booking and Exhibition Contract—entitled that. The first one *if* for five pictures, repeat run; second run is for 5 pictures repeat run; and there is this [fol. 1192] language——

Mr. Raftery: Is there a memorandum on the back signed for Paramount? The spot booking contracts are never signed by exhibitor; it is purely an interoffice memorandum, kept in the office of the exchange for booking records. No signature on it at all.

Mr. Dobey: The Crescent Amusement Company licensed the Ritz in March, 1939, in Morristown, executed this contract.

Mr. Raftery: No signatures on it, though?

Mr. Dobey: That is correct. Now, this is the recommendation: "Where spot booking——"

Mr. Armistead: Just a minute, your Honor; we object to that.

The Court: Let me see those. (Handed to Court)

Mr. Dobey: Before you read that, your Honor, I would like to explain the purpose of it: The purpose of it is to [fol. 1193] show that under these franchise agreements the Crescent Amusement Company was permitted to spot book Paramount product, second run, when, as, and if the Crescent Amusement Company ever wanted it; that is prior to the modification of May 25, 1939; which was about a year after the franchise was allegedly entered into, and after those documents were written.

[fol. 1194] The Court: I will have to sustain the objection. These documents just do not prove themselves, you will have to introduce them by a witness, that is not signed by the Crescent Amusement Company.

Mr. Wright: That is the only record that there is, there is no other contract, and no other way to prove the contract that shows spot booking; the only memorandum.

The Court: You will have to get the witness to prove it, they object to it.

Mr. Wright: It came out of the records of that company, and it is admitted that it is the only record that the company has of the contract. I don't think a witness could in any way say more than what they are, the spot booking.

Mr. Armistead: Then put a witness on the stand; and I will clear this whole business up by asking one question.

Mr. Wright: All right.

[fol. 1195] Mr. Armistead: He is not here.

The Court: Well somebody evidently made it, made out that document in the office of the Paramount Distributing Company. I assume that person could be located to testify why he made it.

Mr. Wright: If the Court please, there may be a hundred people in the exchange who are making out different documents. I think the document having been found in the ordinary course of business, having been kept as a contract as a part of the exchange records is entitled to validity in the absence of the party who typed it out.

The Court: I assume that is true, but counsel can't just walk in and pass in letters or documents, without having them introduced by some witness. There are certain rules with respect to documents, they just don't prove themselves.

Mr. Dobey: Of course these people are co-soncpirators, and I assume some of these defendant exhibitors there, some of their documents, they handed them over to us, and we *with* to introduce them in evidence without further ado. [fol. 1196] Mr. Armistead: I didn't know there were any co-conspirators here, I didn't know there was any proof here that there were any co-conspirators here. I know that is what he is trying to prove.

The Court: As I understand the evidence, there are certain documents that are proved under certain rules of the Court, but here a request for admission has been made, and as I said, some documents by reason of their age, or some reason, prove themselves; otherwise letters and documents will have to be introduced by the testimony of the witnesses who know something about it.

Mr. Dobey:

Q. Mr. Smith, on or about October 7, 1938, did you complain to the Department of Justice with respect to the Paramount-Pictures Corporation?

A. Yes, sir.

Q. And on or about November 21, 1938, you filed suit involving Paramount pictures Corporation, claiming treble damages under the Sherman Act?

A. Yes, sir.

Q. Now after that suit was filed, I will ask you if after [fol. 1197] the suit was filed on November 21, 1938, did you receive this letter, which is dated November 17, 1938. (Passed to the witness.)

A. I believe I did. I think so.

Mr. Dobey: I offer this letter in evidence as Government's exhibit number 94.

Mr. Frolich: When did you say that suit was commenced, Mr. Dobey?

Mr. Dobey: I said the suit was filed on November 21, 1938.

Mr. Frolich: The record shows that the suit was filed by leaving copy of the complaint with the Attorney General of Tennessee, which was later transmitted to the home office of the various defendants.

This matter, Your Honor knows, that letter is dated September 17th, which was four days after the suit was filed,

and there can be no inference that the letter was sent because of the suit.

Mr. Dobey: No, I do not intend to create that inference.

The letter is after that, copy of a letter, this letter is [fol. 1198] dated November 17, 1938. That says November 21, 1938, A. M. This letter is dated November 27, 1938. There was a complaint made to the department of justice by Mr. Smith, dated October 7, 1938.

Mr. Raftery: Who are the parties to that suit, Mr. Dobey, if we might inquire?

Mr. Dobey: Columbia, Paramount Pictures.

This letter is as follows:

It is to Mr. Tim W. Smith and is signed Oscar A. Morgan, District Manager:

> "I understand from Mr. H. E. Pickett, Sales Manager of the Atlanta Office, that you advised him you were interested in securing some pictures for Morristown, Harriman, and Newport, Tennessee.
>
> "We have a substantial number of first run pictures available for your use—also, a substantial number of Short Subjects. I am, therefore, requesting Mr. House, our Branch Manager, to get in touch with you in regard to negotiating a deal for these pictures.
>
> Yours very truly."

Q. Now at a later date did Mr. House——

The Court: Who is that letter from?

[fol. 1199] Mr. Dobey: Oscar Morgan, District Manager for Paramount.

The Court: To this gentlemen. What has that got to do with the suit. I do not understand all this discussion.

Mr. Dobey: I want to show that Mr. Smith did get some Paramount product at a later date. I want to make that clear before the defendants' day.

Q. Did Mr. House call upon you some time after that letter, did you receive that letter?

A. What was his name?

The Court: House.

A. House, well it is just hard to remember one man that came there to call on me.

Mr. Dobey:

Q. Some one that called on you from Paramount?

A. Some one called on me, yes.

Q. Do you remember when?

A. I can't remember those dates.

Q. Was it after you closed your theater at Newport, September or November 19, 1938? Or was it after the letter was written?

A. I just don't remember just what that date is, what date he called on me.

[fol. 1200] Q. You re-opened your theater at Harriman on or about January 28, 1939, did you not?

A. Yes, sir,

Q. And you kept that theater open until February 10, 1940 did you not?

A. Yes, sir.

Q. And during that time were you able to obtain Paramount product?

A. I can't just say for sure on that.

Q. When you opened your Morristown, Tennessee, theater, on or about March 26, 1937, did you obtain any Warner Bros. product?

Q. At Morristown?

Q. Yes?

A. Then it seems to me like we ran some comedies, I don't think we ran any features.

Q. Did your office receive these four letters from Warner Brothers?

A. Yes, sir.

Mr. Dobey: I ask that these letters be marked for identification as Government's exhibits.

The Court: All right, mark them and submit them to counsel.

[fol. 1201] Mr. Dobey: I offer these letters in evidence.

The Court: All right.

Mr. Dobey:

Q. Now, that letter of August 19, 1937 is from D. Alterman, Branch Booker, Warner Brothers, to Miss Zella Dyer of Peerless Enterprises. (Reads Letter)

Mr. Dobey: Now, on August 23, 1937, there is a letter from D. Alterman to Miss Zella Dyer, Palace Theatre, Morristown, Tennessee.

The Court: Does that first letter refer to the Palace Theatre?

Mr. Dobey: Not up above, it does in the body, it refers to pictures for use in the Palace Theatre, Morristown, Tennessee.

(Reads Letter.)

The next is a letter of August 27, 1937 to Miss Zella Dyer, Peerless Enterprises, Knoxville Tennessee. (Reads first two paragraphs of letter) I won't read the rest if that because I don't think it is material in anyway.

Next, a letter of September 30, 1937, from Dave Alterman, Branch Booker, to Miss Zella Dyer. I will read the second paragraph. Then follow four titles.

[fol. 1202] The Court: What is the number of those Exhibits, please?

Mr. Dobey: Exhibits Nos. 95, 96, 97, and 98.

Mr. Raftery: Why clutter up the record with those letters. They are referring to short products.

Mr. Dobey: There is no dispute about short products. The point is, he couldn't get anything except comedies, he couldn't get anything else.

Mr. Raftery: The letters have reference only to short products.

Mr. Dobey: I don't think that is correct. I think there is a refusal there to sell him anything except comedies, both first and second run products.

The Court: I can't see that this evidence is material to anything, except second run comedies, because the first letter starts off: "Dear Miss Dyer: Your letters of August 18th, requesting two-reel comedies for Palace Theatre, Morristown Tennessee." All that correspondence is in connection with two-reel comedies.

Mr. Dobey: I think the next—May I see that again?

The Court: Yes. In the first letter, they said they could [fol. 1203] give him two-reel comedies, if they would take second run. In the second letter they said they had shipped him one comedy for second run but hereafter they couldn't give him anything more two-real comedies for second run, and in the third letter, they said they could. That is comedies. This letter of August 23d, 1937, they say they had confirmed and shipped second run comedy for use in Palace Theatre. However, they would be unable to supply him with any additional bookings on second run product,

inasmuch as they had received a request from the first run situation that they would be in position to use subjects for second run and had asked that they not release them for any other situation.

He didn't ask for anything but second run two-reel comedies.

Mr. Dobey:

Q. Were you endeavoring to get any second run product or third run products, aside from comedies?

A. Yes sir.

Mr. Waller: That is objected to.

The Court: Did you write that letter?

A. No. Miss Dyer wrote the letter.

[fol. 1204] Q. Did they refuse to sell you second run product, except comedies?

A. They refused to sell me any feature whatsoever.

The Court: That is all right.

Mr. Armistead: Then the letters have nothing to do with it.

Mr. Dobey: I think that second letter confirms, when they say second run product, I don't think that is certainly not clear in its face. If it is true that it refers only to comedies, I think there is more, I think that is more susceptible of interpretation, it refers to second run product which is a product of any sort.

The Court: I don't see any point to introducing these letters.

Mr. Armistead: I move to strike those letters, may it please the Court, as being immaterial.

Mr. Dobey:

Q. Did you negotiate with them and endeavor to get second run product?

A. I sure did.

The Court: Well, I think that evidence is competent. I don't see any use or any reason to put all these letters in the record.

[fol. 1205] Mr. Dobey: You disagree with me, apparently, on the interpretation of that "second run product"?

The Court: Maybe I do.

(Court Examines letters.)

Mr. Dobey: I assume that means comedies as well as pictures and features as well as comedies.

Q. Is that the way you interpreted that letter?
A. That is the way I interpreted it.

Objection by Defendants.

The Court: (Reading) "I will be unable to supply you with any additional bookings on second run product."

Apparently this correspondence is in connection with second run two-real comedies.

Mr. Dobey: Of course, I disagree with that interpretation. As far as that particular paragraph is concerned, saying "However, we won't sell you any second run product—" The witness has testified they would sell him any second run or first run or third run, wouldn't sell him any runs.

Q. They wouldn't sell you any runs, would they?
A. That is right.

The Court: That evidence is all right, but these letters [fol. 1206] are immaterial.

Mr. Dobey: My position simply is, that second run product in that letter means second run product.

The Court: I sustain the objection.

[fol. 1207] (Recess)

By Mr. Dobey:

Q. Prior to the time you opened the Palace Theatre at Newport on or about September 2nd, 1938 did you have any conversations with Mr. Randle Bryan of the Warner Brothers organization?

A. [illegible]d you say before I opened or afterwards?

Q. Before you opened.

A. Yes.

Q. When did those conversations occur and what were those conversations?

A. Well, that was about, oh, maybe thirty days before I opened the theatre. He said I could have first run up there;

told me to go ahead and make a deal for that place and he would sell me first run Warner Brothers pictures.

The Court:

Q. Who was that?
A. Mr. Randle Bryan.

By Mr. Dobey:

Q. What was his position?
A. Salesman.
Q. For whom?
A. Warner Brothers.

By the Court:

Q. At the theatre at Morristown?
A. Newport he is talking about. That is before I opened.

By Mr. Dobey:

Q. Now, did Mr. Randle Bryan leave Warner Brothers [fol. 1208] shortly after that time to your knowledge?
A. Yes sir.
Q. And did you then negotiate with someone else for Warner Brothers' product?
A. Yes sir.
Q. With whom?
A. Rudolph.
Q. When did those negotiations occur?
A. That is after we had the theatre up, after we got started with it or before we got started—I forget exactly when, whether we had it up and going or sometime between that time.
Q. Now, what was said by Mr. Rudolph with respect to Warner Brothers product, what was the conversation?
A. Well, he said he had three years product open first run in Newport and he had two years product open in Morristown and Harriman, second run, and he worked out a deal there, a contract there for me to sign, so I signed a contract and then it was rejected.
Q. Now, just a moment. Can you identify these contracts as contracts or copies of contracts there that you signed at that time?

(Handing contracts to witness.)

A. Yes sir.

Mr. Dobey: I asw these *these* contract applications be marked as Government Exhibits W-9, W-10 and W-11.

(Contracts so filed and marked.)

[fol. 1209] Will you mark these for identification as Government Exhibits Nos. 99, 100, 101 and 102?

(Contracts so marked).

I ask that this be marked for identification as Exhibit No. W-12.

Now, I offer in evidence at this time the contract applications from Warner Brothers, made out to Mr. Smith, dated August 20, 1938 at Morristown, Tennessee for both the 1938-1939 and the 1937-1938 Warner Brothers product-number of pictures offered, fifty two; number licensed; thirty six, for 1938-1939 at Morristown; for 1937-1938 at Morristown number offered sixty, number licensed twenty six. At Harriman Warner Brothers for 1938-1939—Going back to Morristown for a moment, both of those were second run at Morristown, ninety days after first run.

Now, Harriman, number of pictures offered for 1938-1939 sixty; number licensed twenty six, ninety days after first run, and for the 1937-1938 season number offered, fifty two; number licensed, thirty six, second run, ninety days after first run. That is W-10.

Now, with respect to contract application for Newport, Tennessee, Exhibit No. W-11, 1938-1939 product, first run, number of pictures offered, fifty two; number licensed fifty two. At Newport with respect to 1937-1938 product, [fol. 1210] number of pictures offered, sixty; number licensed, forty, first run, ninety days after first run.

I call your Honor's attention to the fact that at Newport, Tennessee the contract was for two years of first run product released at Morristown and Harriman contract application was for two years——

The Court: Second run, ninety days after first.

Mr. Dobey: In both cases.

The Court: I thought he said he had a three year contract there.

Mr. Dobey: No, three year——

A. Three years. One was second run at Newport, wasn't it?

The Court: Three year product open for Newport, first run; two year product at Morristown and Harriman.

A. That is what I understood it to be.

By Mr. Dobey:

Q. Now, after you executed these contracts and before you received any word from Warner Brothers——

The Court: Wait a minute. You didn't make application [fol. 1211] for contract for Newport then for other than two two years product?

A. I was thinking it was three years at Newport.

Mr. Dobey: I think he only signed application for two years. At least, that is all we——

The Court: All right.

By Mr. Dobey:

Q. Now, after you signed these applications did you endeavor to spot book any of Warner Brothers product at Newport prior to the time you heard anything from Warner Brothers?

A. Yes sir.

Q. Did you receive these three documents from Warner Brothers in response to your request?

A. Yes.

Mr. Dobey: I offer these in evidence. They are Government's Exhibits 99, 100 and 101. The first one is a telegram from R. L. McCoy, Vitagraph, to Tim Smith, dated August 30, 1938. This is marked out of order. "Unable to spotbook features Newport until contracts approved."

Telegram dated August 23, 1938 from Mr. Rudolph to [fol. 1112] Mr. Smith: "Impossible to get action deal until weekend will advise promptly."

Letter August 29th from Dave Alterman, Branch Booker, Warner Brothers, to Miss Zella Dyer, Peerless Enterprises:

"We haven't yet received approval of contracts in Morristown from our home office, so we will be unable to confirm any product in that situation until this approval is forthcoming."

And then a letter dated September 12, 1938 from Mr. McCoy to Mr. Smith:

"Wish to advise that contracts given our representative, Mr. F. H. Rudolph, for Newport, Tenn. first run, Morristown and Harriman, Tenn. second run, have been rejected by our home office.

"Mr. Rudolph will contact you in near future."

The Court: What is the number of that Exhibit, now?

Mr. Dobey: No. 102.

By the Court: Who signed that?

Mr. Dobey: The saleman, Rudolph. McCoy, I beg your pardon.

[fol. 1113] Q. Now, after you received that letter did you hear anything from Mr. Rudolph?

A. No.

Q. Did you then go down to Atlanta to see Mr. McCoy?

A. Yes sir.

Q. What was said on that occasion?

A. Well, I went in there at Warner Brothers and Mr. McCoy was sitting there at the desk and I said: "Mr. McCoy, Smith is my name from the theatre at Knoxville." And then he recognized me and I asked him what was the matter with the contract that was rejected for Newport, Harriman and Morristown, and he says: "Well, I have got to see Mr. Sudekum before I can do anything." I says: "Well, aint there anything you can give me, spot book me a picture or any old pictures to help me out?" He says: "No, not until we have a contract" and that was about all that was said, and he said: "I will let you know in about two weeks" so he never did let us know.

Q. You never heard anything further from him?

A. No sir.

By Mr. Dobey:

Now, at this time I wish to offer in evidence contract with the Newport Amusement Company as Government's Exhibit W-12, dated November 13, 1938.

(Contract so filed and marked).

[fol. 1214] Q. Now, this contract, which was dated November 13, 1938 is for first run product, 1938-1939 season at Newport. That was the product for the same season

that you had made application for at Newport first run?

A. Yes sir.

[fol. 1215] The Court: What is the number of that Exhibit?

Mr. Dobey: The number of W-12. Now, your Honor, I would like to call your attention to the differences between the contract application.

The Court: Go ahead.

Mr. Dobey: The contract application for 1938-1939, first run product, at Newport, as executed by Mr. Smith in the contract for the line of product of Warner Brothers, 1938-1939, at Newport, same season, same run, that was executed by the Newport Amusement Company. The application of Mr. Smith was, number of pictures offered, 52; number licensed, 52. The contract with Newport states: This is the last contract covering a minimum of 26 features on the 1938-1939 releases at $10.00 per subject for two days' run.

I would also like to call your Honor's attention to the difference in the rentals. As I have just indicated, this [fol. 1216] contract states it covers a minimum of 26 features out of 52 at $10.00 per subject, for two days' run.

The Court: Now, is that 52 features?

Mr. Dobey: They licensed 26 out of 52 features; that is right. Mr. Smith's application was for the entire 52. The rental on Newport, on the contract, was $10.00 for each of those 26 out of 52. On the contract application which Mr. Smith signed, the rental for the first 16, the bracket of the first 16, was a minimum guarantee of $25.00 as against 35 per cent, and in some instances 30 per cent of that. Is that gross receipts?

A. Yes, sir.

Mr. Dobey: With respect to the next 18 pictures on Mr. Smith's application, the rental agreed to be paid was $12.50. With respect to the remaining 18 pictures out of the 52 on Mr. Smith's application, the rental was $10.00—the same as the $10.00 per subject on the Newport contract, which called for 25 out of 52.

[fol. 1217] Mr. Waller: If your Honor please, at this time we properly call to your Honor's attention that the Newport Amusement Company is not a defendant in this case.

Mr. Dobey: But is half owned by the Rockwood Amusement Company—fifty per cent interest.

Mr. Wright: By the Cherokee.

Mr. Dobey: Cherokee. I beg your pardon.

Q. Now, Mr. Smith, did you try to buy any Columbia product in 1938?

A. Yes, sir.

Q. Was Crescent using Columbia product at Morristown during that time?

A. No.

Q. What efforts did you make to buy Columbia product?

A. Well, I went down there at the same time I saw Warner Brothers in September, about the 19th, I think; and I walked into Columbia's office and spoke to Mr. Anderson, and asked him if he had any product open for Newport, Harriman and Morristown.

Mr. Raftery: Who did you speak to?

[fol. 1218] A. Mr. Anderson.

Mr. Raftery: Well, of course, he is dead.

A. And he said he had three years' product open in those towns, and I told him I would like to buy it. He says, Well, I will have to see Mr. Sudekum before I can do anything about it, and he said, I will let you know next Tuesday by Mr. Wallace. So next Tuesday night Mr. Wallace came to my office; he came into my office and says, Well, Mr. Smith, I won't be able to get to you on those three years of product.

Q. Now, who is that, Mr. Wallace?

A. Mr. Wallace, yes. He says, to make a long story short, we have to have a 25 per cent profit on all the product you don't pay for the pictures until they come in; and on this last twenty-five per cent, you have to wait until the pictures are all taken out before you get that twenty-five percent. I says, Isn't that a little out of line in selling pictures? He says, Yes, but the boss says so, it is not me and don't think hard of me. I says, I won't think hard of you. And he went on away and I never did get his pictures.

Q. Now, do you know whether Crescent obtained Columbia products shortly after that, at Morristown, Harriman [fol. 1219] and Newport?

A. I don't believe they did.

Q. What years' product were you trying to get then? Was that 1937-1938 or 1938-1939 product?

A. Well, let's see; he said he had been out of those towns for three years, and that must have been old product, over two years old, and then the new product.

Q. Do you know whether Crescent bought Columbia product for 1938-1939 season?

A. I don't know whether they did or not.

Q. Did you owe Columbia anything at that time?

A. Not a thing.

Q. Now, I believe you stated that you closed your theaters at Morristown on or about December 13, 1938, and at Newport on or about November 19, 1938; why did you close those houses?

A. Well, I just couldn't get any product there, and just had to close; couldn't get enough pictures to make any money so we could stay open; and I just had to close.

Q. Now, you re-opened the Harriman Theater on January 28, 1939; why did you open on or about that date? I believe that is correct?

A. No; a theater in town burned down; and so I had a [fol. 1220] chance to go ahead and re-open that, because that would be the only theater in that town.

Q. Why did you re-open that theater?

A. Well, there was no other theater in the town, so I thought we could make a little money while there was no other theater there.

Q. Now, did you continue to operate that theater until on or about February 18, 1940?

A. Yes.

Q. And what did you do with the equipment on that date?

A. I sold it to the Crescent Amusement Company.

Q. Did you approach the Crescent Amusement Company in the first instance with respect to the sale of the equipment?

A. Yes.

Q. Is this the contract of sale that you made with the Crescent Amusement Company—a copy of it, rather?

A. Yes.

Q. I offer this in evidence as Government Exhibit No. — I ask that this be marked for identification as Government Exhibit No. 103. (So marked by the clerk.) As a part of the sales agreement, was it agreed between you and Mr. Sudekum that you were to dismiss your anti-trust suit?

[fol. 1221] A. Yes.

Q. And you did dismiss it?
A. Yes.

Mr. Armistead: When I said no objection (referring to Government Exhibit No. 103) I meant no objection by reason of the fact that the original was not produced.

The Court: This happened when?

Mr. Armistead: This happened after August, 1939.

[fol. 1222] Q. At the time——

The Court: That was the Harriman Theater you sold out to.

A. Yes, sir.

Mr. Dobey:

Q. At the time you were operating three theaters at Newport, Harriman and Morristown, did you consider that those towns were large enough to support three theaters?

A. Large enough to support three?

A. That is right?

A. No, they were not large enough to support three theaters.

Q. Were they large enough to support two?

A. Yes, I figured they would be large enough to support two theaters.

Q. Are there two theaters in operation in each one of those towns now?

A. Yes, not two of them—in two of them, and one is three.

Q. With respect to Morristown now, Newport, are both those theaters operated by the Crescent Amusement Company, and Newport amusement Company?

A. Yes.

Q. Are there two theaters operated by Crescent Amusement Company in Harriman?

A. Yes.

[fol. 1223] Cross-examination.

By Mr. Frolich:

Q. Mr. Smith, you operated the theater in Knoxville in 1932 and 1933, didn't you?

A. Yes, sir.

Q. And what was the name of that theater?

A. Well there is one, the Palace, and one the Rialto.

Q. And at the beginning of the season 1932-33, Mr. Anderson came to see you about a contract for pictures for that season, didn't he?

A. I couldn't say about that, about the date, but Mr. Anderson was up there once or twice I think.

Q. Didn't you have a talk with Mr. Anderson in Knoxville for that season about pictures for your theater?

A. I don't remember just that date, whether I did, or whether I didn't.

Q. Did you make a contract with Columbia for pictures for your theater in Knoxville for 1932-33?

A. I couldn't say whether that is the date, but I will say this, we made a contract for the Roxy.

Q. What seasons was that for?

A. I couldn't say what season that is for, I couldn't say about that.

Q. Wasn't it for 1932-33?

A. That is close to it.

[fol. 1224] Q. That was about that date?

A. Yes.

Q. And that contract was for all the Columbia pictures, wasn't it, for the current season's contract?

A. Yes, it was that contract was for a subsequent run, you say?

Q. That contract was for a subsequent run, was it?

A. No, sir, that contract, as well as I remember was to run ahead of the Knox theater at Knoxville, Tennessee.

Q. And you signed that contract?

A. I guess I did.

Q. And the contract was approved by the Columbia Pictures Corporation?

A. I couldn't say whether it was approved or not.

Q. Wasn't a copy of the contract given to you, approved, and signed and executed by the Columbia Pictures Corporation?

A. Not having the contract here, I couldn't say.

Q. It was approved by them?

A. Anyway they claim it was approved.

Q. You were sent a copy of it?

A. I couldn't say for sure.

Q. Did you or didn't you have a copy?

A. We were supposed to have a contract all right.

Q. And that you had there you got a copy of it, didn't you?

[fol. 1225] A. We got them but if we got a copy of it I don't remember.

Q. You did get a copy of it, didn't you?

A. I couldn't say whether I did or not.

Q. Will you look through the files and see whether you have a contract with Columbia?

The Court:

Q. Have you done it?

A. I don't know whether I have one approved or not, and in this it is just like I said a while ago, there was supposed to be a contract to run ahead of the Knox theater, and that was probably what Mr. Anderson was up here to see me about. So we did have the contract then once.

Mr. Frolich:

Q. Weren't you notified by the Columbia Pictures Corporation that the Columbia pictures would be available to you as and when they became available at Knoxville for that season?

A. I couldn't say for that all the way, I remember it was to run behind the Knoxville theater at Knoxville.

Q. Did you receive any notification of that fact from time to time, they were ready for you ask you?

A. I know this, they began to play the pictures in Wise theater in Knoxville, and I let Mr. Anderson know that and he came up to see me about it, and I told him, *and I told him* I was not going to play his theaters if the Knox theater was not played, and I discussed it with him.

[fol. 1226] Q. Didn't you say you were going to play the pictures under the contract?

A. I was not going to play his pictures if I didn't have a contract?

Q. Why should you play them or play any pictures, unless you had a contract for them?

A. I just said I wasn't going to say I did that.

Q. You did have a contract, and you told Anderson you would not play any of those pictures because some other theater in Knoxville was getting the same run as you were?

A. They did.

Q. The contract must have been read?

A. I remember the Knoxville Theater.

Q. There must have been some controversy between you and Mr. Anderson about the run?

A. Must have been? I wouldn't know enough to say.

Q. Didn't you threaten him with a lawsuit when he came up here?

A. He came in to see me and I told him, I would knock him out of the office, he tried to sell the pictures.

Q. Didn't you call him back, didn't you write him and tell him you were going to bring a suit against Columbia Pictures because they had an agreement to run that was against your understanding of that contract?

A. I remember I was going to sue him, that I wrote him [fol. 1227] letters, and I think you have those letters there.

Q. Didn't Anderson come to see you and you and he talked, he talked to you about the lawsuit?

A. No, I didn't talk to him about the lawsuit, I just didn't think it best, didn't think it applied to all the companies, I just let him go on.

Q. You didn't pull the companies in, didn't bring the suit?

A. No, sir.

Q. You didn't pay Columbia a penny on that contract?

A. No, sir.

Q. And you had a contract?

A. No, sir.

Q. When you came to see Mr. Anderson in 1938, in Atlanta, did'nt Anderson discuss that old situation at Knoxville with you?

A. Let's see. I brought it up to him in a friendly way and he said, no, while he remembered it like it was yesterday, and I told him I didn't hold a grouch against him, that was a business proposition.

Q. Didn't you and Anderson have a nice, friendly talk about the controversy you had way back in 1932-1933?

A. He may have said, you are getting pictures too now.

Q. My question was your best recollection as to what he did say, what he then said to you?

[fol. 1228] A. I don't remember.

Q. Don't you remember what you said to him?

A. I said mighty well he remembered what I said to him, about the controversy at Knoxville, in the office in Knoxville.

Q. When he walked into this office, that Columbia did not sell a single picture to any exhibitor for any of the theaters at Knoxville, Harriman or Morristown for this 1936-7 1937-38 season, and 1938-9?

A. He told me he had stayed out of Sudekum's chain for three years had stayed out of Sudekum's towns for three years.

Q. So you believed his word for that?

A. Sure.

Q. And you knew as a fact for those three seasons, Columbia had been selling pictures in those three towns?

A. That is what he said.

Q. Didn't Answerson tell you that the pictures for those three years, those three seasons, were available to you as first run?

A. He said after he had seen Mr. Sudekum.

Q. Did he tell you what he would have to see Sudekum for?

A. To see whether he wanted them or not.

Q. Anderson had to see Sudekum?

A. Anderson told me he had to.

[fol. 1229] Q. Anderson told you he had to see Sudekum?

A. Yes, sir.

Q. Didn't you ask to see Sudekum?

A. No, he told me what he had to see him if he wanted them.

Q. What for?

A. To see whether he wanted the pictures or not.

Q. To see whether he wanted to them—who wanted them?

A. Mr. Sudekum, he told me.

Q. You had to see Sudekum for what, and whether he wanted them?

A. To see if Sudekum wanted the pictures.

Q. He told you what?

A. He told me he had to see Sudekum, to see whether Sudekum wanted them or not, and he would let me know, that he decided he was not in the market for them.

Q. In that conversation Anderson told you he had to see Sudekum, didn't he tell you that because of the trouble you had with him away back in Knoxville, the trouble the Columbia and Mr. Anderson had had with you away back in the Knoxville set up, that you would have to pay or make a deposit to make a deal with him?

A. No, sir.

Q. Never mentioned that?

A. No, sir.

[fol. 1230] Q. Neber mentioned that?

A. No, sir.

Q. Just told you to see Sudekum?

A. Told*d* me he had to go to see Mr. Sudekum, to see if he wanted them.

Q. Mr. Anderson had to go to see Mr. Sudekum?

A. Yes, sir.

Q. I am making it as plain as I can, I want to find out whether you took his suggestion and went to see Mr. Sudekum; who was it that was to see Sudekum?

A. Mr. Anderson was to see Mr. Sudekum, to see whether he wanted to buy the pictures.

Q. In other words, it was Anderson that was supposed to see Sudekum?

A. That is right.

Q. Did you ever find out from Anderson whether he had seen Sudekum?

A. No, sir, Mr. Wallace told me.

Q. Mr. Wallace, did Wallace tell you he had seen Sudekum?

A. No, sir, he told me to come in about September.

Q. Didn't mention it?

A. No, sir.

Q. Did Wallace talk to you about you putting up the twenty-five percent?

A. He told me about whether we should go along here [fol. 1231] three years on the contract, but I would have to put up twenty-five percent, no, sir.

Q. Was anything said about that?

A. He sa-d the boss in the office wanted it.

Q. Who was the boss?

A. Anderson.

Q. You knew that well, did you have to go to see Anderson and talk to him, ask him what he wanted twenty-five persent on it for?

A. Did I ask him?

Q. Yes?

A. No.

Q. Did you have any conversation or communication with Anderson about the twenty-five per cent?

A. Not that I remember.

Q. Didn't Wallace tell you that you had to pay twenty-five percent because you were considered a bad risk, a bad account?

A. No, sir, never heard of it from anybody living. I don't owe Columbia, and didn't.

Q. You didn't consider Columbia?

A. No, sir, I considered it alike the others.

Q. But you didn't?

A. No, sir.

Q. Columbia offered you those three seasons if you would pay the twenty-five percent?

[fol. 1232] A. Yes——

Q. You were to pay the twenty-five per cent?

A. That contract if I remember, I would have taken those pictures, because I was really needing them.

Q. You knew you could get any Columbia on the basis of depositing twenty-five percent?

A. That is right.

Q. Didn't you now that they have sold down in those three towns?

A. I don't know.

Q. Weren't you interested enough to even make an inquiry as to the situation?

A. After everything is dead and gone, we tried to contact those places, we thought it was an unusual.

Q. You thought it was an unusual and extraordinary thing for Columbia to ask you to make the deposit, or Columbia asking anybody else to take their film for only twenty-five percent?

A. That is it.

Q. Never heard of it in your life?

A. No, sir.

Q. Did you ever hear of an exhibitor who took out any advance, or paid in advance for all of their contract?

A. I heard of some saying that.

Q. How is that?

A. They never asked me to pay in advance.

[fol. 1233] Q. You knew it was a matter of courtesy?

A. I don't know whether they were hard up or what was the matter about the twenty-five per cent.

Q. Who was hard up?

A. Columbia.

Q. You thought they were so hard up that they would have to get the twenty-five per cent out of you to make a deal with you?

A. Probably so.

Q. You were not hard up then, were you?

A. I didn't have anything.

Q. You didn't have anything?

A. No, sir.

[fol. 1234] Q. Have you gone to Columbia to ask for any product since that conversation in 1938?

A. I don't think I have.

Cross-examination.

By Mr. Armistead:

Q. Mr. Smith, I understood you to state that you thought that the towns of Newport, Harriman and Mirristown were large enough, each was large enough to maintain two theatres; in other words, that two theatres could be successfully operated in each of those towns, that is correct, isn't it?

A. Here is what I figured; they was big enough to operate in each of those two towns, two theatres.

Q. You said you didn't think either of those towns was big enough to maintain three theaters?

A. That is right.

Q. I wish you would explain to me why Newport, and that is applicable to the other two towns, Morristown, and Harriman, was large enough for two theatres and not three?

A. Well, it is according to the population of the towns. There isn't as much drawing power there that just would take care of three theatres.

Q. Is that the only reason?

A. There isn't enough manufactories there, not enough people working to support three.

[fol. 1235] Q. How big do you think a town should be before it would be large enough to support three theatres?

A. Well, it is according to how many manufactories in the town, it could be smaller than others.

Q. Well, give me an idea, I have no idea at all from your testimony?

A. Well, say, a town of 10,000 can, maybe, if it has got a good many manufactories there where people work on the

outside with drawing power from the outside of the city it probably could support three theatres; and, probably, a town of that size wouldn't support over two theatres.

Q. What is the population of Newport, did you say?

A. I imagine it is about 4,000, something like that.

Q. Morristown is how big?

A. Morristown, I imagine about 8,000 or 10,000.

Q. Morristown is two and a half times as large as Newport. Has Morristown any factories.

A. I beg pardon?

Q. Does Morristown have any factories in it?

A. Yes, it had; Let's see, there was a wood working plant there and a lumber yard, not very many factories.

Q. How about Newport?

A. Newport has got a canning factory, and two lumber mills.

Q. That canning factory don't run all the year around, does it?

A. I imagine it does.

[fol. 1236] Q. What do they can down there?

A. I beg pardon?

Q. What do they can down there?

A. Turnip greens, apples, tomatoes—anything that can be canned.

Q. You investigated that before you went into that town, didn't you?

A. I looked around the town before I went into it.

Q. What about Harriman; does it have any factories?

A. Yes, it has several factories.

Q. Don't you think Morristown—Well, does it have twice as many factories, for instance, as Morristown?

A. I don't know how many Morristown has got now, but it had at that time, it did have about twice as many.

Q. Harriman was a better town to support two theatres than Morristown, was it?

A. Well, it was a better show town, yes.

Q. Well, are there any other elements which enter into it besides what you have just stated.

Q. No. I believe not.

Q. Now, when was the Peerless Enterprises incorporated or chartered?

A. That is one thing I don't remember, is dates.

Q. Give me the year?

A. About 1932.

[fol. 1237] Q. In 1932?

A. I imagine pretty close to that.

Q. You say you owned 55 per cent of the stock?

A. Yes.

Q. Who were the other stockholders?

A. My wife.

Q. How much does she own?

A. I don't remember, unless I had the book to tell you.

Q. You mean, you don't know how much your wife held, of stock in a corporation in which you owned a controlling interest.

A. Not off-hand, I don't remember.

Q. Give me your best idea about it?

A. I couldn't give you an idea.

Q. Who is the other lady?

A. Miss Dyer.

Q. How much stock does she own?

A. I don't remember that.

Q. Any other stockholders?

A. That is all.

Q. So you own 55 per cent, your wife owns an unknown quantity and Miss Dyer owns the rest?

A. That is right.

Q. What is it capitalized at?

A. I think it is $10,000.00.

[fol. 1238] Q. Is the entire capital stock issued?

A. I couldn't say.

Q. You don't know, then, whether—How many shares of stock were authorized to be issued under the charter?

A. I forget.

Q. One hundred?

A. I don't remember.

Q. Fifty?

A. I don't remember.

Q. Ten?

A. I don't remember.

Q. What is—Well, you make an annual report to the State of Tennessee, don't you?

A. Yes sir.

Q. You don't know how many shares of stock are authorized under the charter?

A. No sir, I don't remember.

Q. Who keeps the books?
A. Miss Dyer.
Q. Where does she live?
A. Knoxville.
Q. Is she related to you?
A. Not a bit.
Q. How long has she been connected with the Theatre?
A. About seven or eight years.
[fol. 1239] Q. Is she connected with it now?
A. Yes.
Q. In what capacity?
A. Secretary.
Q. What is the par value of that stock?
A. I don't know much about that; I don't keep up with it so much.
Q. What did you pay for your 55 per cent of it?
A. Well, I was the starter of the enterprise.
Q. What?
A. I was the starter.
Q. I know, but you had to pay for your capital stock; what did you pay for your 55 per cent of capital stock?
A. I couldn't say.
Q. You haven't any idea?
A. No.
Q. How old are you, Mr. Smith?
A. Twenty-one.
Q. Would you mind giving me your correct age?
A. Forty-seven years old.
Q. Where is the principal office of the Peerless Enterprises?
A. Knoxville, Tennessee.
Q. How many theatres does it operate now?
A. Two.
Q. One at Fountain City?
[fol. 1240] A. And one at Knoxville.
Q. And one at Knoxville?
A. Yes.
Q. Let's get back to these Newport theatres. What caused you to go over there to look the situation over? In other words, what caused you to commence it in the opening or possibility of opening or operating a theatre in Newport, and by you I mean the Peerless Enterprises?
A. Just about the same reason, Mr. Armistead, that the Crescent Amusement wanted to get over there; it looked

like there was money in that town, like anybody could make some money, so I took a chance to go over there and see.

Q. That opportunity didn't arise all of a sudden, the situation had been there for years, hadn't it?

A. Well, I do things, lots of times, just on a sudden that way; look it over and take a chance on it.

Q. So you went in there just to take a chance?

A. Well, that is the only thing to do in business, is to take a chance.

Q. Did you discuss that with any other stockholders before you went over there?

[fol. 1241] A. I sure did.

Q. Did either of them go over there with you?

A. I couldn't recall whether they did or not. They have been to that place though.

Q. Did you buy a building over there?

A. Leased the building.

Q. From whom?

A. McNeil.

Q. What is his first name?

A. Let's see—I forget his first name.

Q. For what period did you lease the building?

A. Probably five years, as well as I remember.

Q. At what rental?

A. I believe it was $100.00 a month.

Q. Sir?

A. $100.00 a month, I think.

Q. Payable how?

A. Monthly.

Q. In advance?

A. Yes, sir.

Q. Do you know why Mr. McNeil required the payment of that rent in advance?

A. Like all other men that owns anything, it is always paid in advance.

Q. Well then, that is not applicable to the moving picture industry then, which owns the films? It doesn't require [fol. 1242] an exhibitor to pay in advance, as I understood you awhile ago in response——

A. Yes, sir, they are required to pay for the film in advance.

Q. I misunderstood you when you made answer to Mr. Frolich then. Now, there was already a new, modern, up-

to-date theatre in Newport when you entered there, namely, the Winston Theatre?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And it had more seats and was more up to date and modern in appointments than the theatre that you opened?

A. That is right.

Q. Now, was this a store building that you leased, Mr. Smith?

A. Well, it used to be a theatre building that Mr. Baird used to be in before he opened up the new theatre he has got.

Q. Now, where was that located with reference to the Baird or Winston Theatre? Was it on the same street?

A. No, it was on the next block. It was one block in an L shape, and he was on one street and I was on another one.

Q. Was Baird on the main street, that is, the Winston Theatre?

A. Well, I guess this theatre that I was in was on the main street.

Q. Were there any seats in the theatre when you opened it, I mean when you leased it?

A. I think there was an old piano in there and some beaver-board. That was all and Mr. Baird moved that out. [fol. 1243] Q. So then you had to start from the beginning and put in the seats and other equipment, did you not?

A. That is right.

Q. Now, what kind of seats did you put in? Were they cane-bottom seats or were they plush bottom seats?

A. They were plush bottom.

Q. New ones?

A. That is right.

Q. From whom did you buy them?

A. National Theatre Supply Company.

Q. Did you pay for them in cash?

A. No.

Q. On credit?

A. Yes.

Q. Title retained?

A. Yes, sir.

Q. Now then, your sound equipment, from whom did you buy that?

A. Well, let me see. I believe I had part of the sound equipment myself that I put in there; I already had it.

Q. Where had you formerly used that sound equipment, in what theatre?

A. Well, I believe I had had that several years ago in an open air show in Knoxville.

Q. In what?

[fol. 1244] A. An open air show.

Q. Well, you had had that equipment for how many years, that sound equipment?

A. Well, that sound equipment, I forget just how long I had had it.

Q. Well, approximately, how many years?

A. Well, we will say a year before I opened there; close to that time, maybe.

Q. This other equipment, where did you get that?

A. Which other equipment?

Q. You had to have something else besides sound equipment and seats, didn't you?

A. Well, we bought it from the National Theatre Supply Company, most all of it.

Q. Well, did you pay cash for it or did you buy it on time, title retained?

A. Just like I said, bought it on time.

Q. What kind of heating system did you have in the theatre?

A. Steam.

Q. Hot air—I mean one of these radiator things or was that hot air?

A. Unit heater.

Q. You mean a stove setting out in the building, in the theater part?

A. No, that means steam heat coming through a thing like a radiator, like an automobile radiator, with a fan be-

[fol. 1245] hind it to propel the air out of the unit heater.

Q. Was that located in the basement or on the same floor with the seats?

A. Well, the boiler was on the outside of the building and this unit heater was on the inside of the building and you turn on the switch and the fan goes to work and steam circulates through this radiator and heats up the building.

The Court: I suppose your cross examination will take some little time?

Mr. Armistead: Yes, sir.

The Court: All right, Adjourn court until 9:30 in the morning.

(Thereupon an adjournment was taken).

[fol. 1246] Exhibit, Correction

Warner Brothers Contract which was filed as Government's Exhibit No. L-11 to the testimony of H. T. Bailey on July 16th, 1941, should be numbered Government's Exhibit No. W-8.

[fol. 1247] VOLUME IX

Friday, July 18, 1941.

Pursuant to adjournment Court convened at nine o'clock a. m. when the following transpired:

Mr. Raftery: Your Honor please, I would like to hand up to your Honor the last decision in the motion picture case.

The Court: I will be glad to have it.

Mr. Raftery: Decided on the 24th of April, 1941. It is the case of White Bear Theatre Corporation vs. State Theatre Corporation, reported in Commerce Clearings, Federal Trade, p. 52603, paragraph or whatever it is. That was decided in the District Court in Minnesota.

I also have here the decision of Judge Otis which is referred to in the Westway case. On that I believe you have the citation. If you haven't, I will give it to you. That is reported in CCH Federal Trade Regulations service page 6442 and in this same appendix are the findings of fact and conclusions of law in the case of Huber Theatre Company vs. Metro-Goldwyn-Mayer. I also would like to give your Honor a copy of the brief filed by the appellees in the Westway Theatre case, which has practically every motion picture case that is written up in it.

[fol. 1248] The Court: Proceed with the cross examination.

Thereupon Tim W. Smith resumed the stand for further cross examination.

By Mr. Armistead

(For Crescent Amusement Company):

Q. Mr. Smith, you stated that the reason for your entry into Newport was because you thought that that town was large enough to support two theatres?

A. Yes, sir.

Q. When was the first time you went to Newport to look over the situation?

A. Well, I had went up there on several occasions, I guess, before the Crescent Amusement Company figured on going in there when Baird was up there himself, and looked at the place and it looked like there was plenty of business there.

Q. What was your purpose in going there when Mr. Baird was operating the theatre there?

A. Well, it looked like he was doing plenty of business and I just went up there—I didn't figure on putting up a theatre at that time, you see.

Q. What were you going there for?

A. Well, just to look over the town and see if it was big enough to put in two theatres.

Q. What year was that?

[fol. 1249] A. Well, I imagine that was back in about 1934 or something like that.

Q. Why didn't you open up a theatre then in Newport?

A. Well, I just didn't open it.

Q. Sir?

A. I just didn't want to open one at that time.

Q. Why not?

A. Well, I couldn't give you any reason why I didn't but I just didn't feel like I wanted to put one in there.

Q. Well, you went over there to look the situation over and see whether or not the town was big enough to support two theatres and at that time you reached the conclusion that it was large enough, did you not?

A. Well, lots of times a person will change their minds. They might think they want to go in a place and then they say, I don't believe I want to go in and not have any particular reason for not going into the place.

Q. Where were you operating a theatre in 1934?

A. Knoxville.

Q. Just had one theatre?

A. In 1934 I think I had two.

Q. In Knoxville?

A. Yes, sir.

Q. Now, why did you change your mind then?

[fol. 1250] A. Well, lots of times persons change their minds and don't know why they do change their minds.

Q. Lots of times a person does what?

The Court: Change their minds when they don't know why they do.

A. Change their minds when they don't know why they do.

By Mr. Armistead:

Q. Is that characteristic of the male sex?

A. Well, I don't know; probably so.

Q. So then you waited from 1934 until 1938 before you definitely decided to go into Newport, is that correct?

A. That is correct.

Q. Now, during that four year period did you go back over to Newport and look the situation over?

A. Well, not in particular. I would go through there and kinder stop and look it over.

Q. Where were you on your way to when you would drive through Newport?

A. Well, not any particular spot.

Q. Just driving around?

A. Just driving around.

Q. Well, for what purpose?

A. Well, just to get a little air and probably look over the scenery.

[fol. 1251] Q. Can't you get air closer to Knoxville than Newport?

A. Well, maybe it was a little different air up there.

Q. Sir?

A. A little different—people goes to the mountains sometimes to get a different—people leave Nashville and go to the Smokies.

Q. So you went over to Newport to get air?

A. In other words, I was just riding around.

Q. Who was with you?

A. Well, I just was by myself.

Q. Did you go over there to get theatrical air?

A. No, I already had that.

Q. Well, how many times between 1934 and 1938 did you go over there to Newport?

A. Well, I couldn't recall just how many times; probably three or four times, something like that.

Q. Well, when you opened up a theatre at Newport what did you say your admission price was?

A. Twenty cents, ten and twenty cents.

Q. Well, why did you make your price lower than the Winston?

A. Well, just like store; you can go in there and get steak and things and some of it is better quality stuff that you pay more for. A lot of the goods I was putting out wasn't as good as the Winston so I went down to a lower price.

Q. Now, what kind of pictures were you exhibiting in your theatre there at Newport?

A. Well, we run Westerns and some features.

[fol. 1252] Q. Your pictures for the most part were Westerns and outdoor action pictures, were they not?

A. Well, that is about all we had, yes sir.

Q. They are shown mostly in what we call B houses, is that correct?

A. Well, some B houses shows the best features.

Q. Well, this situation there in Newport, for the most part they were a different kind of pictures than were exhibited in the Winston?

A. Well, there was a whole lot worse pictures than exhibited in the Winston, probably. Is that what you mean?

Q. What?

A. There was a whole lot worse pictures than exhibited in the Winston.

[fol. 1253] Q. Now, you say that the Peerless was in a bad financial condition at that time?

A. Said what?

Q. You say the Peerless was in a bad condition financially at that time?

A. In all those towns?

Q. No, when you were in Newport?

A. No, we were going pretty good; making money.

Q. Didn't you say on direct-examination yesterday that you never had anything hardly?

A. Oh, at the last, no; that is right.

Q. I am talking about financially?

A. At the last part of my time there?

Q. During the whole of the time?

A. I had enough money to go into those towns.

Q. You did?

A. Yes.

Q. Now, we are talking about Newport. Now, what did the Peerless obligate itself to pay for the equipment that went into that theater at Newport?

A. Well, I couldn't give you a definite figure on that.

Q. Well, give me an approximate figure?

A. I will say around six or seven thousand dollars, something near about that.

[fol. 1254] Q. Six or seven thousand dollars?

A. Yes, sir.

Q. All right. Now, how much cash did you pay as the initial payment on the equipment then?

A. Well, some of it was already paid for, and on some others I paid may be twenty per cent down, something like that, or twenty-five per cent down on it.

Q. Well out of that equipment which was all paid for, what value did you place on that?

A. Well, I wouldn't know; I couldn't say exactly what value I would place on that.

Q. Sir?

A. I couldn't say exactly what value I would place on that.

Q. Well, give me the approximate amount?

A. Well, it is pretty hard for me to say just what that part of the equipment was worth.

Q. Well, haven't you any idea?

A. I could say two thousand, or I could say three thousand and probably be wrong.

Q. Well, I want to get your best estimate which would be right?

A. Well, I will say a thousand dollars.

[fol. 1255] Q. All right, sir. So that left, then, five thousand dollars, or six thousand dollars, that you had to pay for, isn't that correct, on the balance of the equipment?

A. Well, I couldn't say.

Q. Well, didn't you say a while ago that you thought that——

A. I don't know how much we valued that that I had that was paid for, you see; just like I said before; I could give it to you at a thousand dollars, I could say two thousand or three thousand; I haven't got the figures to give you a value.

Q. What became of that unpaid-for equipment?

A. It went back to the National Theater Supply Company.

Q. They got it all back, didn't they?

A. No, they didn't get it all back.

Q. Well, what part did they get back?

A. Well, I couldn't say what part they did get back; a lot of it was stolen up there.

Q. What?

A. Stolen out of the theater.

Q. When?

A. After it was closed down.

Q. Well, did you pay for that?

A. Well, I think the payment down was twenty-five per cent or whatever it was, you see.

[fol. 1256] Q. I know, but that wasn't the full price for it, and even if it was stolen you were still obligated for the balance.

A. When they took it back they didn't charge me anything for that.

Q. When they took it back they didn't charge you anything for that that was stolen?

A. Yes.

Q. Well, what was that?

A. I couldn't say, may be a fire extinguisher, something like that; I couldn't say just exactly what was stolen.

Q. You couldn't say exactly what was stolen?

A. I don't remember.

Q. Have you any idea, besides the fire extinguisher?

A. It might have been a few parts, a seat or two, or something like that.

Q. Did you ever find out who stole it?

A. Never did.

Q. Well, when the Equipment Company regained possession of the unpaid-for equipment, did it relieve you from your obligation to pay the balance of the purchase price?

A. Well, I never did get no paper or writings to that effect; never have tried to get any.

[fol. 1257] Q. I will ask you as a matter of fact if the Equipment Company didn't attach that unpaid-for equipment in that case?

A. No; I volunteered and told them they could take it.

Q. Wasn't there an attachment issued on a portion of the equipment in that Newport theater?

A. By who?

Q. I am asking you?

The Court: By anybody.

A. Oh, I believe the man that owned the building there charged them $75.00 for storage; they took the equipment

out because they had title retained on it, and they could have brought it out without paying anything, but they went ahead and paid it off, I understand.

Mr. Armistead:

Q. Who issued the attachment?

A. I believe it was O'neal.

Q. He was the owner of the building?

A. Yes, sir.

Q. You say the Peerless was obligated to pay a hundred dollars a month?

A. Yes, I think that is what it is, a hundred dollars a month.

[fol. 1258] Q. And how much did you pay Mr. O'neal? I mean the Peerless?

A. I don't remember exactly how much I did pay.

Q. Haven't you any idea?

A. No, sir.

Q. To refresh your recollection, you didn't pay but $60.00 and that is the only rent you paid during the whole time the Peerless occupied that building?

A. I couldn't say but I know I paid more than that; I don't know how much.

Q. You have no idea about it?

A. No, sir.

Q. You know you didn't pay the rent in full?

A. I know that.

Q. How much did you lack?

A. I couldn't say.

Q. How many months were you behind?

A. I couldn't tell you that.

Q. Have you any idea?

A. Well, I imagine may be I owed him around $40.00 probably.

Q. Now, let's see: Then you went in there what month?

A. Let's see: that was September; opened up in September, 1938.

[fol. 1259] Q. All right, I see. Now, you had that building remodeled at your own expense?

A. Yes.

Q. Did you pay for that?

A. Yes.

Q. Who did you pay?

A. Paid the workmen.

Q. What is his name?

A. There were several workmen; I just done the contract myself and paid them off.

Q. You paid the labor, labor bills and bills for all material in remodeling?

A. Yes, sir, all except there may be one or two we are still paying on.

Q. Now, let's find out about those; who are they?

A. Well, there is lumber companies up there, I forget their names. It seems like it was the Helen Lumber Company.

Q. What?

A. Helen Lumber Company, it seems like.

Q. How much did you owe that company?

A. I couldn't say; around forty or fifty dollars.

Q. How much did you owe that company when you closed the theater?

[fol. 1260] A. Around two hundred dollars, probably.

Q. Any other outstanding unpaid bills?

A. Another lumber company up there—I forget the name—I owed them, I think, forty-five dollars.

Q. What did you owe that company when it was closed?

A. That is what I owed when it was closed

Q. Now, when you closed the theater did you owe any of the employes there?

A. No.

Q. You had them paid in full?

A. Yes.

Q. What salary were you drawing in operating that theater?

A. Well, I didn't draw any particular salary from that theater.

Q. Well, how much did you get out of it personally?

A. I beg your pardon? What is that again?

Q. How much did you get out of it personally for operating that theater?

A. Well, I didn't get nothing out of it, just to say out of that theater; it come out of all of the theaters, you see.

Q. Well, how much of your salary or compensation was allocated to that Newport theater to be paid?

[fol. 1261] A. Well, there wasn't any stipulated amount for that place.

Mr. Dobey: May it please the Court, I object to these questions at this time; I don't see the materiality.

Mr. Armistead: I am trying to prove that he was broke, that is all; that he wasn't drawing any salary there and wasn't paying his obligations.

The Court: Well, I don't know whether you will prove that by this witness.

Mr. Armistead: I don't want to try to, your Honor.

Q. So when the Newport Theater was opened up, the corporation didn't have any amount which it was obligated to contribute to your salary, is that correct?

A. The Peerless Enterprises?

Q. Yes, sir?

A. Well, I got a set salary there of $400.00 a month out of the Peerless Enterprises.

Q. How much of that was the Newport Theater supposed to pay?

A. I couldn't say.

[fol. 1262] Q. Don't have any idea?

A. No, sir.

Q. Now, you closed that theater one Saturday night, didn't you?

A. I believe that was the night.

Q. And you moved the equipment out of there on Sunday, didn't you?

A. No, sir.

Q. When did you move it out?

A. Well, at different times.

Q. You moved some of it out on Sunday, didn't you?

A. Well, I believe I took the machines out on Sunday.

Q. Why did you take them out on Sunday?

A. I had a little time to do some work there on Sunday, instead of taking them out on Monday or Tuesday.

[fol. 1263] Q. Did you make any announcement that you were going to close that theater?

A. No, I didn't think it would have been necessary to make any announcement, because the people knew.

Q. Mr. Smith, don't you know it was closed at night?

A. At night.

Q. Did they have Sunday movies there in Newport?

A. No, sir.

Q. How would they know it was closed?

Q. Yes, and as a matter of fact it was not necessary for me to advertise that I was going to close.

Q. Now that equipment which was paid for, where was that moved to, Mr. Smith?

A. I believe I took it home.

Q. Put it in any other theater?

A. No.

Q. What did that equipment consist of?

A. It consisted of machines, rectifiers, lamps and sound equipment.

Q. Did you finally use it in some other theater, and if so where?

A. No, sir, I believe I have got that equipment laying around up in the attic now.

Q. That is where you stored it, up in your attic?

A. Yes, sir.

[fol. 1264] Q. At your home?

A. Yes, sir.

Q. Wasn't very much of it was there?

A. Well about fifteen hundred pounds probably.

Q. Now that sound equipment, the first thing, the first night you opened that theater it went bad, didn't it, didn't work properly?

A. Well I couldn't say to that now w-ether it went bad, I don't think it—I just can't recall whether it went bad or not.

Q. Well it did from time to time go bad during the time that theater was being operated?

A. It is kind of customary for it. As you now state when this is going bad, or when it is not going better, and we have Western Electric for the theaters in Knowville, and still they go bad.

Q. You were there the first night it opened, were you not?

A. Probably I was, I couldn't say for sure.

Q. Back to my question, didn't that sound equipment from time to time, while you were operating that theater go bad?

Q. Just what do you mean now by going bad?

A. Get out of fix, and did not function properly?

A. Well it is not so.

The Court: He is talking about the first night now.

[fol. 1265]. A. The first night?

The Court: Yes, sir.

A. I just don't remember whether it went bad the first night as you call it or not.

Mr. Armistead: Was there a newspaper published in Newport?

A. Yes, sir.

Q. Not but one, was there?

A. Well I believe a fellow by the name of Campbell or McCampbell ran a paper there, I don't believe there was but one, I couldn't say.

Q. Now after that theater closed, there was a notice in the newspaper at Newport of its closing, was there not?

A. Yes, sir.

Q. And I will ask you if that notice did not read as follows:

"Peerless Theater Closes After Short Run Here. New play house, getting off to a bad start, was never able to obtain a foothold. Part of Equipment taken to Morristown —Other property is left in Main Street Building.

"Local people were surprised on Sunday afternoon when Tim W. Smith, Knokville theatre operator and owner of [fol. 1266] the new Palace Theatre here, came to Newport and closed out the show. The Palace opened only a few months ago in the O'Neil building, formerly occupied by the May Theatre.

"For various reasons the Palace did not receive the patronage expected and it was rumored for days that the play house would be closed. The projectors and sound equipment of the local theatre were taken to the Palace Theatre in Morristown, another Peerless Enterprise theatre. Other equipment was left in the Main Street building, and yesterday creditors had an attachment issued against it, but it was learned that Smith had not paid for it and that likely the owners would come here to reclaim the property.

"Mr. May, who was sent here recently as manager; Max Hendrick, projectionist; Miss Kay Dickerson, Cashier, and Lacy Hale, Usher, were left without jobs by the closing of the theatre. Mr. May returned to his home in Knoxville today. Mr. Headrick is still in Newport, and will probably be employed by another theatre here. Hale has

taken a job at Miunis Drug Co., while Miss Dickerson is continuing her studies at Central High School. Mr. Hale and Miss Dickerson were local residents.

[fol. 1267] "The Palace got away to a bad start on opening night. The sound equipment was poor, and the large crowd who had gathered for the opening performance went away without seeing the show. With two other theatres already in operation it apparently was impossible for the Palace to get a foothold. Overhead and operating expenses were said to be quite large, and the attendance at the shows did not justify its continuance, it was said."

You read that, didn't you?

A. I never did see it, I had the paper in my pocket yesterday but I changed and left it out, I couldn't say which way it was but I claim that line where they said I had closed it and had taken the sound equipment to Morristown, but I don't think that was it, somebody wrote that up, put a good deal more to it than I did.

Mr. Armistead: Crescent offers this in evidence as exhibit number blank, and we will prove later on.

Mr. Dobey: We object to the introduction of this.

The Court: Sustained, you can ask him whether any part of that or all of it is true, and you can ask those quetions.

[fol. 1268] Mr. Armistead:

Q. Well, is this notice true?

A. Well taking those machines out, that is true, I took them out on Sunday I believe they said.

Q. Anything else there true?

A. We couldn't make it after this other theater opened up and it says that interfered, that is true.

Q. Anything else in that in any other portion that is true?

A. Read it over again, if you want to.

Q. I will let you, I will give it to you and let you read it, I don't want to encumber the record.

The Court: If you wish to have the exhibit marked for identification so as to note it, but it is ruled out.

Mr. Armistead: The objection is well taken I admit, but I will ask that it be marked.

The Court: All right.

Mr. Armistead:

Q. Now since you have read that, Mr. Smith—and by the way, Your Honor, we desire to get that identified as the proper exhibit number.

The Clerk: That is exhibit 46.

[fol. 1269] The Court: All right, let it be identified, and the objection to offering it in evidence, let it be sustained.

Mr. Armistead: Now having read that newspaper again, are there any other statements in there that are true besides those you have mentioned?

A. Well about taking the equipment to Morristown, I didn't take the equipment to Morristown, I took the equipment home as far as that is concerned, I am sure I took it home, because I had machines already in Morristown, I didn't need any machines there, if I did I didn't put them in operation there at Morristown.

Q. With that exception then that article is correct, is it not?

A. Well there is some of it about the people were surprised at this, to see this theater closed, and then state they were expecting it when it happened, you would not be surprized if you were expecting it to close, that is not true.

Q. Anything else in there which is not true?

A. Well I just couldn't say.

[fol. 1270] A. Is there anything in there you want me to say that is true but what I have already said?

Q. No, I just asked you what was true?

Mr. Dobey: You can ask him about specific sentences.

A. Anything you want to ask me about them, if you will just ask me, I will answer it.

Mr. Armistead:

Q. All right, just point out anything in there that isn't true, besides what you have already said?

A. You ask me the questions.

Q. No.

A. You ask me the questions and I will answer it.

Mr. Armistead: I think I have the right to ask the question that way. He has read the article and I have asked him to point out those things in it which are not true.

The Court: Yes, Let him see the article and say which parts are not true.

A. I don't know whether those are true or not.

Mr. Dobey: I think the witness should be handed the article and let him point out, sentence by sentence, anything that is not true.

The Court: All right, let him have the document. Take them up one at a time.

[fol. 1271] A. (Examining the article.) As to the creditors attaching the equipment, where it says "creditors", I don't think there was but one creditor that attached and that was O'Neil. It reads like it belonged to him, but it belonged to the National Theatre Supply Company, they got the equipment back. "The Palace Theatre got off to a bad start on the opening night." I can't remember whether we had any trouble on the opening night or not. Well, we could say—I just couldn't come out and say whether these are exact true words to these facts or not, but I will say it is pretty well true, all of that, because we did have trouble with the machine there, but I couldn't say on the first night of the show.

Q. Now, Mr. Smith, you have been living in East Tennessee practically all of your life, haven't you?

A. Yes sir.

Q. You were familiar more or less with other towns in East Tennessee, besides Newport?

A. Yes.

Q. And you were familiar with towns about the size of Newport in East Tennessee in which there was located only one theatre?

A. Yes sir.

Q. Well, did you go around to any of those other towns and look the situation over to see about putting in another theatre?

A. Well, I went to Harriman and looked at that.

[fol. 1272] Q. And you looked at Morristown?

A. Morristown and Harriman.

Q. Besides those two, now, did you look at any other towns?

A. Well, not in Tennessee. I went around to Harlan, Kentucky and looked at that place.

Q. I mean in Tennessee?

A. I went to Murfreesboro.

Q. Murfreesboro?

A. Yes.

Q. Any other place?

A. I guess that is about all.

Q. Was there any particular reason for you to go to those towns that you have mentioned, because the Crescent Amusement Company, or some corporation directly or indirectly affiliated or connected with it was operating a theater in those towns?

A. Have I what?

Q. Was there any particular reason—I will put it this way: Why was it you picked out those towns in which you knew the Crescent Amusement Company, or one of the corporations directly or indirectly affiliated with it, was operating a theatre?

A. Well, those towns was pretty close to Knoxville and I just kind of watched them and seen they were doing business there and I noticed the Cherokee Amusement Company, it looked like they thought it was a good town and while there wasn't but one theatre in the town it looked like there would be room in that town for two or more, [fol. 1273] and fellows that worked around there told me they was doing a big business there, people stood out there, they couldn't get in the theatre and it looked like there was room for another theatre.

Q. What about the other towns in which Crescent and Cherokee was not operating, in East Tennessee?

A. Those towns are so little I didn't believe they would be much good or they would have a theatre in that town.

Q. Do you mean there were not towns in East Tennessee, practically the same size as Harriman, Morristown and Newport, no other towns?

A. There might have been, but may be I didn't go to those towns.

Q. Why didn't you go to those towns?

A. Probably I didn't know where they were at.

Q. You what?

A. Probably I didn't know where they was at.

Q. I thought you said you had been living in East Tennessee and were familiar with the towns?

A. I am with several towns in East Tennessee.

Q. Name some town about the size of Newport?

A. Maryville.

Q. Why didn't you go there, then?

A. They had two theatres in it.

Q. All right, name another one?

[fol. 1274] A. Lenoir City.

Q. Why didn't you go there?

A. George Denton had one, they had two theatres, and somebody else had another one there at the time I was speaking of, and I didn't want to go in there.

Q. Any other towns?

A. I went into Loudon but I didn't do any good there, it was too small, nobody had made any money, it is too small a town.

Q. How big a town is Loudon?

A. I imagine about 2500 people.

Q. When did you go into that town?

A. I forget the date; around 1932, maybe, close to that.

Q. Between 1934 and 1938, did you go to any other towns around there to see about starting a theatre?

A. Well, I have looked at several towns but I never did feel like I would want to go into them.

Q. What towns?

A. That was after I went into Morristown and of course I knew there was no use to go into another town.

Q. When was it you looked at Murfreesboro?

A. That is when I was putting a theatre in Harriman.

Q. Why did you go down to Murfreesboro? That isn't close by.

A. It didn't make much difference whether it was close [fol. 1275] or not, for you can run it off pretty quick; it looked like a pretty good town.

Q. Why didn't you go to Murfreesboro and open a theatre there?

A. I beg pardon?

Q. Why didn't you go to Murfreesboro and open a theatre there?

A. Well, I got ready to go into Murfreesboro and found out all the pictures were sold so I wouldn't get any pictures there and it was not use going in there.

Q. What year was that?

A. That was about 1938.

Q. What time in 1938?

A. I couldn't say just about the time. I had the palace going at Harriman.

Q. You were expending rather rapidly in 1938, were you not?

A. I was going a pretty good gait.

Q. Your expansion was limited, your actual expansion and prospective expansion was limited to towns in which the Crescent Amusement Company, or one of its affiliates, had a theatre?

A. It seemed like it had to be that way, that they went in towns only that was any good or they wouldn't have any theatre in there.

Q. Why do you say that?

A. Other towns are all too small, or something, or there wouldn't be no work there, maybe a bunch of farmers that never go to a show or anything.

[fol. 1276] Q. What kind of house was that you were going to put up in Murfreesboro?

A. I didn't get that far along with it to say what kind I was going to put up.

Q. I thought you said it wouldn't do any good to go into Murfreesboro because all the product was sold—sewed: how did you know that?

A. I knew it was sewed up in all the rest of the towns.

Q. How do you know that?

A. I knew I couldn't get pictures, in towns they were in.

Q. What picture producing company or distributor did you consult with to try to get films for Murfreesboro?

A. None.

[fol. 1277] Q. You made the statement awhile ago that the Crescent or one of its affiliates was in every town in Tennessee.

A. I didn't say every town in Tennessee. I said every town in Tennessee which would look like it would be a profitable proposition for a man to go into.

Q. You didn't give me a chance to finish my question.

A. I beg your pardon.

Q. I was going to add to it, Mr. Smith. I want to ask you, do you know how many theatres the Crescent Amusement Company operates, and the Strand Enterprises, Nu Strans, Rockwood, Cumberland Amusement Company, and the Newport and the Ruffin Amusement Company——

The Court: And the Cherokee.

By Mr. Armistead:

Q. The Cherokee Company and what is that one up here—Midstate, operate in the State of Tennessee?

A. No sir, I couldn't say but Mr. Sudekum told me, I think, as well as I remember, he had a hundred and fifty three theatres when I was in his office talking to him. Now, I don't know whether he included those, all his enterprises in that or not.

Q. I am talking about Tennessee. How many theatres in Tennessee now? You made the statement awhile ago and I want to show what you base that on.

A. Well, what I am basing that on, like if I was to go into a town where there was no theatre, it was just the same as putting up a place on a piece of farm land because [fol. 1278] I wouldn't do no good, and if I went in a town where there is a theatre now it would be where the Crescent Amusement Company or one of these corporations you called here or Schine or some place like that and I would be up against a proposition, up against a stone wall and where I wouldn't have any chance.

Q. How many independent theatres are being operated in the State of Tennessee?

A. I don't know. I haven't counted them.

Q. You have no idea?

A. No.

Q. Why then did you make that statement that you made awhile ago that Crescent was in every town, it or one of its affiliates was in every town in Tennessee where it looked like there was any chance of operating a theatre successfully?

A. Well, from reading the papers.

Q. What papers?

A. The News Sentinel and first one paper and another, it looks like they own everything.

Q. All right, now, just name one instance in the newspapers that you refer to where there was any article or any discussion of that.

A. Well, I don't remember just what paper it would be in.

Q. Well, tell me what year.

A. I couldn't say that. And it looks like from the lawsuits that has been around here, it looks like they are [fol. 1279] in nearly every town in East Tennessee and Kentucky.

Q. What lawsuits around here?

A. This one.

Q. So then you are basing your opinion on what you have heard around here?

A. Yes and what I have heard other exhibitors say.

Q. What other exhibitors?

The Court: Well, I don't think there is any use of going into that question again.

By Mr. Armistead:

Q. Now, who was financing Peerless Enterprises during this period of 1934 to 1938 and 1939?

A. Peerless Enterprises itself.

Q. Are there any judgments, unpaid judgments against Peerless Enterprises?

A. Well, I couldn't say whether there are or not.

Q. You are president of the corporation and don't know whether there are any judgments against you?

A. Well, I don't think there are.

Q. Well, hasn't Peerless been sued from time to time during this period for not paying its obligations, is that correct?

A. Well, I couldn't say just when they had been sued and when they hadn't been sued.

Q. Sir?

A. Or if they have ever been sued.

[fol. 1280] Q. You don't know whether Peerless Enterprises have ever been sued?

A. I couldn't say off-hand right now, no, sir, whether they have ever been sued or not. I know Tim W. Smith has been sued.

Q. I am talking about Peerless Enterprises. Tim W. Smith, as far as he is concerned, he went into bankruptcy in 1926, didn't he?

A. I think so.

Q. Have you done it again?

A. Not yet; successful so far.

Q. Sir?

A. Successful so far.

Q. Now, Mr. Smith, when you closed that theatre at Newport, Tennessee you were under contract to exhibit a number of pictures, were you not?

A. Well, there wasn't so very many pictures because I couldn't get many.

Q. We will get to that a little later. Well, those pictures that you were under contract to exhibit and didn't exhibit, you were obligated to pay for them, were you not? And by you I mean Peerless?

A. They never did hold anybody to a contract like that.

Q. I didn't ask you that, Sir.

A. I don't think a man would be obligated to pay a contract when he is out of doors, no.

[fol. 1281] Q. You don't.

A. No.

Q. Now, let me see if I get that right.

A. All right.

Q. It is your idea that you can go and make a contract with any of these eight distributors named in this complaint and if you want to go out of business—make a contract with them to exhibit or purchase forty or fifty pictures and if you have only exhibited four or five of them and decide to go out of business, it is your idea and has been your idea all along that you can just quit and there would be no obligation on your part to pay the rentals called for in the contract?

A. Well, in case I would go out of business myself just willingly, there may be something there, but you take a house, you are running a house and you buy for the Palace Theatre at Newport, for this particular house, and then something comes, a storm comes along and wipes this house out and you have got no place to exhibit these pictures, do you think the distributor would hold you to that contract with no place to play them? I will say no.

Q. I will answer that by saying, suppose the storm, suppose that theatre is not done away with by an act of God of the public enemy, do you then consider that you are not responsible for the carrying out of this contract and pay for the rental?

A. Well now, the public enemy——

[fol. 1282] The Court: Well, let's don't go into that. You are covering enough territory in this lawsuit.

A. You are getting kinder in war times.

By Mr. Armistead:

Q. Now, I believe on yesterday in your direct examination you said that you opened a theatre in Harriman, Tennessee and then you closed that theatre?

A. Yes, sir.

Q. And then later on you re-opened the theatre?

A. Yes, sir.

Q. Why did you close that theatre in Harriman the first time, Mr. Smith?

A. The first time I closed it?

Q. Yes, sir.

A. Well, we wasn't doing so well there; we couldn't get pictures like we wanted and we thought we had just better close it.

Q. Now, why was it you re-opened then?

A. Well, the Crescent Amusement Company house burned down and we begun a theatre in the——

Q. Sir?

A. I say the Crescent Amusement Company house burned down and, of course, that left our theatre the only theatre in the town and we opened back there. We knowed the people would come to see some kind of pictures anyhow for [fol. 1283] amusement.

Q. So then when the Crescent Amusement house burned down you came in?

A. Yes, sir, directly.

Q. Now, you knew the Crescent Amusement Company was going to continue to operate a theatre, did you not?

A. Well, not while it was burned down, I knowed they wasn't.

Q. Don't you know they rented another building immediately?

A. They tried to rent my building and they wouldn't give me enough for it and I went ahead and opened it myself and then they got a little house up the street and started up.

Q. The Crescent Amusement Company in about thirty days after the fire started remodelling this first theatre it had there?

A. I don't think it was thirty days. I think it was longer than that before they started remodelling.

Q. Anyhow, they started remodelling.

A. Yes, sir.

Q. And put up a great big, nice, modern theatre?

A. A nice theatre.

Q. And so Crescent had two houses there?

A. That is right.

Q. One you call a class A theatre and another one you call a class B theatre?

A. Well, I guess that would probably be what you would call it.

[fol. 1284] Q. This second theatre then was the same class as yours?

A. No, it wasn't hardly as good. It wasn't as big a theatre.

Q. Well, it showed the same kind of Western and outdoor pictures that you did, didn't it?

A. No, they showed better pictures than me because they had the pick of the pictures.

Q. You showed Western pictures and action pictures, did you not?

A. Well, we showed Western pictures and some action pictures and the pictures that we showed there wasn't the pictures that we would want to run at all, if we could get any other pictures, you see.

Q. And your admission price in that theatre wasn't as high as the admission price in this first class theatre that Crescent had there?

A. It was about five cents difference in the admission prices.

Q. Now, you said in 1938, on your direct examination, that Mr. Sudekum told you, in substance, that you would have a hard time getting pictures. That statement was made in connection with what town, now?

A. Well, I don't know what town he was referring to. He told me in all of them he could save me money probably, and he asked me what I was paying for pictures. That is at his office over the Fifth Avenue Theatre or in the building next to it somewhere.

[fol. 1285] Q. What year did that conversation occur.

A. In 1938.

Q. What month?

A. Well, I couldn't say what month it was.

Q. Have you any idea?

A. No. It was in the spring or summer, I couldn't say when.

Q. Now, you also made the statement that Mr. Sudekum told you he didn't think Morristown and Harriman were large enough for two theatres, and you made the statement

that you were of the contrary opinion. Now, how long have you been in the theatre business, motion picture business?

A. Oh, about fifteen years.

Q. Do you know how long Mr. Sudekum has been in that business?

A. No, sir, I never did ask him how long he has been in it but I guess he has been in it longer than I have.

Q. You know he is one of the pioneers in the moving picture business in the State of Tennessee?

A. Well; from the way he talked to me he seemed like he is.

Q. That is the reputation he has?

A. Yes, sir, he has been in the business a long time.

Q. Mr. Smith, do you remember when you opened your Morristown theatre?

A. Yes, sir.

[fol. 1286] Q. Didn't Mr. Earl Hendron come through there about that time and have a talk with you?

A. Well, I don't remember whether Earl came through there. It seems like a fellow working for Earl came through there or maybe Earl did come though there. I couldn't say for sure.

[fol. 1287] Q. Didn't at that time you tell Earl Hendren, in substance, that if Mr. Sudekum would pay you twenty-five thousand dollars that you would get out of Morristown, Harriman and Murfreesboro and other towns?

A. I don't remember it.

Q. You don't deny telling him that, do you?

A. Well, I don't remember it; I couldn't deny it if I don't remember it.

Q. You know Mr. Bevel, who was manager for the Crescent at Harriman, Tennessee, do you not?

A. Yes, sir.

Q. I will ask you if you didn't tell him that you could get all the pictures you needed but you couldn't get the pictures you wanted?

A. I don't think I ever told Mr. Bevel that.

Q. Now, let's get down to this picture business: On yesterday you said that you couldn't get the product and that is the reason you had to close the Harriman theater in 1938 and the Newport Theater in the same year; you remember making that statement, don't you?

A. Yes, sir.

Q. Now, you remember that Columbia did offer you its product, don't you?

A. Well, Columbia offered it to me in a way that I [fol. 1288] couldn't take the Columbia, you see.

Q. I am speaking of at that time?

A. I didn't consider that an offer; that was a hold-up.

Q. Sir?

A. That would be a hold-up.

Q. Now, I will ask you: Let's take this Newport situation—If on October 15, 1938, if you didn't make a deal with RKO for 32 pictures of the 1937-1938 product for Newport?

A. Well, probably I did; I couldn't say just what date it was.

Q. And that none of those pictures were played by you?

A. Was the theater closed at that time, then?

Q. You know when you closed it; you said you closed it in November because you couldn't get pictures; now, here is where you got a contract for 32 pictures for the 1937-1938 product?

A. Well, that could happen; we could run for may be a month and have other pictures booked in there and we didn't want to cancel pictures out to play RKO.

Q. What other pictures did you have booked?

A. I couldn't tell you; I haven't the booking sheet here with me.

Q. From what companies, what distributors?

[fol. 1289] A. Well, I amagine from Affiliated Producers.

Q. Is that all you had available?

A. We probably had pictures from United Artists.

Q. How many?

A. Well, it was a full contract; I don't remember how many pictures we stood for that year.

Q. Now then, 32 pictures from RKO, and United Artists for its entire product. Now, let's get to Metro, and Loew's

The Court: Q. Did you have a contract with United Artists for that year for its entire product?

A. Yes, sir.

Q. All right.

Mr. Armistead: Q. I will ask you if on October 14, 1938, if you didn't make a deal for Newport with Loews for the entire 1937-1938 product?

A. Well, I just don't remember whether I was dealing with them or not; I haven't got the contract with me.

Mr. Armistead: May it please the Court, these questions that I am asking him now, are based upon answer No. 12 made by RKO, Metro, Loews, which shows that RKO made [fol. 1290] the contract with Peerless for 32 pictures for the 1937-1938 product for Newport, and that they made a deal with Peerless at Newport for the entire 1937-1938 product.

Q. Now, I will ask you, Mr. Smith, if it is not a fact that you only played or exhibited four of those Loews pictures?

A. Well, I don't guess I had time to exhibit more than that for the length of time I was in business.

Q. But you said, as I caught it, that you didn't have enough product, and that is the reason you closed. Now, you have got United Artists, you have got RKO and you have got Loews, all for Newport. Now, how many more was it necessary for you to have to properly operate that theater?

A. Well, it takes more pictures; say when we pick RKO, may be there would be only four pictures that would "click", that would make any money; may be there would be five.

Q. My attention has been called to the fact that although you had a contract for the RKO 1937-1938 product and that you didn't play a single picture, nevertheless you had spot booked four pictures from the previous season's contract from RKO. Now, why did you do that?

A. If you can tell me the title of these pictures, I can tell you why.

[fol. 1291] Q. No, I haven't the title.

A. Well, may be those pictures were spot booked in and may be the others wasn't available.

Q. These pictures, the spot booking of the four pictures cost $60.00; does that help you?

A. Well, may be those other pictures wasn't available that you were talking about there.

Q. Well, assuming that they were available, why didn't you accept them?

A. I couldn't go back and see whether they were available or not, I couldn't say why I didn't. If you could tell me they were available, then I could tell you why.

Q. Assuming the product was available for exhibition, why didn't you exhibit them?

A. They must not have been available.

The Court: Were they available?

Mr. Armistead: Yes, sir, they were available, and so were Loews available.

Q. Now, let's pass to Harriman; on October 15, 1938, RKO sold Peerless Enterprises for Harriman, Tennessee, 32 pictures out of the 1937-1938 product, and you only played seven but you also spot booked 18 pictures. Now, that showed that you had that RKO product there for Har-

[fol. 1292] riman, does it not?

A. Yes, sir.

The Court: How many pictures from RKO?

Mr. Armistead: Thirty-two pictures.

The Court: 1937-1938 product?

Mr. Armistead: 1937-1938 product, your Honor. He played 9 instead of 7.

The Court: Played any spot booked, how many?

Mr. Armistead: Eighteen.

The Court: Of the previous season?

Mr. Armistead: The same season, your Honor.

The Court: Outside of the 32?

[fol. 1293] Mr. Armistead: Outside of the 32. In other words, there were 50 pictures which were available for him from RKO.

Q. Now, we come to Loews: On June 29, 1937, Loews made a deal for Harriman, Tennessee with Peerless for the entire 1937-1938 product; do you remember that?

A. I guess we made a contract with them.

Q. And only 22 pictures out of that product were played, do you remember that?

A. Well, I couldn't recall how many pictures we played.

Q. Well, you know you didn't play out the entire contract, don't you?

A. Probably we didn't.

The Court: How many pictures were in the entire contract; does it show?

Mr. Armistead: It doesn't show in that answer but it is usually 52.

Q. Now, in that same season didn't you buy two re-issues from Loews which you cancelled?

A. Well, I couldn't recall whether I did or not.

Q. Well now, in addition to having—By the way, you had Columbia available, if you had been willing to pay the prices, for Harriman, did you not, for the 1937-1938 season? [fol. 1294] A. Well, if I had been able to pay about two thousand dollars, it might have been available.

Q. I say, if you met their terms it would have been available?

A. Well, I didn't want to be hijacked on them.

Q. I didn't ask you that, Mr. Smith.

A. Well, I don't know whether they would have let me have them if I had paid for them.

Q. Well, I thought you said yesterday the reason you didn't negotiate with Columbia was because you couldn't meet their terms?

A. I was unwilling to buy because I was unwilling to meet the terms.

Q. Aside from the RKO, didn't you get pictures from independent producers?

A. Yes, we got some. I could have gotten United Artists in Harriman.

Q. Then you got pictures from United Artists, too?

A. Yes.

Q. Now, let's see: there is RKO, Loews, Columbia, United Artists and independents; five different products available for Newport and Harriman, is that correct?

A. Just about, yes, sir.

Q. Now, on yesterday you testified that you tried to get [fol. 1295] some second runs from Paramount, and you introduced in evidence a letter from Mr. Oscar Morgan of November 17, 1938, in which Mr. Morgan says that Mr. House—I forget his initials—would come around to see you. Now, House did come around to see you, as I understand you testified yesterday, is that correct?

A. Yes, sir.

Q. Now, you were not questioned about your interview with House—Now, these are second run pictures, now, I am speaking now of Paramount. I will ask you if Mr. House didn't offer you second run pictures for Harriman, Morristown and Newport?

A. Well, let's see: that is Paramount, you say?

Q. Yes, sir.

A. Well, Paramount, we bought some pictures from them, second run, but after that time we were never able to buy any pictures from them.

Q. You never did ask them, did you?

A. Yes, we asked them.

Q. I will ask you if House didn't offer to sell you certain second run Paramount pictures, 58 for Morristown, 50 for Harriman and 55 for Newport?

A. I don't think so.

Q. Do you deny that?

[fol. 1296] A. Yes, sir, I think I deny that.

Q. Well, let me read you a few of these pictures and see if this don't help you—I am not going to go into all of them, your Honor. I will ask you if House didn't offer to *see* you second run pictures for Morristown, the titles of the pictures being as follows: "My American Wife;" "I Would give my Life;", "Hollywood Boulevard;" "Go West Young Man;" now here is one: "Let's make a Million;" "Doctor's Diary;" "Make way for Tomorrow;" "Turn off the Moon." Do you remember any of those pictures?

A. Being offered to me as second run?

Q. Being offered to you as second run?

A. No, sir, I do not.

Q. Now, how about Harriman?

A. No, I don't remember them offering me anything in Harriman that way.

[fol. 1297] Q. Hadn't they offered you anything for Newport either?

A. No, sir.

Q. But you did buy some few pictures from him?

A. For Morristown.

Q. Morristown?

A. Yes, sir.

Q. Now let's get to Morristown; we have covered Newport and Harriman; I will ask you if on October fifteenth, 1938, if RKO didn't make a deal with Peerless for thirty-two pictures out of the 1937-38 product for Morristown and that only three pictures were played; do you remember that?

A. No, I don't remember how many pictures were played.

Q. You know you made a contract with them?

A. If we took the three pictures over there, if we played three pictures we probably made a contract all right.

The Court: How many pictures?

Mr. Armistead: Thirty-two and played three.

Q. I will ask you if on December 30, 1937, if Loew's didn't make a deal with Peerless for Morristown, Tennessee, for approximately thirty-two second run pictures, and that you played only sixteen pictures?

A. Probably that is right.

[fol. 1298] Q. Now you had the same contract available for you in Morristown that you had available in Harriman and Newport, didn't you?

A. Yes, all except Fox we had Fox there in Morristown.

Q. You didn't have any Newport, Harriman?

A. That is two more.

Q. That is?

A. Yes, sir.

Q. And in addition you had the independents for Morristown?

A. Yes, we had some independents.

Q. You had United Artists also in Morristown?

A. Yes.

Q. Now a letter was introduced here yesterday on your direct examination where you wrote Paramount requesting Paramount to take some of the pictures from the contract you had with Fountain City, Tennessee, and transfer them to Morristown and exhibit them up there, didn't you?

A. Yes, sir, I think I did.

Mr. Dobey: That letter was objected to and not admitted in evidence.

Mr. Armistead: A letter was admitted.

The Court: That was as I recall about a second run.

[fol. 1299] Mr. Raftery: The thing that Mr. Dobey is objecting to and has in mind, is the exhibit showing the inter-office records, they were excluded and the letter was admitted.

The Court: Look at the exhibits and see.

Gen. Ballew: They were all Warner's, I have them right here before me.

Mr. Dobey: All right, sir.

The Court: As I recall the four letters were relative to Warner Bros. second run two reel comedies.

Mr. Armistead: Yes, sir.

Q. You remember writing that letter do you not, to Paramount?

A. Yes.

Q. You had some product then at Fountain City that you could use, you were oversold, is that right?

A. No, we were not oversold at Fountain City, we figured we could play them in Morristown quicker than they would be wanted at Morristown under the contract.

Q. You thought that part of your Fountain City contract [fol. 1300] you could play at Morristown rather than at Fountain City?

A. What we were trying to do we were trying to get pictures and make something at Morristown.

Q. Fountain City is how big a place?

A. I imagine Fountain City, it is one of the biggest cities in the United States, unincorporated, around ten thousand or twelve thousand, probably.

Q. You say it is unincorporated?

A. Yes, sir, it is the largest unincorporated city in the United States, it was a while back, unless some other city has got ahead of it.

Q. How close to Knoxville is it?

A. Well the corporation lines are in two miles of Fountain City.

Q. How close to Morristown?

A. Forty-two miles—forty-five.

Q. Now let's get to the sale of this theater at Harriman Tennessee, to Crescent, February, 1940, according to these exhibits that were put in here yesterday; on your direct testimony; you were renting an old store building there from a fellow named Roberts, or what is that gentleman's name?

A. Roberts, that is right.

Q. You converted that into this theater?

A. Yes, sir.

Q. When you sold to Crescent you had a lease on that [fol. 1301] building?

A. Yes, sir.

Q. And Crescent did not take over that lease?

A. No, sir.

Q. You obligated yourself to convert that building into a storehouse, didn't you?

A. That is right.

Q. And that is what you did?

A. Yes, sir.

Q. And you further obligated yourself to pay that rent?
A. Yes, sir.

Q. To continue paying that rent?
A. Yes, sir.

Q. And you failed to do that, didn't you?
A. Well it was not on my part I failed to do it.

Q. Whose?

A. It was on Roberts' part that I was to remodel it, remodel that building where I had to carry out a contract, where they suggested to come in, and they were to remodel it and instal a bowling alley, and I had to leave the place where the stage went in, and when they came back with the figures, and I went over the figures and it was changed because to put a bowling alley in there, Mr. Roberts said I couldn't go ahead for this is where I couldn't move this stage out.

Q. You still were not paying the rent?
[fol. 1302] A. Yes.

Q. You didn't pay it?

A. I haven't paid it yes, he didn't carry out the lease and I sued him for five thousand dollars.

Q. Now then somebody else moved into that building and opened up a theater, and is operating now?
A. Yes.

Q. There are three theaters in Harriman now?
A. Three theaters.

Q. Now, Mr. Smith, yesterday you testified somet-ing about the F.B.I., Mr. Arnold's office I believe, communicating with it; when was the first time you communicated with Mr. Arnold's office?

A. Well I just forget the date there, I think Mr. Dobey can give you the date on it he has all the papers probably, when I went to Washington.

Q. Oh, you went to Washington?
A. Yes, sir.

Q. I will ask you if on September 22, 1938, if you didn't write Congressman J. Will Taylor and made a complaint that you could not get pictures for your theaters in Morristown, Newport and Harriman, Tennessee, you couldn't get sufficient product?

A. Well I don't think I wrote him, I went down and talked to him in regard to it, and then may be he might

[fol. 1303] have told me to write him a letter, and probably I wrote him a letter after that.

Q. Where did you say, when did you say you talked to him, and where abouts?

A. He was in Knoxville, in his office.

Q. You did complain that you could not get sufficient product for those three theaters?

A. That is right, yes, sir.

Q. Now I want to ask you when you had that interview with Mr. Taylor, if you told him you had a contract with RKO and that you had a contract with Loews and you had a contract with United Artists and with Columbia, they offered you its pictures, and if you were getting pictures from independents, and getting some second run pictures from Paramount; did you tell him that?

A. No, I didn't tell him that.

Q. Why didn't you tell him that?

A. Because I don't believe all those pictures you named ever were offered.

Q. You bought them in October?

A. With a deal not at all a thing like that, we were not getting pictures that we could run and make any money.

Q. Ah: you say they were not what you could run and enable you to make money with them?

A. That is right.

[fol. 1304] Q. Now I will ask you if what is your complaint about it, what is your complaint about the quality of Loew's product and RKO product?

Q. RKO and Loew's, what is my complaint?

Q. Yes, about the product.

A. Well the product, if it be on a fair proposition—you mean now for me to explain to you about that?

Q. Yes?

A. Well say there are 800 pictures made by the movin/ picture companies in the United States, and one theater might probably play three hundred pictures, so you see it is this way when you come into a town w-th three play two hundred apiece and that would be six hundred, that would be about three hundred pictures unprovided for, so you se- we don't get such a contract. We may never get it, just like Warner Bros. and Columbia would never get the pictures.

Q. I will ask you, Mr. Smith, you have been in the moving picture business for a good number of years, if it is not generally recognized that Loews makes the best pictures?

A. Well in some houses you can, then again in some other houses you can't do anything with them.

Q. I want you to answer the question?

A. Well this year I believe Paramount had the best pictures.

Q. I am talking about 1938, 1937-38.

[fol. 1305] A. They were one of the big five, I guess I could say yes they make good pictures.

Q. I would like for you to answer the question, I will ask you if it is not generally recognized that Loews make the best pictures, and that was so in 1937-38?

A. I will say yes, then.

Q. About that RKO, what was your complaint about this product?

A. RKO is a small company, there is no advertising power to its product.

Q. How did you go about buying RKO pictures?

A. I had to have something.

Q. You had four others?

A. About the same thing.

Q. Now United Artists and Fox and Columbia, they were all a-ailable to you, United Artists?

A. Well they are in the same class, those companies' product was in the same class as RKO.

Q. Well United Artists of course in that year?

A. Probably have about four or five good pictures, they could make a little money on, and the others just common ordinary pictures, you might say for a B house.

Q. They were then in the same class with RKO?

A. That part of them, yes.

[fol. 1306] Q. How about Fox?

A. Well Fox pictures, they had a few pictures that were pretty good, but those pictures we couldn't get enough to show.

Q. You had them for Morristown?

A. We had them for Morristown, yes.

Q. I will ask you if on October third, 1938, if you did not receive a l-tter from the Department of Justice, dated the first of October, 1938?

Q. What *was* the letter say?

Q. It refers to your letter of the second, October, 1938, to Congressman Taylor?

A. Well I got an answer back, which I wrote to Congressman Taylor, from the department of justice.

Mr. Armistead: I would like for you to produce for inspection by counsel for Crescent, the letter of October first, 1938, to Mr. Thurmond Arnold, or from his office.

A. Do you have that?

Mr. Dobey: We do not have that, I can give you all the others, the reference to it.

Mr. Armistead: Sir?

[fol. 1307] Mr. Dobey: There is a reference to it here, but we do not have the letter.

Mr. Armistead: You do not have this letter?

Mr. Dobey: We do not have the letter.

[fol. 1308] Q. Well, to refresh your recollection, since it appears that the letter is not available and has been misplaced or lost, in the letter from Gen. Arnold, he requested the following information: Statement from you showing your efforts to procure products from each of the major distributors together with the reasons each had given for a refusal to sell pictures to you; (2) The length of time that Peerless Enterprises Theatres have been operated, and the length of time each competing theatre had been operated. Do you remember that.

A. Yes, I believe I gave them the information, but I don't think I put it down in writing. I think I went to Washington and told Mr. Williams.

Q. To refresh your recollection, I will ask you if on October 7, 1938, you didn't write to Mr. Thurman Arnold, as follows: (Reading)

"Dear General: In reply to your letter of October 1, we are giving you the following information:

On March 26, 1937, we opened a theatre in Morristown, Tennessee and at that time there was only one theatre in that town owned by the Crescent Amusement Company Nashville, Tennessee, Mr. Tony Sudekum, President. Before the opening of this theatre, Mr. Castleberry of this organization contacted me, saying that Mr. Sudekum sent him to find out what I would take for the theatre, and I [fol. 1309] told him what I would take, and he informed me

that he would let me know within three or four days. This time had elapsed and he had not gotten in touch with me until about sixty days later when the theatre was open and going and Mr. Castleberry came back and said that Mr. Sudekum had sent him back again to find out what I would take for the theatre after it was up and going. So I gave him a price, and did not hear any more from him until about eight months, when I had secured a lease on a building in Harriman, Tennessee to build a theatre there, this town only having one theatre operated by the same company as stated above.

At this visit, Mr. Castleberry told me that Mr. Sudekum wanted me to come to Nashville and talk over the matter of his buying half interest in our interprise. Within two weeks from that time, I went to Nashville and Mr. Sudekum offered me half the price our enterprise was worth for half interest, telling me that he thought I would be satisfied with the deal with him, as it would be hard for me to get pictures, and that he could save me money, as he could get the pictures cheaper than I could buy them. We did not make any deal as I did not want to sell our for a small amount as other exhibitors had been doing with him as [fol. 1310] he always tried to buy out all opposition that goes up in any town that he is in.

Since that time, I opened a theatre in Harriman, Tenn., June 17, 1938 and one in Newport, Tennessee September 2, 1938. After we secured the lease for the house in Newport, the Crescent Amusement Company immediately makes arrangements to open their second house in that town which was opened one week ahead of our house running at a lower admission price than ours, 15¢ on first run pictures, and we are charging 20¢ admission and running some second run pictures behind them.

Also within two weeks from the time, they started building the theatre in Newport, they erected the second house in Morristown, Tennessee charging 15¢ for this house which is under our admission price 20¢ in that town. We are afraid to lower our prices in either of the towns as he has stated that he will meet our price.

Mr. Sudekum's agent, Mr. Castleberry, approached Mr. Roberts, the man we have our lease with on the Harriman theatre, and tried to buy the building with the intention of keeping us out of Harriman.

At the time Mr. Sudekum talked to me in regard to [fol. 1311] buying half interest in our enterprise, he stated that Harriman, Morristown, and Newport, Tennessee were too small for two theatres; now he had opened his second theatre in Newport, and Morristown, which makes three theatres in these towns.

Mr. J. Winston Baird first erected a theatre in Newport, Tennessee several years ago, then Mr. Sudekum's agent came thru and told him that Mr. Sudekum wanted to buy half interest in his theatre, at which time Mr. Baird refused to sell. Then later, Mr. Sudekum buys two lots in that town and pays $7500.00 for them which is recorded in the court house of Newport, Tenn. and which lots he still holds. After Mr. Sudekum bought these lots, Mr. Baird sold half interest to the Crescent Amusement Company, thinking that they would run him out of business, provided they put up a theatre against him.

A similar case happened just recently at Rogersville, Tennessee, where this same company bought out Mr. Miller's theatre, Mr. Miller thinking it would be better to sell than to lose what he had built up for years.

We have heard it said that Mr. Sudekum has made his brags that before it's over with, he will own every independent theatre in the State of Tennessee.

[fol. 1312] It seems that the Crescent Amusement Company and the producers have violated the Anti Trust Laws. We would appreciate your giving this matter your immediate attention, as it is only a question of time that we can stay in business in these towns if the distributors do not agree to sell us pictures. Yours very truly . . .

P. S. We are attaching separate copies stating why the various producers refuse to sell us product. You have our authority to discuss our complaint with the New York Representatives of these distributors involved."

[fol. 1313] Q. On October 7, 1938,——

The Court: How many pages do you have there?

Mr. Dobey: About 8 or 10.

The Court: Do you think it is very important for you to read them?

Mr. Armistead: Yes, I haven't read them yet. I know this is important. If your Honor is going to take a recess, I will run through them right here.

(Recess.)

Mr. Armistead:

Q. Mr. Smith, this letter that I just read, of October 7, 1938, you signed and mailed that letter to Mr. Arnold?

A. Yes, sir.

Q. Now, I notice in this letter, where you said you made a price, gave Mr. Castleberry a price on your theatre. You referred to which theatre, now, the one at Morristown?

A. Well, there is two or three places where I gave him a price, I guess that was Morristown you are speaking of there.

Q. Yes, I think it is.

A. Is that the first place it came in?

Q. Yes.

A. Yes.

Q. What was that price?

A. I don't recall just exactly what the price was, I [fol. 1314] believe it was around $5,000.00, something like that.

Q. Well, you didn't like it because Mr. Sudekum didn't buy your interest in that?

A. No, I didn't care whether he bought it or not.

Q. Why did you mention that here to Mr. Arnold, then?

A. Well, I just wanted to show he was trying to buy them. I wasn't putting up theatres trying to sell.

Q. Well, you did want to sell, didn't you?

A. Well, I would sell anything I have, but I wasn't putting up theatres to sell.

Q. I didn't ask you that. I asked you, didn't you want to sell that theatre?

A. Well, if I hadn't wanted to sell I wouldn't have give him a price, I don't guess, would I?

Q. Did you want to sell?

A. I wasn't wanting to sell.

Q. I asked you, did you want to sell that theatre?

A. At that price I wanted to sell.

Q. Did you want to at that price?

A. At that price I would have wanted to.

Q. Did you get a reply from Mr. Arnold to that letter?

A. I guess we did.

Q. Have you got it?

A. No sir.

Q. What did you do with it?

[fol. 1315] A. Well, I might have it in my files at the office.

Q. Why was it you kept—Did you keep any correspondence you got from Mr. Arnold?

A. Yes.

Q. Where is that?

A. I guess it must be in my files at the office.

Q. Didn't you show it to a representative of the Plaintiff, the Government?

A. To Mr. Ballou, my attorney at that time——

Q. I said, a representative of the Plaintiff, the Government?

A. I guess they had seen it.

Q. You know they have?

A. I imagine they have seen that, may be got that.

Q. Don't you know it, didn't turn over to a representative of the Government in this case all the correspondence you had?

A. No, I don't think I have.

Q. With Exhibitors of moving pictures and your complaint?

A. I don't think I turned over all the papers.

Q. Which of those did you withhold, what are they?

A. I know I have got a letter or two from Mr. Thurman Arnold.

Q. Why didn't you turn that over?

A. They didn't want it, I guess.

Q. Why?

A. I don't know.

Q. I will ask you if on October 18, 1938, if the Depart-[fol. 1316] ment of Justice didn't write you a letter, acknowledging receipt of your letter of October 7, 1938, and if, in that letter, it wasn't stated, in substance,

> "That many distributors have stated their policy to be the favoring of an old account and that many distributors have refused to sell second runs in small towns. In the event any of the distributors have sold product away from your theatre (referring to your Palace) the following information is requested: (1) The size and admission price and playing policy of your theatre, together with similar information as to the competing theatre: (2) The names of distributors who have diverted product from your theatre to the theatre of your competitor, together with the reasons given for such change: (3) Since you play many pictures not exhibited by your competitor, the Depart-

ment asks what efforts exhibitors have made to procure such product from the distributor and the reason given by them for refusing to license pictures which had never been exhibited in the town."

Didn't you get such a letter?

A. I don't remember whether I got a letter from the Department just like that or not.

Q. Well, after receiving a letter from them, along about that time you went to Washington. Didn't you?

[fol. 1317] A. I don't know whether it was before that time or after that. I went to Washington.

Mr. Armistead: Mr. Dobey, have you got that letter of October 18th from the Department of Justice to Mr. Smith?

Mr. Dobey: I haven't it here; we possibly might have a letter of that date in our files. I can go to the file and see. I would like to ask where you got those letters?

Mr. Armistead: I get a heap of things I don't tell where I get them from, your Honor.

I would like to see that letter if it is available.

Q. While Mr. Dobey is searching for that letter, I will ask you why, in writing to Mr. Arnold on October 7, 1938, you didn't mention in there that you had available for exhibition in Morristown, Harriman and Newport, second run Loew's product, second run RKO, first run United Artists and that you got some pictures from Paramount and that Columbia—Well, you mentioned, I believe, about Columbia—and that you got pictures from independents; why didn't you tell him all that?

A. I probably did tell him everything I knowed when I went there.

Q. I mean, in this letter?

A. I don't remember writing a letter there.

[fol. 1318] Q. I understood you to say a while ago you wrote this letter of October 7, 1938?

A. If you read that letter, I probably——

Q. I have *heard* the letter.

A. Yes, I wrote that long letter you read, yes.

Q. Why didn't you tell Mr. Arnold in that, that you had all this product available?

A. Maybe I told him in the letter before that, what I had, I don't know.

Q. Do you have that? Let's have it?

A. I don't know.

Q. Did you write a letter like that?

A. Well, say I did tell them that. I know I had available, I had those pictures available that you have named.

The Court: He is asking you whether you did or not. Not, "say you did".

A. We did those named, except from Paramount and Columbia, I didn't have those. The others we had available second run.

Mr. Armistead:

Q. I asked you why, in writing to Mr. Arnold, you didn't write him to that effect?

A. I don't know the reason why I didn't write him.

Q. Anyhow, you got a free trip to Washington, didn't you?

A. A free trip?

Q. Yes.

[fol. 1319] A. Who paid my way?

Q. I am asking you, didn't you get it?

A. No.

Q. You didn't get any free trip?

A. No sir.

Q. You went up there and paid your own expenses?

A. I sure did.

Q. And return?

A. Yes, sir.

Q. And never have been reimbursed?

A. No sir.

Q. Never expect to be reimbursed?

A. No sir.

Q. All right. Now, do you know Mr. Fred Gorman?

A. I don't believe I do.

Q. You never have heard of him?

A. I have heard of him.

Q. When was the first time you heard of him?

A. His name sounds familiar but I don't know whether he is the one that told me and gave me the figures that these theatres was taken in by Crescent Amusement Company or not, whether that was Gorman or not; anyhow, I think that is Gorman.

[fol. 1320] Q. What figures do you refer to, Mr. Smith?

A. To the Cherokee Amusement Company, the Newport Amusement Company. Was he the auditor for that company at that time?

Q. He was the bookkeeper for them up there.

A. Well, he is the one then that sent me these figures, what they had taken in at Newport and these other towns up there that way.

Q. Well, was that while he was working for Newport?

A. Yes sir, while he was working.

Q. Cherokee, I mean?

A. Cherokee.

Q. Did you write and get in touch with Gorman or did he get in touch with you?

A. No, he wrote me but he didn't sign any name on it. He told me he was the auditor and he just tore it off and said "Here is some information which will be good in a lawsuit." And he wrote me again.

Q. What lawsuit?

A. The one I had against the Crescent Amusement Company.

Q. That is the one you filed on November 21, 1938 in the District Court at Knoxville?

A. Yes sir.

Q. Now, let's see. You were suing Crescent at that time for treble damages?

A. Yes sir.

Q. And at the same time you were making complaint [fol. 1321] to the Department of Justice?

A. Yes sir.

Q. Now, I want to ask you if in this complaint that you filed in the District Court there at Knoxville if you didn't make this allegation: "Following up said conspiracy the said defendants, Vitagraph, Inc., Columbia Pictures Corporation, Twentieth Century Fox Film Corporation and Paramount Pictures Distributing Company, Inc. have refused to negotiate with the plaintiff for pictures for exhibition in said theatres, and have refused to sell any pictures to the plaintiff for exhibition in said houses."

Now, was that correct when this complaint was filed? Was that true?

The Court: When was it filed, Mr. Armistead?

Mr. Armistead: November 21, 1938.

A. What were those film companies now again? The names of those?

By Mr. Armistead:

Q. Vitagraph, Columbia, Fox and Paramount.

A. Well, Fox sold us at Morristown but they wouldn't sell us at Newport and Harriman and the rest of them wouldn't sell us any other towns except Paramount sold us a few pictures in Morristown.

[fol. 1322] Q. Now, you say that those distributors refused to negotiate with you. Now, that isn't true, is it, in the case of Columbia?

A. Well, what would you think now if Columbia would come up there——

The Court: Well, now, he is asking you.

By Mr. Armistead:

Q. Is that allegation correct? That Columbia refused to negotiate with you?

The Court: Well, he testified that they did offer him, to sell him pictures on terms of twenty five per cent of the cont-act down and he pay for all the pictures as they were released, twenty five per cent——

A. That is correct.

By Mr. Armistead:

Q. Now, you say that these companies have refused to sell you any pictures—well, I believe you said Fox—in these towns, Harriman and Morristown and Newport, Fox sold you at Morristown?

Q. Sold me at Morristown, yes.

Q. And Paramount sold you some pictures?

A. Yes, sir.

Q. Now, you say further in this complaint filed against [fol. 1323] the Crescent: "That the plaintiff has heretofore and for many years done business with said defendants." Had you for many years been doing business with Columbia?

A. Yes sir, I have done business with Columbia way back there in 1929.

Q. And what other years?

A. Well, right on, 1930 and probably done business with them in 1932.

Q. Now, when you went to interview the Department of Justice with whom did you talk?

A. I talked to Mr. Williams.

Q. Who is he?

A. He must be one of the attorneys there in the office.

Q. You were very much interested in seeing the Department of Justice institute this suit against Crescent and these other distributors, were you not?

A. Well, it didn't make any difference much to me in this suit here.

Q. Sir?

A. This suit didn't concern me very much as I am out of the other towns where he is at.

Q. Well, if it didn't concern you so much why did you go at your personal expense to Washington?

A. Oh, that there; yes sir, that concerned me a great deal.

Q. Do you know a man by the name of Hugh Thomas?

[fol. 1324] A. Yes sir.

Q. How long have you been knowing him?

A. I have been knowing Hugh a good bit, several years.

Q. Did you ever tell him that you went into those towns for the purpose of selling out to Sudekum?

A. No sir, I never did. Hugh Thomas came to see me and told me Mr. Sudekum had sent him to see me and wanted to buy my theatres out. I says: "Hugh, Lee Castleberry has been to see me five or six times and never has anything happened." He said: "Well, Mr. Tony told me to see you. He knows I know you well and he wants to see if you will sell." I said: "There is no use talking to me. I don't want to sell unless he gives the price that I have offered him."

Q. When was that?

A. Well, I forget what month. I don't never keep dates.

Q. What year was it?

A. It was about 1938.

Q. What theatre was that he was trying to buy?

A. Well, he would have bought a half interest in all of them.

Q. When you went to Washington and conferred with the Department of Justice did you discuss with any representative there in that department your contemplated suit for treble damages against Crescent?

A. Did I consult anybody in Washington?

The Court: Discuss it with anyone in the Department of Justice at Washington.

[fol. 1325] A. Before I went?

Mr. Armistead:

Q. No.

A. Oh yes, I discussed with Mr. Williams.

Q. And told him you were going to bring that suit?

A. Yes, sir.

Q. And you wanted to see this suit brought here, didn't you?

A. I wanted to see a suit brought, why, sure.

Q. In other words then, you thought you would get some money and have a better opportunity of getting some money out of that treble damage suit if the Government brought this present complaint?

A. I thought I could get pictures anyhow. That is what I had in mind, is getting pictures.

Q. Answer my question.

A. Well, I dropped my suit and that showed I didn't figure on this making me any money, because I dropped my suit against Mr. Sudekum before this ever come up.

Q. Why, you didn't drop your suit against Sudekum until February of 1940 and this complaint was filed in 1938, 1939?

A. I still had this suit pending. This suit was still going.

Q. You weren't interested then in seeing this suit, this present suit brought against Crescent, were you?

A. Well, I would like to see the pictures, get to where people could buy them.

Q. I am not asking you that, now. I am asking if you [fol. 1326] were interested in seeing this present suit brought against Crescent.

A. This suit we are in now?

Q. Yes sir, the one you are testifying in?

A. I would like to see it where it would break up the——

Q. I didn't ask you that. I asked you, were you interested in seeing this suit brought against Crescent.

A. Well, I am not so exactly interested in seeing it brought against Crescent, no.

Q. Well, are you interested at all?

A. I am interested in seeing it where people can get the pictures.

Q. I didn't ask you that.

The Court: He means he was interested in seeing that result accomplished, and if this suit would accomplish that result, he would be interested in it.

A. Yes.

By Mr. Armistead:

Q. Weren't you interested in seeing this suit brought in aid of your trebie damage suit there in Knoxville?

A. At this present time?

Q. No.

A. Yes sir, I would like to have seen it have been brought.

[fol. 1327] Q. Mr. Smith, did you ever rent any property from Miss Katie Zeigler in Knoxville?

A. Yes sir.

Q. When you moved out of that building you owed her some rent?

A. Your Honor, I don't see that that has anything to do with it.

The Court: All right. Answer the question.

A. Yes, I owe her.

Mr. Armistead:

Q. How much did you owe her?

A. I think it was $500.00.

Q. Have you ever paid it?

A. Not yet.

Q. Now, in 1939 you had a building there under lease on Market Street, didn't you?

A. That was the Katie Zeigler building?

Q. No, another building?

A. Yes.

Q. The Maddin place.

A. Yes.

Q. I will ask you if on December 31, 1939 you didn't owe back rent to the extent of $1368.75 on that building?

A. I couldn't say.

Q. Well, that is about correct, isn't it?

A. I couldn't say.

[fol. 1328] Q. You haven't any idea how much rent you owe?

A. No.

Q. Have you paid that rent?

A. I couldn't say.

Q. You don't know whether you paid it or not?

A. No.

Q. Now, I have here, which Mr. Dobey very kindly handed me, what purports to be a copy of the letter of

October 18, 1938, addressed to you and signed by Mr. Thurman Arnold. This letter is the one I referred to a moment ago. I will read it to you and ask you if you received it.

"October 18th, 1938——

The Court: Why don't you see if there is any particular matter in that letter that bears on this suit? I don't see any use reading the whole letter.

Mr. Armisead: Your Honor, the only thing I wanted to bring out in this letter is that Mr. Arnold asked for certain information, that is, the size of the theatre and the admission prices and the playing policy of his theatre, together with similar information concerning—— .

The Court: Well, read that part of it.

[fol. 1329] Mr. Armistead: In this letter it recites, Mr. Arnold seeks the following information from you: "First—size, admission prices and playing policy of your theatre, together with similar information as to the competing theatre.

Second. Names of distributors who have diverted product from your theatre to the theatre of your competitor, together with his reasons for such a change.

Third. As you believe many pictures are never exhibited by your competitor, the Department will appreciate your reply as to your efforts to procure such product from the distributors and the reasons given by them for refusing to license to you pictures which have never been exhibited in the town.

Upon receipt of the above information your complaint"——

The Court: Well, that is practically the same thing you read awhile ago.

Mr. Armistead: Yes sir.

Q. You received that letter?

A. Yes sir.

[fol. 1330] Mr. Armistead: We would like to offer this letter, or a copy of it, as an Exhibit—Defendant's Exhibit No. 47.

(Marked as Exhibit No. 47.)

Mr. Dobey: We would like to offer in evidence the complaint on which Mr. Smith has been examined, dated October 7, 1938, addressed to Mr. Thurman Arnold.

Mr. Armistead: May it please the Court, there are attached to this letter certain documents, which we object to the competency of.

Mr. Dobey: They are a part of the complaint.

The Court: Are they a part of the letter?

Mr. Dobey: Yes, they are all in the form of a letter; there are certain enclosures in addition.

The Court: Here is one letter that is already in the record, relative to the Mountain City proposition; did you make that an exhibit?

Mr. Dobey: I believe so, yes.

[fol. 1331] The Court: In regard to transferring the remaining six pictures on the Mountain City contract to Morristown?

Mr. Dobey: Yes, I think so, but that is all attached as a part of the complaint, these enclosures, and as you will see, with respect to each distributor, the date is October 7, 1938, in which he sets forth the substance of his complaint.

The Court: Well, as to the yellow sheet, being a copy of the letter dated February 15, 1938, to the witness by Mr. A. H. Buren, that will be excluded from this Exhibit, because it is already in the record. The other three yellow sheets, dated August 29th and 23rd, 1937, copies of correspondence with Mr. Austin and Mr. Dyer, will be excluded, because those letters were excluded from the record yesterday on objection. The other letter which appears to be the original letter about which Mr. Armistead cross-examined and relative to the information asked for, they will be admitted in evidence.

Mr. Raftery: May we take a look at them for the distributors?

[fol. 1332] The Court: Yes, sir.

Mr. Raftery: We might have an objection to make.

The Court: All right. They follow up the letters, those about which he has cross-examined.

Mr. Dobey: May it please the Court, you will recall that yesterday some point was made by Mr. Waller to the effect that the Warner Brothers contract for Newport for the 1938-1939 season provided for a minimum of 26 pictures at $10.00 per subject, was for the Newport Amusement Company, not a defendant in the case; of course, it was pointed out at the time that the Newport Company was a subsidiary. At this time, I would also like to call your at-

tention to the fact it is signed by defendant Kermit C. Stengel.

The Court: Well, I admitted it anyway.

Re-cross-examination.

Mr. Dobey: For the Plaintiff:

Q. Now, Mr. Smith, prior to the time you closed your [fol. 1333] theater at Newport on November 19, 1938, and prior to the time you closed your theaters at Morristown and Harriman on December 13, 1938, if you had been able to take the pick of Warner Brothers pictures at $10.00 per picture, would you have been able to continue in business?

Mr. Armistead: I object to that, your Honor.

The Court: Sustained.

Mr. Dobey:

Q. If you had been able to obtain approval of those Warner Brothers contracts, would you have been able to continue in business?

A. Yes, sir.

Mr. Armistead: I object to that, your Honor.

The Court: That is the same question; I sustain the objection. I don't think from his evidence this man could have continued in business if he had gotten all the pictures.

Mr. Dobey:

Q. Could you have gotten the Warner Brothers product?

A. No, sir.

Q. Was it a severe blow?

[fol. 1334] A. Well, I was expecting to get the product, of course.

Mr. Dobey: Now, at this time I would like to offer in evidence the complaint that was filed by Mr. Smith and upon which Mr. Smith was cross-examined.

The Court: All right; let it be admitted.

(Admitted as Gov. Ex. No. 104.)

Mr. Raftery: In this letter there is considerable stuff about that exhibt which has no place in the record. It is substantially what he would testify to, with the exception of that.

Mr. Dobey: This hasn't been numbered yet; what is the number of that Exhibit?

Clerk Wasson: No. 105.

Mr. Dobey: Now, I would like to read the paragraph of Mr. Smith's complaint with respect to Columbia Pictures, concerning which Mr. Smith was cross-examined by Mr. Armistead: (Reading):

> "That the plaintiff through its officers in September [fol. 1335] 1938, sought to buy from the Columbia Pictures Corporation such of its products as were open for the towns of Harriman, Newport and Morristown, Tennessee; that the officers of the plaintiff were informed that said defendant had three years product open for the above towns, (That is to say, that the pictures made by this defendant for the past three years had never been exhibited or sold for exhibition in said towns) but plaintiff was further informed that these pictures could not be offered to the planitiff nor a price quoted thereon until said defendant had contacted and consulted with the president of the Crescent Amusement Company. That said defendant at that time through its representatives stated that it was known by said defendant that the plaintiff was needing pictures very badly. That shortly thereafter a representative of the defendant called upon the officers of the plaintiff at Knoxville, Tennessee and offered to sell said product to the plaintiff, provided the whole of said product was contracted for and provided that the plaintiff paid at the time said contract was executed 25% of the entire purchase price of said picture. That the defendant well knew that such payment was irregular, unheard of and impossible to any exhibitor of motion pictures. That the usual and ordinary manner of sell- [fol. 1336] ing pictures is to ship the films C. O. D. or for the exhibitor to mail a check therefor when each picture is booked. That said scheme on the part of said defendant is not practiced with any other exhibitors of its products and said deposit is not required of the Crescent Amusement Company or other exhibitors. That the plaintiff is not indebted to said defendant in any amount and that said demand was in furtherance of the scheme or conspiracy with said Crescent Amusement Company to withhold pictures from the plaintiff and was in violation of the Anti-trust Laws. * * *"

The Court: Well, that is practically the same thing he has already testified to.

Mr. Dobey: Yes, but Mr. Armistead questioned him about certain——

The Court: What purpose is that offered for? There is no use to duplicate the record; he has testified practically to the same thing.

Mr. Dobey: Well, Mr. Armistead questioned him on a paragraph of that complaint with respect to Columbia pic-
[fol. 1337] tures Corporation, as to which Mr. Smith was questioned, I will say that the complaint is slightly inaccurate; but we want to get down to that part dealing with Columbia Pictures Corporation; they are all there, as Mr. Smith testified to.

The Court: All right.

Mr. Frolich: Of course, we don't agree to that. But that is a matter for your Honor to decide.

The Court: Yes, I will decide that.

Mr. Dobey:

Q. Did you draw that complaint, or did your lawyer draft it, Mr. Smith?

A. My lawyer.

Mr. Frolich: And not repudiated by him?

Mr. Dobey: Don't answer that question.

Q. What pictures were you playing at your theaters in Knoxville and Fountain City?

Mr. Raftery: We object to Fountain City; the record is
[fol. 1338] big enough without bringing that out.

The Court: Is there any complaint about Fountain City?

Mr. Raftery: No, sir.

The Court: No, there is no question of competition in Knoxville?

A. No, sir.

Mr. Dobey:

Q. What pictures were you playing at Fountain City, and what features were you playing at the time at Fountain City?

A. We were playing anybody's pictures at Fountain City, only except Warner Brothers, when we first opened; of course, they promised pictures at their first run but we never did get them, and that was the only objection on that.

Q. How about Paramount and R. K. O.?

A. Paramount, we played those.

Q. How about Columbia?

A. We didn't play Columbia.

Q. Fox?

A. Played Fox.

Q. Do you owe any of these film companies any money?

A. Well, I owe Universal.

[fol. 1339] Q. How much?

A. I believe it is $75.00.

Q. Do you owe anybody else?

A. I don't know of any other film company that I owe a penny to.

Q. How do you pay for your pictures?

A. Well, if we don't send a check with the letter we have to pay for them C. O. D. when they arrive.

Q. At Harriman and Newport, did you pay for the pictures C. O. D.?

A. Yes, sir; sometimes mailed a check.

Q. Sometimes mailed a check. Did you get the pictures?

A. Yes, sir.

Q. And when you stated yesterday that it was customary to pay for films in advance, you meant on a C. O. D. basis?

A. Sure, that is it.

[fol. 1340] Mr. Dobey: You did not mean you had to pay twenty-five per cent of the total amount of the contract?

A. No, not up to date.

The Court: Well he said that is the only time that he had a contract to make a twenty-five per cent deposit.

Mr. Dobey:

Q. Now at Morristown, Harriman and Newport, I believe you had the RKO pictures, Metro Pictures, and United Artists?

A. Yes, sir.

Q. Was that second run with respect to RKO and Metro?

A. Second run.

Q. And United Artists first run?

A. First run.

Q. Now with respect to the United Artists pictures, do you know whether or not you took all pictures, or whether or not Crescent had selected five best ones out of the season's product?

A. I believe I had all those pictures.
Q. How many pictures were there?
A. I think there were around thirty, I aint for sure.
Q. For one season?
A. For one season, yes.
[fol. 1341] Q. Now with respect to all these pictures, you did not play on the RKO contract second run, Metro second run, and United Artists, if there were any, I believe there were, was the reason you——

The Court: Now ask him what was the reason, you have been leading him entirely too much, ask him what was his reason.

Mr. Dobey:

Q. Why didn't you play all those pictures?
A. Probably we were closed down and didn't have a house to play them in.

Mr. Dobey: That is all, it was obvious, I didn't want your Honor to miss it.

Q. Now with respect to Paramount.

Mr. Raftery: I think it is obvious that he did not pay for them.
Mr. Dobey: Has the Crescent Amusement Company paid for any pictures they never played?
Mr. Raftery: You bet there is.

The Court: Ask the witness.
[fol. 1342] Mr. Dobey: The testimony in the deposition is that they paid for all pictures they did not play.
Mr. Raftery: I am speaking for the United Artists.
The Court: All right.

Mr. Dobey:

Q. Now did Paramount sell you any pictures until after you filed suit against them, and after you had made your complaint to the department of justice of this, except when you very first started and they quit for a period; is that correct?
A. I think that is correct.
Q. After they quit selling, did they sell you any more pictures until you complained to the department of justice?
A. I don't think they sold me any pictures then.

Mr. Armistead: He has testified to that, he said he was getting from Fox and Paramount.

Mr. Dobey:

Q. At Morristown?

A. We got pictures for a while and they told us they couldn't sell anything anymore.

[fol. 1343] Q. How about Newport?

A. We didn't get any there.

Q. You never got any there?

A. No.

Q. With respect to the theater at Newport, the second theater you opened in that town, did you know who started construction first on the second theater in Newport, you or Crescent Amusement Company?

The Court: He started first, Crescent started second and beat him to it. We have been over that.

Mr. Dobey: That is all.

Mr. Frolich: I would like to offer an answer of Columbia in the damage suit of 1938, I want to offer it in evidence as defendant's exhibit m—.

The Clerk: Columbia's exhibit, next number will be C-38.

The Court: We are not going to try that lawsuit.

Mr. Frolich: I would like to read to the Court just one sentence on page three of Columbia's answer, it is exhibit forty-eight, "It is the usual and customary policy of this [fols. 1344-1345] defendant to require a deposit of twenty-five per cent of the film requirements where there is any doubt of the performance of the contract by the exhibitor, and from defendant's experience with the plaintiff, the requirement of the twenty-five deposit was entirely justifiable and reasonable."

My object was to show that Columbia took a decided position in the lawsuit by asking for that deposit.

The Court: Any further questions? Call the next witness.

Further deponent saith not.

[fol. 1346] ANDY ANDERSON, next witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. Andy Anderson, Hartford, Kentucky.

Q. Try to speak so these gentlemen over here can hear you too. What is your occupation?

A. I operate a chain of theaters.

The Court: Talk a little louder, please sir.

Mr. Wright:

Q. Whereabouts?

A. In Hartford, Eddyville, Beaver Dam, Kentucky.

Q. One theater in each of those towns?

A. Yes, sir.

Q. How large are those?

A. Hartford is about fourteen or fifteen hundred, — is about the same, Beaver Dam is about twelve or thirteen hundred, and Eddyville, I think is a little less than two thousand.

Q. You were formerly employed by the Crescent Amusement Company?

A. I was.

[fol. 1347] Q. When was it you worked with them?

A. I began with them about January first, 1936, and left I think it was in April of 1937.

Q. In what capacity?

A. As manager of the Alhambra theater in Hopkinsville, Kentucky.

Q. And after you left the Crescent Company you were associated with two other men I believe in the operation of the Kentucky theater at Hopkinsville?

A. That is right.

Q. Who were the other two?

A. F. M. May of Owensboro and Cecil P. Taylor of Beaver Dam, Kentucky.

Q. That Kentucky theater was opened when?

A. June, 1937.

Q. Will you describe that theater?

A. Well it was an old building that had been a theater, we remodeled and equipped it.

Q. How long had that been closed?

A. I think it was closed around 1930.

Q. Prior to that time, do you know who operated it?

A. Crescent Amusement Company was operating it prior to that time. It had been closed since 1930.

Q. And then what was the remodelling you did when you opened it?

[fol. 1348] What is that?

Q. Describe the remodelling that was done?

A. We went in there and built rest rooms, changed the building and front, and put in new wood all over the entire building and built some offices upstairs, and built a new booth.

The Court: That is the Alhambra?

A. That is the Kentucky, we remodeled the whole thing inside almost except the floor, we didn't do anything to it, and built a room in the back of it for an airconditioning unit.

The Court: How much did you spend on the remodelling?

A. I think around five thousand dollars.

The Court: Where is the Kentucky theater located?

A. It is on Ninth street in Hopkinsville, across from the Princess, around five thousand dollars spent as well as I remember.

Mr. Wright:

Q. How much did you spend for equipment there?

A. Well equipment and remodelling both run around fifteen thousand dollars.

Q. At the time you opened there were two other theaters operating in Hopkinsville?

A. There were.

Q. What were they?

[fol. 1349] *Q.* The Alhambra and Princess.

Q. Both operated by the Crescent Amusement Company?

A. That is right.

Q. Will you describe those theaters?

A. The Alhambra was a very nice house, seated around nine hundred, and the Princess I think it seated around five or six hundred.

Q. What kind of a house was it?

A. It was a much smaller house, not near as nice as the Alhambra.

Q. How did it compare with your Kentucky?

A. The Princess?

Q. Yes?

A. It didn't compare.

Q. Was it better or worse?

A. I think the Kentucky was a much better house than the Princess.

Q. And how big was the Kentucky?

A. About four hundred and fifty.

Q. When you opened the Kentucky, what admission prices did you charge?

A. We charged twenty-five top with two cents tax.

Q. And what were the top admission prices of the other theater?

A. The Alhambra?

[fol. 1350] Q. The Princess?

A. The Alhambra was gettting thirty-five cents for some of the pictures on Sunday and Monday, and the rest of the time twenty-five with two cents tax, and I think the Princess was getting around fifteen and twenty cents.

Q. Was there any change in the Alhambra and Princess prices after you opened?

Mr. Waller. We object to that, I think it goes in the same classification as bank night, and so on.

The Court. Overruled for the present.

A. There were lots of changes in prices.

Mr. Wright: Q. In which direction?

A. Down.

Q. You mean the policy followed from week to week, the policy varied?

A. Yes, from week to week and from day to day, sometimes.

Q. Did you vary your admission prices?

A. I did not. I did change it once in a while on big pictures.

Q. What pictures were you showing when you opened at the Kentucky?

A. When we opened we had Paramount and Columbia [fol. 1351] first run and we had Grand National.

Q. That is Columbia and Paramount, were they for what season?

A. Those were for 1937-1938.

Q. Talking about now in the spring of 1937, when you opened?

A. Those were 1937-38 first run contract.

Q. Your Paramount was 1937-38, first run?

A. Yes, that was 1937.

Q. You opened the house in 1937?

A. I think that was 1937-38 product, I am not sure about that.

Q. I believe that the contracts show that you were buying 1936-37 Paramount Product, first run, were you buying 1936-37 Paramount Product, first run, when you opened?

A. That is right, it was 1936-37.

Q. The 1937-38 season had not started?

A. That is right. I am sorry, that is right.

Q. And the same was true with Columbia?

A. Yes, sir.

Q. That was the 1936-37 product you were playing as first run?

A. Yes, sir.

Q. Did you have some second run too?

A. We did, we bought later Fox and also Warner Brothers.

[fol. 1352] The Court: Second run?

A. That is right.

Mr. Wright: Q. Did you try to get Paramount first run for the 1937-38 season?

A. I did.

Q. I show you these letters here, a letter Dated October 11, 1937, from a Paramount salesman to you, and another dated October 14, 1937, from the Paramount's Branch Manager to you, and ask you if you received those shortly after the dates they bear?

A. That is right.

[fol. 1353] Mr. Wright: I would like to have these marked the next number of the Exhibit, Exhibit No. 105.

(Letter marked Government Exhibit 105)

Q. I notice the letter of October 11, 1937, Government Exhibit No. 105, which was just shown to you, refers to a letter of October 7th from you. Have you got a copy of that letter?

A. I don't believe I have.

Q. By looking at this letter, can you recall the substance of what your letter of October 7th was?

A. Well, I was trying to buy that product, I think I wrote the letter asking whether there was a chance for us to make a deal for that product.

Q. Was it with reference to first run?

A. Yes.

Q. This letter of October 14, marked Government Exhibit No. 106, for identification, refers to your telegram of October 12th. Have you got a copy of the telegram?

A. No I have not.

Q. Can you recall what the substance of the telegram was?

A. Well, after I received that letter, saying they had sold first run here, I wanted to know whether second run was available.

Q. This letter of October 14th is the reply you got?

A. That is right.

Mr. Wright: I offer these in evidence.

[fol. 1354] (Government Exhibits 105-106, offered in evidence)

Q. Now then, I show you a photostat of a telegram from you to Metro-Goldwyn-Mayer Pictures, dated October 13, 1937, and ask you if that is a copy of the wire you sent that company on or about that date?

A. That is.

Q. And this letter of October 13, 1937, from Mr. Avey to you, was the reply to the telegram, shortly after the date of it?

A. Yes sir.

Q. This letter of November 29, from you to Loew's, is that the next communication that passed between you, written by you between that date?

A. I believe it is because I was asking them to reply to it.

Q. And that letter of November 30th, from Mr. Avey to you, was the reply that was received shortly after that date?

A. That is right.

Q. And this letter of December 1, 1937, from you to Mr. Avey, is the next letter you wrote to him on or about that date?

A. That is right.

Q. With reference to this letter of December 1, 1937, from you to Mr. Avey, did you receive a reply to that letter?
A. I must have. I don't recall, I don't remember.

Q. I will show you this letter from you, dated December [fol. 1355] 24, 1937, to Mr. Avey; does that refresh your recollection as to whether you received a reply on December 1st?

A. Well, I am asking for a reply, in this letter.

Q. What is the date of that letter?

A. This is December 24th, I am still asking for a reply. I say here: "I have received no reply".

Q. This letter of December 24, 1937, evidently refers, then, to some letter you wrote between December 1, 1937, and December 24th?

A. That must be, because I am still asking for a reply, in regard to second run.

Q. Have you got a copy of an intermedite letter that you received?

A. No sir, I don't suppose I have.

Q. All you recall is, that you were asking for second run?

A. That is right.

Q. This letter of December 29, 1937, from Mr. Avey to you was a reply that you received shortly after that date?

A. That is right.

Q. This letter dated February 11, 1938, from you to Mr. Avey was the next letter you wrote to him?

A. That was the next letter, I believe.

Q. This letter from Mr. Avey to you, of February 16, 1938, ~~is the reply that~~ you received from him?

[fol. 1356] A. That is right.

Q. And this letter of February 17, 1938, from you to Mr. Avey is the next letter you wrote to him?

A. Yes, this letter, in reply to that February 16th letter.

Q. This letter dated March 11, from you to Mr. Avey, is a copy of the next communication?

A. Yes.

Q. This letter dated March 12, 1938, from Mr. Avey to you, is a copy of his reply?

A. It is.

Mr. Wright: I will ask to have this correspondence just identified as the next Government Exhibit numbers.

The Court: Do you wish to have them marked in the same order.

Mr. Wright: In the same order they have been identified.

Mr. Wright: I would like to read the Paramount letters that I have previously offered.

The Court: That is Exhibit 105?

Mr. Wright: Yes. (Reading)

"Dear Mr. Anderson: Thanks for your letter of October 7, and in reply thereto, I wish to advise that we have closed a deal with Mr. Sudekum for Paramount Pictures for his circuit in the coming year. I regret [fol. 1357] that we will not be in a position to offer you service for Hopkinsville, but trust you will have no difficulty in arranging your plans for the coming season.

With reference to the adjustment on the "C" product, this will advise that this adjustment is in New York and we hope to hear from it in a few days.

Kind regards. Very truly yours * * *"

Q. In this letter of October 11, 1937, to you from Mr. L. C. Lowe, Paramount salesman, addressed to you at Hopkinsville, Kentucky, I notice a reference to an adjustment on the "C" product. Was that "C" product of the 1936-1937 season?

A. That is right.

Mr. Wright: The letter dated October 14, 1937, Government Exhibit No. 106, is from Cecil E. House, Branch Manager, Paramount, to Mr. Anderson, and reads as follows: (Reading).

"Dear Mr. Anderson: I thank you for your telegram of October 12, in which you expressed interest in the second run of our product in Hopkinsville.

We regret that we are unable to offer this service.

Kind regards. Yours very truly * * *"

Mr. Wright: I will offer in evidence the telegram and letter that passed between Mr. Anderson and Metro, marked [fol. 1358] Government Exhibits Nos. 107 and 108. Also Government Exhibits Nos. 109 and 110. While those are being inspected, I would like to read Government Exhibit No. 107, which is as follows: (Reading)

"METRO GOLDWYN MAYER PICTURES ATLA—

IS YOUR PRODUCT AVAILABLE FIRST OR SECOND RUN HOPKINSVILLE WILL APPRECIATE REPLY WESTERN UNION IMMEDIATELY—

KENTUCKY THEATRE ANDY ANDERSON."

Q. How came you to send that telegram, Mr. Anderson?

A. Well, I wanted——

Q. Did you observe Crescent had been using it there?

A. They had been using first run, yes. I wanted to get second run. At that time I didn't know about the coming year, whether it had been sold or not. That was in October. I don't think that product had been sold to Crescent at that time, I wanted it for my first run.

Q. That was your impression, at that time.

A. That was my impression.

Mr. Wright: I will read the reply of Mr. Avey, dated October 13, to Mr. Anderson, filed as Government Exhibit No. 108—I see this is from the Secretary of Mr. Avey. (Reading)

[fol. 1359] "Dear Mr. Anderson: With reference to your telegram of today, please be advised that Mr. Avey, our Branch Manager, is out of the city at this time but immediately upon his return, your telegram will be brought to his attention. Yours very truly • • •"

Mr. Wright: The next letter is Government Exhibit No. 109, dated November 29, 1937 and is a letter to Loew's Inc., Atlanta, Georgia. (Reading)

"Gentlemen: Some time ago you promised me a reply regarding your product for this situation. Would appreciate knowing something definite by return mail. We are interested in first run. Very truly yours • • •"

I read next letter from Mr. Avey to Mr. Anderson, Government Exhibit No. 110, dated November 30, 1937, as follows:

"Dear Mr. Anderson: Thank you very much for your letter of inquiry of November 29th. Please be advised that our product has already been sold first run in Hopkinsville. Yours very truly • • •"

I next read Government Exhibit No. 111 a letter dated December 1, 1937, from Mr. Anderson to Mr. Avey: (Read-
[fol. 1360] ing)

"Dear Mr. Avey: Thank you for your prompt reply. Since your product is sold first run, please advise if second run is available. Very truly yours • • •"

The next is a letter of December 24, 1937, from Mr. Anderson to Metro, Atlanta, Georgia, Government Exhibit No. 112, which is as follows: (Reading)

"Gentlemen: Several weeks ago I wrote you asking if your pictures were available to the above theatre second run. Up to now I have received no reply.

Will you please let me have this information by return mail.

Very truly yours • • •"

(Recess.)

[fol. 1361] Afternoon Session

Mr. Wright: If your Honor please, I believe the last letter was—

The Court: Exhibit 112 is the last, I think, that I have.

Mr. Wright: That was the letter of December 24th, asking about second run pictures. The reply of Mr. Avey to Mr. Anderson dated December 29, 1937, Government's Exhibit No. 113, reads:

"Thanks for your letter of December 24th.

"Our Tennessee Sales Representative, Mr. C. F. McGuire, will call to see you shortly after the first of the year."

Q. Now, Mr. McGuire came to see you, did he?

A. He did, sometime right after Christmas.

Q. Where was that at, Hopkinsville?

A. At Hopkinsville.

Q. What did he have to say?

A. Well, he came in there and I asked him about the product and he said he didn't have any information; that he didn't have any cut-offs; he just drove up from Nashville and didn't know anything about the situation and he [fol. 1362] couldn't quote me any figures or talk about any contracts, and he didn't know anything about it.

Q. This next letter is dated February 11, 1938 from Mr. Anderson to Mr. Avey, marked Government's Exhibit No. 114.

(Letter not handed to reporter).

Q. Was this conversation you were referring to in the letter of February 11th the latter conversation you had with the salesman?

A. No, I think he was—no, that was to the conversation we had in January when he was up there. Nothing ever happened and I think that was the reason for my writing that letter.

Q. Well, the letter says here; under date of February 11th, "Your representative was in to see me about ten days ago and we discussed second run contract for this house."

A. Maybe that was the first time he was there, around the 1st of February. I don't recall exactly when it was.

Q. At any rate the discussion you referred to in the letter was the discussion you have already described?

A. That is right.

Q. Then a reply was written from Mr. Avey to Mr. Anderson dated February 16, 1938, marked Government's Exhibit No. 115:

> "Replying to your letter of February 11th, from the report furnished us by our Representative, Mr. C. F. McGuire, who called on you recently, we understood [fol. 1363] that you had more product under contract than you had playing time for this season and that the prices you could afford to pay for our product would barely cover the handling charge.
>
> Please let us know just what you are asking of us."

Q. Had you had any conversation with Mr. McGuire with respect to prices or playing time?

A. None whatsoever except I told him I would be willing to pay in line with what I was paying the other companies, second run, but he said he couldn't quote me any prices and didn't know anything about it.

Q. What, if anything, was said with respect to the amount of playing time you had?

A. I don't recall of anything being said. If there was anything said about playing time it was very little because he didn't want to discuss product.

Q. The next letter is a reply of Mr. Anderson to Mr. Avey dated *dated* February 17, 1938, Government's Exhibit No. 116:

> "Your letter dated February 16, received.
>
> "Contrary to what you understand we do not have enough product to last us until the end of this year. You know as well as I do that Crescent does not buy until shortly before the first of the year and no com- [fol. 1364] pany will sell me without first being turned

down by Mr. Sudekum. You are aware, too, how far behind release that causes product to be played.

"Your representative, Mr. McGuire, quoted me no prices and where you obtained 'the afford to pay prices' is beyond me.

"I feel sure that the rental of your pictures will be in line with some other product I have second run or I would not require a second run deal.

"I realize that because of circumstances I am due for 'a little kicking around'. I am willing to take it up to a certain point but beyond that it becomes another matter. I am sure, Mr. Avey, if you were in my situation you would feel somewhat the same as I do.

"Would appreciate learning from you by return mail definitely whether you intend to sell me second run or not. Please do not stall me any longer."

Now, this was about this six months after the 1937-1938 season pictures had begun to be released, wasn't it?

The Court: That is 117?

Mr. Wright: 116.

Q. Then the next letter is from Mr. Anderson to Mr. [fol. 1365] Avey, dated March 11, 1938, marked Government's Exhibit No. 116.

"Will you please favor me with reply to my letter concern- second run deal for this theatre"?

The next letter is dated March 12th from Mr. Avey to Mr. Anderson, Government's Exhibit No. 118:

"I have just returned from my vacation and find your letter of February 17th in reply to ours of February 15th.

"I do not understand your letter and under the circumstances we deem it advisable that our Tennessee representative, Mr. C. F. McGuire, or if possible the writer, visit you in order to ascertain just what your wishes are regarding our service. We will let you know just as soon as we can do so."

Q. Now then, did Mr. Avey or Mr. McGuire come to see you?

A. Mr. Avey came to see me in April.

Q. Where was that, at Hopkinsville?

A. In Hopkinsville.

Q. Was anybody else with him?

A. No, he was by himself.

Q. What was the conversation you had then?

A. Well, there wasn't anything except that we made a second run deal at that time.

Q. He finally offered you the product?

A. Yes.

[fol. 1366] Q. That was for what season?

A. 1936-1937.

Q. That was the season preceding the then current season?

A. That is right. It wasn't a full deal at that time because some of the product had been played there second run at the Princess Theatre.

Q. The product you bought second run was what had been previously played at the Princess for 1936-1937?

A. That is right.

Q. I will show you this contract dated April 12, 1938, approved April 25th, between yourself and Metro for second run, 1936-1937 product at the Kentucky Theatre at Hopkinsville, and ask you if that is the contract that you negotiated with Mr. Avey.

A. It is.

Q. This letter from Mr. Avey to you, dated April 12, 1938 is the letter you received with the application for the contract which has just been identified?

A. That is right. It was attached.

Q. When you had the talk with Mr. Avey about the second run 1936-1937 deal was anything said about the 1937-1938 product?

A. Yes sir. That is the product I wanted and they wouldn't let me have it, saying that they wanted to play off this 1936-1937 and then perhaps we would make a deal for the 1937-1938.

Mr. Wright: I will call attention—I want to call to your [fol. 1367] Honor's attention to the language in the contract that was made, which says, under the playing arrangements: "Exhibitor agrees to play or pay for three pictures per month commencing June 1, 1938 in order of release if and as available."

Then I will offer in evidence this letter dated April 12, 1938 from Mr. Avey, marked Government's Exhibit No. 119 for identification. This letter reads as follows:

"Following up the writer's personal call at your office at your Kentucky Theatre in Hopkinsville on April 7th, we are enclosing herewith applications for Metro-Goldwyn-Mayer's pictures of the 1936-1937 season for second run in Hopkinsville in exact accordance with the proposal which you made at that time.

"Since the 1936-1937 product covered by your application is available for second run, and if we hope to receive any revenue while the prints are in service, it is necessary that we complete contractual relations as early as possible in order that we may begin to realize revenue from the second run in the town of Hopkinsville. You are, therefore, advised that unless these applications properly executed are in our hands before the close of business one week from this date we shall take such steps as we may deem advisable for the disposition of this product for second run [fol. 1368] in Hopkinsville. Please sign all copies of the application and also initial all copies of the rider which are attached to the applications.

"Thanking you for the courtesies extended me during my visit with you and with kindest regards, we are * * *"

Q. Then you did execute the applications and send them in immediately?

A. That is right.

Q. And they were accepted?

A. Yes.

Q. I call your attention to two letters here, one dated May 4, 1938 from you to Mr. Avey and the reply dated May 10th, 1938 from him to you, and ask you if those letters were respectively written and received by you on or about the dates they bear?

A. They were.

Mr. Wright: I will ask to have these two letters marked Government's Exhibits No. 120 and 121.

(Letters so filed and marked.)

[fol. 1369] Mr. Wright: I will also ask to have this application, dated November 8, 1937, acceptance November 23, 1937, between Crescent Amusement Company and Metro

for the exhibition of the 1937-1938 product, first run, in Hopkinsville, marked Exhibit L-15.

(Marked Gov. Exhibit L-15.)

Government's Exhibit No. 120 is a letter from Mr. Anderson to Mr. Avey, dated May 4, 1938, which reads as follows:

"Dear Mr. Avey:

You will note from the attached ad, which appeared in yesterday's local paper, that the Alhambra Theatre is running some of the pictures on a two-for-one basis. The admission price at the Alhambra is: Matinee 20¢, Evening 25¢. This two-for-one plan, makes it actually: Matinee 10¢, Evening 12½¢. I am wondering if anything can be done to stop the showing of first run pictures of this caliber for this cut rate admission.

Kindest personal regards.

Sincerely yours, Andy Anderson."

The Court: What is the number of that exhibit?

[fol. 1370] Mr. Wright: That is 120, if the Court please.

Q. What pictures were you referring to in this letter that had been run on a two-for-one basis?

A. I really don't remember what pictures they were.

Q. What pictures, what companies?

A. Metro-Goldwyn-Meyer.

Q. Those were pictures released for the 1937-1938 season?

A. They were first run pictures.

Q. And those pictures were then being played in Hopkinsville, first run, at this two-for-one admission price?

A. They were.

Q. At twenty-five cents?

A. That is right.

Q. And then the letter, the reply from Mr. Avey, dated May 10, 1938, marked Government Exhibit No. 121, reads:

"This will acknowledge your letter of May 4th in regard to admission prices. Thank you for bringing this to my attention."

After you received that letter, was there anything done with reference to the admission price at which the Alhambra was showing the 1937-1938 pictures?

A. Nothing whatsoever.

Q. They continued to show them at two for a quarter?
A. Yes, sir, sometimes three for a quarter.

[fol. 1371] Mr. Waller: If your Honor please, there is nothing in the bill of particulars about double features.

A. It was two admissions for the price of one.

Mr. Wright: I want to offer at this time Government's Exhibit L-15, Metro contract for the 1937-1938 season. And I would like to call your attention to the admission price provision in Mr. Anderson's contract for second run of the 1936-1937 features, which stipulates a minimum evening and matinee adult admission price of twenty-five cents.

The Court: Is that the contract with MGM?

Mr. Wright: Yes, that is Government's Exhibit L-11. Government's Exhibit No. L-15 is the MGM contract with Crescent for the 1937-1938 features, which provide also minimum adult admission price of 20 cents and the same for the matinee.

Q. Now, I hand you another series of letters exchanged between yourself and Metro; the first from you to Mr. Avey, dated June 2, 1938, and a copy of the letter written by you on or about that date?

A. That is right.

[fol. 1372] Q. And a letter in reply to Mr. Avey, dated June 24, 1938, that was received by you shortly after that date?

A. Yes, that is the letter.

Q. Is this a letter of June 25, 1938, from you to Mr. Avey a copy of the next communication you have?

A. That is right.

Q. And this letter from Avey to you dated June 28, 1938, is his reply, is it?

A. It is.

Q. And this letter of July 31, from you to him, in reply to his last letter?

A. Yes.

Q. And the letter of Mr. Avey to you, dated August 2, 1938, is the next communication you received?

A. That is right.

Q. And this letter of August 8th, from Mr. Avey to you, was the next communication you received from him?

A. It is.

Q. This letter of August 10, from you to Mr. Avey, is a copy of your reply to that letter?

A. It is.

Q. And the letter from Mr. Avey to you dated August 12 is his reply to your last letter?

A. It is.

[fol. 1373] Q. And the letter of August 15th, from you to Mr. Avey is the next letter you wrote him?

A. It is.

Q. And the letter from Mr. Avey to you, dated August 17th, 1938, is in reply to your letter of August 15th?

A. It is.

Q. And this letter of August 18th from you to Mr. Avey is the next letter you wrote him, or a copy of it—or it is the letter itself, I believe, or a photostat?

A. It is.

Q. And the letter of August 22nd from him to you was the next letter you received from him?

A. It is.

Q. And the letter of August 29th from you to Mr. Avey is your reply to his of the 22nd?

A. It is.

Mr. Wright: I will ask to have all these letters which have just been identified, marked exhibit with the Government's serial numbers, in the order of the dates of them.

The Court: All right, let them be so marked.

[fol. 1374] Mr. Wright: I offer in evidence those that have been marked from Nos. 122 to 125, inclusive: The letter dated June 22, 1938, from Mr. Anderson to Mr. Avey, Government Exhibit No. 122, as follows:

[fol. 1375] Mr. Wright: Government's Exhibit number 122, is as follows:

> "I would like to buy your 1938-39 product for this theater, second run, when you are ready to sell it. Please give me the opportunity of working out a deal with you before you sell elsewhere."

Letter from Mr. Anderson to Mr. Avey, June 22, 1938.

A letter dated June 24, 1938, government's exhibit number 123, letter from Mr. Avey to Mr. Anderson, which reads as follows:

> "Replying to your letter of June 22nd, please be advised that we have not as yet closed a first run deal for our 1938-1939 product in Hopkinsville."

Government's exhibit 124 from Anderson to Avey, dated June 25, 1938, and reads as follows:

"Thanks for your letter dated June 24.

"Would also like to make a deal with you for your 1937-38 product, second run, in Hopkinsville. Please allow me the opportunity of working out one with you when you are ready."

Reply of Mr. Avey to Mr. Anderson, August 2nd, 1938, government's exhibit number 125, is as follows:

"Regarding your letter of July 31st, with reference to 1937-38 product second run in Hopkinsville, please [fol. 1376] be advised that Mr. Avey is out of the city at this time but immediately upon his return your letter will be brought to his attention."

Letter of Mr. Avey to Mr. Anderson, June 28th, 1938, Government's exhibit No. 126, and reads as follows:

"Replying to your letter of June 25th, stating that you would like to make a deal with us for our 1937-38 product, second run, in Hopkinsville, I would like to call your attention to the fact that you have twenty-seven (27) pictures undated on our 1936-37 contract. We dislike to place our product under contract unless we know it will be played.

"With the fine quality of product undated I wish you would work out as many dates as you can for July and August in addition to any you have already furnished us with and if by the end of August you have played this product in a manner that would indicate to us that you intend to play the product and not just tie it up, we will be glad to discuss the placing of additional product with you for second run in Hopkinsville."

Letter from Mr. Anderson to Mr. Avey, July 31, 1938, Government's Exhibit No. 127, as follows:

"I am ready to make a deal with you for the 1937-38 [fol. 1377] product, second run, Hopkinsville. I can make a similar deal to the 1936-37 one.

"I have dated all subjects on the present contract and I believe that they will stand with the exception of a few which I might have to move up. Kind regards."

Mr. Wright: At that point I would like to offer the letters in answer to interrogatory 16 I believe it is, which shows at the time this letter—I will have to have it marked first with the next L. number.

The Clerk: L-No. 16.

Mr. Wright: That play-off sheet number L-16.

Government's exhibit number L-16 shows that Mr. Anderson had played three pictures, three MGM pictures for his second run, 1936-37 contract during the month of June at the time this was written, and you will recall that the contract provided for a play-off at the rate of three per month beginning with June first.

Q. Now I call your attention, Mr. Anderson, to the statement in this letter with respect to undated product: do you recall what the facts were at that time with respect to pictures in June that had been dated?

[fol. 1378] A. He is wrong here, there were more pictures than that dated at that time.

Q. What does that contract call for, a total of how many pictures?

A. The contract is over there I believe. Will you get the contract I think it was a total of 29 pictures, and I know I had more than that played or dated, many more than that.

Mr. Wright: Government's exhibit No. 127 dated July 31, 1938, is a letter from Mr. Anderson to Mr. Avey:

> "I am ready to make a deal with you for the 1937-38 product, second run, Hopkinsville. I can make a similar deal to the 1936-37 one.
>
> "I have dated all subjects on the present contract and I believe that they will stand with the exception of a few which I might move up."

This contract is a contract for twenty-nine pictures.

Government's exhibit number 128, August 8, 1938, letter from Mr. Avey to Mr. Anderson:

> "Replying to your letter of July 31st, with further reference to our 1937-38 product, second run, Hopkinsville, we wrote you on June 28th pointing out that you had twenty-seven pictures undated on your 1936-37 contract. In your letter of July 31st you state that you have all subjects under contract dated. It

is true that they have been dated since my letter of the [fol. 1379] 28th but the dates run into March, 1939.

"Now, if it is going to take you until March to complete your 1936-37 contract, it would not be good business for us to place out 1937-38 product with you at this time. If you want to change your dates on the 1936-37 product and play each picture as soon as available after first run we will be glad to negotiate a deal on our 1937-38 product for second run Hopkinsville."

Q. Now was there any provision in your contract for 1936-37 Metro pictures first run which provided that they were to be played off before March, 1939?

There was not. All those pictures have been played first run I think in the deal by May.

Q. Your understanding was that they had been played first run and the ones you had not bought had been played second run in Hopkinsville on the 1936-37 product?

A. That is right.

Q. I am calling your attention now to the provision in the contract that you were to play them off at the rate of three per month, and if there was any understanding of any sort that they were to be played prior to March, 1939?

A. There was not.

[fol. 1380] Mr. Wright: The next exhibit is Number 129, a letter from Mr. Anderson to Mr. Avey:

"I have your letter dated August 8. We will have no difficulty in working out suitable dates and I am ready to make a deal. Please advise. Kind regards."

The next exhibit is number 130, letter from Mr. Avey to Mr. Anderson, dated August 12, 1938:

"Thanks for your letter of August 10th. We are very happy to know that you intend working out suitable dates for our product and we look forward to receiving them."

The next number is Government's exhibit number 131, letter dated August 15th, 1938, from Mr. Anderson to Mr. Avey:

"It appears that for some reason you wish to write evasive letters—let's get down to cases.

"I shall be happy to work out suitable play dates when we make the contract. I am also interested in making a deal for the 1938-1939 product, second run. Please advise.

Government's exhibit. Kind regards."

Government's exhibit 132, dated August 17, 1938:

[fol. 1381] "Dear Mr. Anderson: Replying to your letter of August 15th, we are at a loss to understand why you say we write evasive letters. We have been very emphatic in all of our correspondence with you. We wrote you on August 8th pointing out that the way you were dating your 1936-1937 contract you would not complete playing that season's product until March, 1939.

"In order not to be a bit evasive—what we want to know is this: In the event we make a deal with you for our 1937-1938 product, second run, Hopkinsville, when would you agree to commence playing that product? And how many pictures a month would you agree to play?

Yours very truly."

Mr. Wright: I next read Government Exhibit No. 133, Anderson's reply to Mr. Avey, of August 18, 1938, as follows: (Reading)

"Dear Mr. Avey: Thanks for your letter dated August 17th.

"I believe that we will be able to play or pay, for all the product in question by June 1, 1939 or sooner if necessary.

Kind regards. Yours very truly. . . "

Mr. Wright: The next letter of August 22, Government [fol. 1382] Exhibit No. 134, as follows: (Reading)

"Dear Mr. Anderson: This will acknowledge receipt of your letter of August 18th in reply to ours of August 17th.

"Your letter certainly does not answer the last paragraph of our letter in which we asked when would you agree to commence playing and how many pictures a month would you agree to play. What we want to know is, in the event we sell you our 1937-8 product for second run, Hopkinsville, Kentucky, when will

you commence playing it and how many pictures will you play each month.

"Yours very truly . . ."

Mr. Wright: Now, if your Honor please, I would like to call your Honor's attention to this point, that at the time that last letter was written, the play-off record shows that Mr. Anderson had played then more Metro pictures than he was required to play; the contract required him to play three of them and he was then ahead of the contract provision.

The Court: That is Exhibit L-16?

Mr. Wright: Yes. The next Exhibit is No. 135, dated August 29, 1938, from Mr. Anderson to Mr. Avey as follows: (Reading).

[fol. 1383] "Dear Mr. Avey: I have your letter dated August 22.

I thought you would understand that I meant to work out the playing arrangement with you at the time we made the contract. I was, and am, willing to agree to any reasonable arrangement. You know the going is plenty tough in this situation and I need product badly. I can use your 1937-38 and your 1930-39 product, second run. I can use thirty pictures on each group and will be able to play five a month for twelve months ending October 31, 1939; this is disregarding the pictures that are now dated. If this is not satisfactory, I might be able to do some better.

Kind regards. Sincerely yours . . ."

Mr. Wright:

Q. At the time this letter was written was at the end of the 1937-1938 season, that season was then over, was it not?

A. Yes sir, just about.

Q. Did you get any reply to that letter?

A. What is the date of that letter?

Q. Show him the letter.

[fol. 1384] A. (Referring to letter) I don't remember whether I did or not.

Q. Well, at any rate, were the 1937-1938 or 1938-1939 ever offered to you for second run?

A. They were not.

Q. I call attention to this letter written October 17, 1938, and ask you if that is a copy of the letter you wrote to Mr. Dave Alterman, Vitagraph, Incorporated, at Atlanta, Georgia, on or about the date it bears?

A. Yes sir, that is the letter.

Mr. Wright: I will ask to have that marked with the next Government Exhibit Number, Government Exhibit No. 136.

(Copy marked Government Exhibit No. 138.)

Mr. Wright:

Q. I will show you a letter dated November 29, 1937, from you to RKO in Indianapolis, and will ask you if that letter was written by you on or about the date it bears?

A. Yes sir.

[fol. 1385] Q. Is this letter dated December 4, 1937, from RKO, a reply to your letter you referred to, your letter of November 29, 1937?

A. Yes it is.

Mr. Wright: I will ask that these letters be given the next Government Exhibit numbers, in the order of the dates that they bear.

(Letters marked, respectively, Government Exhibits Nos. 137 and 138.)

Mr. Wright: I now ask to have this RKO second-run play-off sheet, which was produced by RKO in answer to Interrogatory 16, marked with the next RKO Exhibit Number.

(Copy marked Government Exhibit No. 136.)

Mr. Wright: I offer in evidence letter to Mr. Dave Alterman, Vitagraph, Inc., Government's Exhibit No. 136, and which reads as follows: (Reading)

"Dear Mr. Alterman: I am submitting the following list of subjects to be booked which will complete my commitments at this theatre.

There is one thing I would like to have you do for me, that is, for you to apply the amount of film rental already paid on TOVARICH to another subject. I do not believe that TOVARICH is the right kind of pic-

[fol. 1386] ture for this town. You will note that I

have eliminated it from my bookings. Would also appreciate having the privilege of picking up some additional shorts later on. Your company has good shorts and I will need additional shorts soon * * *"

This statement at the bottom of the titles of pictures and dates I don't think are material.

The last paragraph says: (Reading)

"Kindly advise just how you wish to take care of the remittance already paid on TOVARICH; also, would like to know if your company intends to sell us this year's product, second run. I appreciate that we were slow in dating some pictures but you know as well as I do that Crescent Amusement Company was slow in dating frist run. Some of the dates that I have submitted to you in this letter were subjects that have not yet played first run.

Kind regards. Sincerely yours * * *"

Q. What were you referring to there?

A. I think that was 1938-1939.

Q. These booking dates refer to 1937-1938 product that you were just finishing playing?

A. Just finishing the commitment of that contract.

Q. These pictures that you were dating were also following the Crescent?

[fol. 1387] A. Yes, waiting the completion of first run before I could date.

Q. What were they; those that had been rejected on first run, those that you dated in advance of the first run, were they?

A. Yes. I don't think there were many like that though.

Q. (Reading) "I am enclosing an ad which appears in today's paper in which the Alhambra is advertising two-for-one. The admission is 14¢ Matinee; 23¢ Evening. What is this socalled gag about first run product being run for less than 15¢?"

Q. What was the ad you were referring to there?

A. That was a two-for-one that they had, some short subjects they were playing from Warners, some of the Warner products were being played that way.

Q. What admission were you charging for your second run on Warner product?

A. Second run, 25 cents.

Q. Did Warner Brothers ever offer you second run of the 1938-1939 feature product?

A. No sir.

The Court: The letter is addressed to Vitagraph, incorporated?

Mr. Wright: That Vitagraph, Incorporated, is a one hundred per cent selling agency of Warner Brothers of their own pictures.

[fol. 1388] Now, I offer in evidence Government Exhibits Nos. 137 and 138. I read the first letter, dated November 29, 1937, from Mr. Anderson to RKO Indianapolis, as follows: (Reading)

> "Gentlemen: Please advise by return mail if your product is available here, first or second run, features and short subjects.
>
> Very truly yours * * *"

I next read Government Exhibit No. 138, dated December 4, 1937: (Reading)

> "Dear Mr. Anderson: Replying to your letter of November 29th, kindly be advised that our product is sold in Hopkinsville first and second run to Mr. Sudekum.
>
> Yours very truly * * *"

Mr. Wright: I would like to have the RKO play-off sheet. What is the number?

The Clerk: RKO-4.

Mr. Wright: RKO-4 shows pictures played second run in Hopkinsville, that were released by RKO during 1937-1938 season, second run, Alhambra, Crescent house. It shows that 9 RKO 1937-1938 features were played under a contract made on November 19, 1937, and there were 8 more that were played under contract made in the year 1938, and the rest were unplayed.

[fol. 1389] Q. Mr. Anderson, you and your partners in the Hopkinsville Theatre sold to Crescent Amusement Company in November, 1938?

A. That is right.

Q. When was the first time any representative of that Company came around to see you about selling the theatre?

Mr. Waller: That is improper. Nobody has said that any representative came around. We object to the form of the question as leading and suggestive.

The Court: Did a representative of the Company come to see you?

A. Yes sir.

The Court: All right, go ahead.

Mr. Wright:

Q. Will you state when that was please?

A. I don't know the first time we talked about it but it was not when someone came to see me. I am not so sure when I started talking about the sale. They did come to see me, but I met them on the street first and talked to them.

Q. Who did you first talk to about a deal on the street?

A. Mr. McGowan.

Q. Mr. McGowan?

A. That is right.

Q. Who is he?

A. He is an official of the Crescent Amusement Company.

[fol. 1390] Q. What was his job?

A. I don't know exactly what his title is. He is one of the officials.

Q. Where was the conversation had with him?

A. In a restaurant next to the theatre.

Q. When was this?

A. I think it was early in the summer of 1938.

Q. What was said then?

A. Well, we talked about the theatre business for a while and during his conversation Mr. McGowan says something to the effect, did I think I would be better off by going back to the Company and disposing of the theatre. That was about all there was to it.

Q. Going back with what Company?

A. Crescent Amusement Company. At that time I told him I wasn't able to do anything like that because my partners were satisfied and I was satisfied and had too much money invested to just push it around.

[fol. 1391] Q. Then what was said? Did you have any further conversations with Mr. McCown?

A. Not for sometime after that.

Q. How much later?

A. I saw Mr. Baulch on the street, oh, sometime after that.

By the Court:

Q. About how long, he says?

A. Oh, it was during the summer of 1938. It is pretty hard to remember exactly, Judge, when it was. Anyway, I was talking to him on the street and he and I always had lengthy conversations and during this conversation something was said in reference to disposition of my theatre.

Mr. Wright:

Q. What was said? Do you remember the substance of the conversation?

A. He asked me if I didn't think I would be better off with that same amount of money invested elsewhere and I agreed with him that I probably would.

Q. Did you see him after that again?

A. Yes, sir, I saw him five or six times after that.

Q. And the same always occurred?

A. Always the same.

Q. How did you finally get to the point where you made arrangements to sell?

[fol. 1392] A. I hadn't intended to sell until up in November and I decided that it would be best if I did sell and get rid of one of my partners, take my money and get out of this situation, and bought one of my partners and get the business to myself, which was at Eddyville and Hartford.

Q. Who did you see and who did you talk to about making the final deal?

A. Mr. Baulch. When the final deal was made Mr. Baulch, Mr. Hayes and I believe Mr. McCown was present.

Q. Did you ever talk to Sudekum about it?

A. No. I believe I did see Mr. Sudekum during the summer and told him I had talked to Mr. Baulch but I didn't know whether anything would be worked out or not. Mr. Sudekum didn't say much about it. He just told me, well, perhaps Baulch would be back to see me and that is about all the conversation that was had.

Q. When was it you worked out the deal—was that at Hopkinsville?

A. Was it at Hopkinsville?

Q. Yes.

A. It was in Hopkinsville.

Q. When was that?
A. It was in November.
Q. What date, do you remember?
A. It was around the 21st or 22nd or something like that.
[fol. 1393] Q. Who was present then?
A. Mr. Baulch, Mr. Hayes and Mr. McCown.
Q. Who is Mr. Hayes?
A. He is an official of the Crescent Amusement Company.
Q. Do you know what his first name is?
A. Webb, I believe it is.
Q. You finally made a deal then?
A. That is right.
Q. What was the deal that you made?
A. Well, I agreed to sell my business for $15,000.00.
Q. That was about what you had in it?
A. Just about.

By the Court:

Q. What did that include, now, just the theatre?
A. That included the lease and all the equipment.
Q. Just the theatre in Hopkinsville?
A. Yes, sir.

By Mr. Wright:

Q. Now, at that time was anything said with reference to agreeing not to compete with them?
A. There was.
Q. What was the conversation about that?

Mr. Waller: That is objected to.
Objection overruled.

A. At the time that we talked and discussed the deal and [fol. 1394] agreed to terms, why, Mr. Baulch said something about they would like to have an agreement whereby I wouldn't enter into their towns in the future, and I said, "Well, that would be agreeable with me if they would make the same agreement."

By Mr. Wright:

Q. What was the agreement you worked out with respect to that?

A. Well, it was for a ten year period, we wouldn't enter each other's towns.

By the Court:

Q. Wouldn't compete against each other?

A. That is right.

Mr. Wright:

Q. Then was anything said at that time with respect to continuing operation or closing the theatre?

A. Yes, sir, that was. I wanted to run until the first of the year but Mr. Baulch thought that maybe Mr. Sudekum would rather close the theatre sooner, and he called Mr. Sudekum and after his conversation with him he told me that they thought it would be best to close sooner than that; they would like to close it, I think, the following week that we agreed upon.

Q. Did he tell you why?

A. Well, they didn't intend to operate the theatre.

Q. Then you stayed on and closed the theatre yourself?

A. I stayed on and closed the theatre myself.

Q. And is it still closed?

[fol. 1395] A. Yes, it is.

Q. By the way, did you bring a copy of that agreement that you would not compete with him?

A. No, sir.

Q. Do you have a copy?

A. I do have a copy of it, yes.

Cross-examination.

By Mr. Waller:

Q. Mr. Anderson, when you left the Crescent Amusement Company and opened the Kentucky Theatre in 1937, was that the first time that you had had any experience in dealing with these film distributing companies about films?

A. No, sir.

Q. You had previously been in the theatre business?

A. Yes, sir.

Q. Where was that?

A. Well, I have been in the theatre business for a good many years all the way from Missouri to New York.

Q. Then after you closed the Kentucky Theatre you continued in business in those other towns in Kentucky?

A. Yes, sir.

Q. Have you always found this MGM, Metro as hard to deal with as you did——

A. This year is the first time I ever made a deal with Metro.

Q. You have found them tough people to deal with?

[fol. 1396] A. Well, I have had difficulty making deals with them.

Q. You say this year is the first time you have ever made a deal with them?

A. Yes.

Q. You don't think the Crescent Amusement Company had anything to do with your failure to make deals, do you?

A. No.

Q. And you don't think the Crescent Amusement Company had anything to do with the trouble there in the Kentucky Theatre?

A. You mean on this Metro deal?

Q. Yes.

A. I wouldn't know if they did.

Q. Now, when you opened the theatre——

By the Court:

Q. Which deal are you speaking of that you don't think the Crescent Amusement Company had anything to do with the failure to make?

A. Well, I don't know as the Crescent Amusement Company had anything to do with the difficulty I had obtaining product in Hopkinsville. I mean, I have no way of knowing that they did.

By Mr. Waller:

Q. But you have always found them tough to deal with whether you were in towns where you had competition or had no competition?

A. You see, I have never been able to make a deal with Metro, speaking in Kentucky, until this year. At the time I operated the Kentucky Theatre in Hopkinsville I was [fol. 1397] operating the Eddyville Theatre and also Hartford and one of my competitors was buying Metro product, the competitor to me in Hartford is located in Beaver Dam, and I was never able to get the product away from him.

Q. Who was that competitor there?

A. A fellow by the name of Durham.

Q. Was he an independent? Or chain?

A. He was an independent.

Q. Now, in 1937 when you opened the Kentucky Theatre I believe you stated you had first run Columbia product, first run Paramount product, second run Fox product and second run Warner product?

A. Not when we opened we didn't.

Q. Well, shortly after that?

A. We opened with first run Paramount and first run Columbia and first run Grand National.

Q. And then shortly after you got this second run Fox and Warner?

A. That is right, selective deals.

Q. Now then, what about United Artists?

A. I didn't get United Artists until later. I think it was during the winter, January or February, sometime then. I know it was.

Q. Did you try to get it before then?

A. I think I did; I don't recall. They were selling that product, you see. At that time that product was sold to [fol. 1398] Crescent Amusement Company and the product that I later bought was 1937-1938 product which was not, they didn't start releasing it until September of 1937.

By the Court:

Q. You mean it was sold when you opened?

A. It was sold, the current product was sold when I opened.

By Mr. Waller:

Q. But eventually you got first run Columbia for 1936-1937, first run Paramount for 1936-1937?

A. Yes.

Q. And second run Fox for 1936-1937?

A. I think that was the 1937-1938. I don't recall but I think that was 1937-1938.

Q. You could have gotten 1936-1937 Fox?

A. I don't know whether it had been sold or not. I don't know whether it had been played.

Q. Now then, that second run Warner was 1936-1937?

A. I think that was 1937-1938, Warner was.

Q. Then you got first run United Artists for 1937-1938?

A. I got that very late in the season. I think that was around the first of February.

Q. And you had first run Columbia for 1937-1938 as well as 1936-1937?

A. That is right.

[fol. 1399] Q. And then did you make a deal with Columbia for the 1938-1939 product?

A. Yes, I think I did. I think I did right before I sold out.

Q. So with all of those deals that you had, you had enough pictures to keep your theatre running and changing programs three or four times a week?

A. Well, it was hard sometimes dating pictures when you didn't have any more than I had.

Q. But as a matter of fact you were able to do it and keep the theatre going?

A. I kept it open but I had to play a lot of pictures I shouldn't have played.

Q. You mean you had to play sometimes B pictures?

A. I had to play some C's, D's and E's.

Q. Now, the Crescent Amusement Company played some B pictures too, didn't they?

A. I imagine they did. They often do.

Q. And that was some of the occasions when they were having those Two for One nights, wasn't it?

A. No. They played some pretty good pictures Two for One; some mighty good ones, in fact. I would have been mighty glad to have had them for a twenty five cent admission.

Q. Now, all of these picture contracts contain clauses for [fol. 1400] minimum admission prices, don't they?

A. I believe they do. Most all that I have signed do.

Q. You never have signed one that didn't have such a clause?

A. I don't remember it.

Q. When you made this contract with Metro for the second run pictures in April, 1938 and agreed to maintain a minimum admission price of twenty five cents at night did you protest against that?

A. No, I did not because I thought that was a fair price. I thought they should get twenty five cents.

Q. You wanted to operate your theatre on a twenty five cent admission price?

A. Yes.

Q. And you never tried to get any of these companies to agree that you reduce the admission price?

A. No.

Q. Now, you were satisfied with the way things were going there with your theatre in the early part of 1938 when you first talked to Mr. McCowan?

A. Yes sir.

Q. It wasn't until the fall of 1938 that you made up your mind it would be better to get your money out?

A. That is right.

Q. And you did get your investment out of this, $15,000.00?

A. That is right.

[fol. 1401] Q. And you bought out one of your partners?

A. Well, what I did, you see, one partner that I had, F. L. May, had a one third interest in the Hartford and one third in the Eddyville, and Mr. Taylor one third interest in Hopkinsville only and by my disposing of the Hopkinsville enabled me to buy Mr. May's interest in the other two theatres and give both of those two situations to myself.

Q. So now you have four theatres in those small towns?

A. That is right.

Q. Did you deal with the Indianapolis Exchange on this Warner Brothers deal?

A. Yes sir.

Q. Do you remember the occasion when the Indianapolis Exchange manager made a deal with you on Warner product and the Atlanta branch manager made a deal with Mr. Sudekum on the same pictures?

A. I remember some confusion about it. The branch manager didn't make a deal with me on Warner product. The salesman made the deal with me.

Q. The salesman from the Indianapolis office?

A. That is right. They later told me they had a second run deal with Mr. Sudekum at the time this deal was made; the deal had been made out of Atlanta and they asked me to release them on that product and I wouldn't do it.

Q. Well, you got the product?

[fol. 1402] A. I got the product; that is right.

Q. Mr. Sudekum released it to you?

A. I don't know who released it. Anyway, I got the product.

[fol. 1403] The Court: What company was that with?

A. Warner.

Cross-examination.

By Mr. Frolich, For Columbia:

Q. Mr. Anderson, was Mr. C. P. Taylor connected with you?

A. Yes, sir, and still is.

Q. And still is; in 1937 was he your partner in the Rex Theater in Hopkinsville?

A. That is right.

Q. Would you recognize his signature if I showed it to you? (Exhibiting paper to witness)

A. Yes, that is it.

Mr. Frolich: I would like to put in evidence the contract between Columbia and C. P. Taylor for the 1936-1937 product.

Mr. Wright: This is for what theater?

Mr. Frolich: The Rex Theater.

A. That was changed to the Kentucky, Mr. Wright; it was [fol. 1404] formerly the Rex.

Q. I will show you a series of ten contracts for the 1937-1938 and the 1938-1939 product of Columbia, and ask you whether your signature is affixed at the foot of each of these contracts?

A. That is right.

Mr. Frolich: I would like to offer as a collective exhibit, these 10 contracts. (C.-40, from 1-10.)

Q. Now, Mr. Anderson, you knew that Columbia had been selling to the Crescent Amusement Company in Hopkinsville for the four seasons prior to 1936-1937?

A. Yes, but they didn't sell the 1936-1937.

Q. No; but I say for the four seasons prior?

A. Yes, that is right.

Q. And then you and Mr. Taylor obtained all of Columbia's product for the seasons commencing 1936-1937, and ending with 1938-1939, is that right?

A. That is right.

Q. And you played off and Mr. Taylor played off product for the 1937-1938 season?

A. That is right.

Q. Now, as to the 1938-1939 play off?

A. We didn't play all of them.

[fol. 1405] Q. And Columbia didn't bring suit against you for the money that you should have paid them under the contract?

A. No, sir.

Q. Columbia treated you very fairly?

A. Yes, sir, always has.

The Court: As I understand you, prior to 1936-1937, Columbia had been selling the pictures to Mr. Sudekum in Hopkinsville?

A. Yes, sir,—I think that is right, isn't it?

Mr. Frolich: That is correct. (Exhibit C-39 was offered)

Re-direct-examination:

Q. When was it with reference to the 1936-1937 licensing season that you were offered the 1936-1937 features?

A. I think the 1936-1937 features were, I think, in the end of September, 1936; we weren't in the——

Q. Everything had been licensed before you opened it?

A. No, sir, we didn't try to buy films until up in 1937.

Q. Now, the Warner 1937-1938 second run contract: Were you told by anybody that Mr. Sudekum had—What was said to you with reference to that contract as to Mr. Sudekum's activities, if anything?

A. Oh, you mean on that second run deal?

[fol. 1406] Q. Yes?

A. Well, after the deal was made, I was astounded that he even offered the product to me, and when he offered the product to me and we signed the contract I thought there was something strange about it at the time; and so a couple of weeks later they approved the contract by telegram, and I was up in the air; and I says, Here, I have the Warner contract anyway; and Mr. Schrader, a few days after that, told me that they had no right to sell the second run, that it had been sold out of Indianapolis and they had no right to sell it out of Indianapolis, and they wanted me to release it and I said no, I wouldn't release it; I couldn't release it then; he tried to get me to release it.

Q. You made a valid, accepted contract, didn't you?

A. Yes, sir.

(Noon Recess.)

[fol. 1407] Oscar A. Morgan, Called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. My name is Oscar A. Morgan; New York City.

Q. Your occupation, Mr. Morgan.

A. I am a Sales Executive of Paramount Pictures, Incorporated.

Q. Were you with Paramount Pictures on March 20, 1935?

A. Yes.

Q. In what capacity?

A. As General Manager of the Southern District in Atlanta, Georgia.

Q. I show you a telegram dated March 20, 1935, from you to William F. Bugie, Paramount Pictures, Memphis, Tennessee, and will ask you if you sent that telegram on or about that date, in the course of performing your duties as Southern District Manager?

A. I would say, yes.

Mr. Wright: I will ask to have the telegram marked as the next Government Exhibit.

(Telegram marked Government Exhibit No. 147)

Q. You were also employed by Paramount on October 1, 1937?

A. Yes sir.

Q. In what capacity?

A. In the same capacity.

[fol. 1408] Q. Southern District Manager?

A. Yes.

Q. I show you a letter from you to Mr. A. J. Barnard, Paramount Pictures at Indianapolis, dated October 1, 1937 and ask you if you wrote that letter on or about that date, in the course of performing your duties as Southern District Manager?

A. Yes sir, I wrote that letter.

Mr. Wright: I would like to have that letter marked the next Government Exhibit number.

(Letter marked Government Exhibit No. 148)

Q. You were also employed by Paramount Pictures on February 11, 1938?

A. Yes sir.

Q. In what capacity?

A. I think the same capacity at that time.

Q. I show you a letter from you to Mr. J. J. Unger, Paramount Home Office, dated February 11, 1938, and will ask you if you wrote that letter on that date, in the course of your duties as Southern District Manager?

A. Yes sir.

Mr. Wright: I would like to have that marked as Government Exhibit, the next number.

(Letter marked Government Exhibit No. 149)

Q. You were also Southern District Manager for Paramount on February 16, 1938?

[fol. 1409] A. Yes sir.

Q. I will show you a memorandum that you wrote, dated February, 16, 1938, with reference to Gallatin, Tennessee, and ask you if you wrote that on or about that date in the performance of your duties as Southern District Manager?

A. This is not a letter, it is a memorandum.

Q. That is what I described it as; your answer is Yes?

A. Yes.

Mr. Wright: I would like to have that given the next Government Exhibit number.

(Memo marked Government Exhibit No. 150)

Q. I will show you a letter dated August 6, 1938, from you to Mr. J. J. Unger at the Home Office, and ask you if that letter was written by you in the course of your duties as Southern District Manager of the Paramount?

A. Yes sir.

Mr. Wright: I would like to have that marked with the next Government Exhibit number.

(Letter marked Government Exhibit No. 151.)

Q. I show you a letter dated November 14, 1938, from you to Mr. J. J. Unger, at the Paramount Home Office and ask you if you wrote that letter on or about that date in the course of performing your duties as Southern District Manager?

A. Yes sir.

Mr. Wright: I will ask that that be marked with the next Government Exhibit number.

[fol. 1410] (Letter marked Government Exhibit No. 152)

Mr. Wright: I now offer in evidence this first Exhibit telegram from Mr. Morgan to Mr. Bugie, which has been marked Government Exhibit No. 147, for identification.

The Court: Don't you want to read it.

Mr. Raftery: If your Honor please, regarding this telegram, and the other exhibits, so that there will be no misunderstanding between the Government and Counsel on this side of the table; as we understand it, Mr. Wright, this evidence is being offered only against Paramount as a distributor, and not against any other distributor, whether the distributor is named as a co-conspirator or as a defendant. Specifically, what I mean is, this evidence is not being offered against either of the Universal, or United Artists Corporation, or Columbia Pictures Corporation?

Mr. Wright: That is correct.

The Court: It is offered, as I understand it, now, under the Government's theory that there was a conspiracy between the individual distributors and the exhibitors in this case, and not a general conspiracy among the distributor defendants.

[fol. 1411] Mr. Armistead: Of course, Crescent Amusement Company is going to object and does object to the introduction of these letters and telegrams referred to and already filed for identification, for the purpose of evidence in this case, on the ground that there was been no evidence of any conspiracy, between Crescent Amusement Company and the Paramount.

The Court: All right, let me hear the telegram and I will pass on it.

Mr. Wright: The telegram is dated March 20, 1935, to Mr. Bugie, Manager of the Memphis Branch, and states as follows:

> "Have made deal with Sudekum S-7, therefore void Paris contract and do not negotiate Brownsville or Union City. Writing Under"—This word, by the word "Under", it should be "Unger", is that right, Mr. Morgan?

Mr. Morgan: I think that is right.

Q. That word "Under" refers to Unger at the Home Office?

A. Yes.

Mr. Wright: (Reading continued) "Writing Unger requesting he wire approval. Will advise you. Regards." (Signed) "Oscar A. Morgan."

The Court: Overrule the objection.

[fol. 1412] Mr. Armistead: By your Honor's ruling do I understand that for the time being you overrule my objection? Or does your Honor think there is already sufficient evidence, prima facie evidence of a conspiracy?

The Court: Apparently this proof is offered for the purpose of proving a conspiracy.

Mr. Armistead: Yes, It is, therefore, not competent because there is no prima facie evidence of a conspiracy.

Mr. Wright: We don't concede that, your Honor. We say that that will show some prima facie case of conspiracy as between Paramount and the exhibitor defendants and that this evidence doesn't merely go to show the existence of the conspiracy but also goes to show what was done pursuant to it.

The Court: Well, conspiracy is a hard matter to prove all at once.

Mr. Wright: That is right.

The Court: I disagree with counsel that they have al-[fol. 1413] ready made out a prima facie case of conspiracy so far. There has not been a very strong prima facie case of conspiracy made out with the distributors, individual distributors, as the Court looks at it at this time but this evidence is now being offered, may or may not, I don't know what it will be, but it may be offered for the purpose of also proving the conspiracy.

Mr. Armistead: That is the reason we respectfully submit it is incompetent. There must be shown that there is a prima facie conspiracy before declarations of a co-conspirator are competent.

Mr. Wright: That is one of the ultimate conclusions your Honor will have to draw from the evidence offered in the case, as to whether there was or was not a combination between the defendant exhibitors and the Paramount. This telegram takes the product away from the exhibitor at Brownsville without giving him any opportunity to negotiate for it.

The Court: That may be pursuant to a conspiracy or it may not be pursuant to a conspiracy. I can't tell until I hear this. I will overrule the objection for the present.

[fol. 1414] Mr. Wright: The next Exhibit is Government's Exhibit No. 148.

The Court: Before you get through with 147, that was a telegram saying he had told Bugie to void the contract with whom?

Mr. Armistead: We are going to have to have those exhibits because I'm going to have to have them to cross-examine Mr. Morgan.

Mr. Wright: I would suggest this if you propose to cross-examine on these that you do it exhibit by exhibit and then we wont have that difficulty locating the exhibits.

Mr. Armistead: I couldn't very well do that.

Mr. Waller: Your Honor asked about what the tel-gram said. It says, void the Paris contract and don't negotiate the Brownsville contract. That is what is said as I recall.

The Court: Go ahead.

Mr. Wright: Government's exhibit No. 148 for identifi-[fol. 1415] cation is a letter from Mr. Morgan to Mr. Barnard, Paramount Manager at Indianapolis, which reads as follows:

"Re-Earlington S-10

Dear Mr. Barnard:

I wanted to add to my letter of yesterday regarding Earlington that you please don't do anything definite in this situation on S-10 without first taking it up with Mr. Reagan so he can discuss it with Mr. Unger. I write you at this early date because our deal with Mr. Sudekum is for five years and while he is satisfied to let the deal between Madisonville and Earlington stand as it is for S-9, we don't want to do anything to interfere with our negotiations with Mr. Sudekum for the remaining four years. Confidentially, Mr. Sudekum understands that our customer in Earlington has been playing these pictures for a long time and that we will still retain the right to sell him next year. However, the thing that Mr. Sudekum is objecting to is the matter of protection.

Sincerely yours."

I offer them in evidence.

Mr. Armistead: I think my objection is broad enough to cover all of these instruments.

The Court: Yes sir, it will be so understood.

[fol. 1416] Mr. Wright: Shall I proceed?

The Court: Proceed.

Mr. Wright: Government's Exhibit No. 149 is a letter dated February 11, 1938 from Mr. Morgan to J. J. Unger at the home office.

"In Re Gallatin, Tennessee.

"Replying to your letter of February 10th in regard to Gallatin, Tennessee, it will be absolutely necessary to include Gallatin in the franchise. If you will recall, Sudekum made an issue out of this in New York because even after we had started negotiating with him on the franchise Gallatin had been sold in July and we agreed to include Gallatin for the remaining four years in the total of his product for the Crescent circuit. Incidentally, Tony has built a big, new, beautigul theatre in Gallatin, Roth's old house is a pretty poor one and it is very doubtful if he will be able to continue against Tony's big proposition. For instance, he had a guarantee of $30.00 on Artists and Models, and High, Wide and Handsome, and he grossed $35.50 on Artists and $48.[illegible] on High and Wide. He had $30.00 guarantee on Double or Nothing, and grossed $60.40.

"Yours very truly."

[fol. 1417] Government's Exhibit No. 150 is dated February 16th, 1938, a memorandum from Mr. Oscar A. Morgan, and is marked "Confidential."

(Reading):

"Gallatin, Tennessee.

"Advised Sudekum on the 'phone that the Department of Justice was asking us why we sold our pictures next year and thereafter in Gallatin, Tennessee away from a man who had been our regular customer for years. Outlined the situation to Mr. Sudekum, who stated he was willing to do anything Mr. Unger and I felt was necessary, as he did not want to embarrass Paramount.

"Sudekum suggested that possibly the product could be split and it is my opinion that if a split could be arranged that we let Roth have first six months releases and Tony last six months.

"Advised Mr. Unger by 'phone today of the result of this conversation with Mr. Sudekum and it was Mr. Unger's opinion and my own that he should refer Roth to me and let me find out what it is all about and what is necessary to be done.

"Sudekum stated that Roth had a Fox franchise and that the only product Sudekum has bought for next year in Gallatin is Paramount. Also, stated that the Metro Manager went to see Roth and he wanted to buy only fifteen pictures.

"Oscar A. Morgan."

[fol. 1418] Government's Exhibit No. 151 is a letter from Mr. Morgan to Mr. J. J. Unger at the home office, dated August 6th, 1938, "In re. McKenzie, Tennessee:

With further reference to your letter of July 28, regarding the letter that Mr. Y. D. Moore, of McKenzie, Tennessee, wrote to Mr. Agnew. I have discussed the matter several times with Mr. Sudekum, and he insists that Huntington have protection over McKenzie.

I think there's a little bad blood, Joe, here, caused by certain unethical things that Mr. Sudekum claims have been done by the exhibitor in McKenzie, but be that as it may, I am attaching hereto copy of letter from Bugie, explaining about the situation.

As you can gather, McKenzie is not the only town affected by the clearance. As a matter of fact, several of these small towns over there, bought service, and paid us certain film rentals, when they found out during the S8 and S9 season, that Tony was not going to run pictures, and they got the benefit of it, and now that they have to play behind some of these Sudekum towns, they naturally put up a lot of resistance.

You will note that Bugie says he thinks he is getting this thing straightened out. I discussed it with him on this trip to Memphis, and he feels he is going to sell all of these exhibitors, probably a 10-picture outback.

[fol. 1419] Wouldn't it be the wisest course, therefore, to have Neil write Mr. Moore, and say that because of complications existing where there are a great number of small towns this way, that such matters have to be left mainly in the hands of the District Manager for decision, and that Mr. Moore will therefore understand the reason why Mr. Agnew is referring the entire matter to me, so that I can

advise Mr. Moore. Then I will simply wait a little while before I reply to Mr. Moore, until Bugie has a chance to see him and make a deal, which I think Bugie is going to do.

This will clear the matter up in the smoothest way possible.

Very truly yours, Oscar A. Morgan."

[fol. 1420] Government's Exhibit No. 152 is a letter from Mr. Morgan to Mr. Unger, reading:

"Nov. 14, 1938.

"In Re. Tim Smith Circuit

Dear Joe:

"With further reference to your letter of November 11th, regarding the TIM SMITH Circuit, and which letter crossed my letter to you of November 11th, in the mail.

"When you have returned to us the list showing the pictures on which the film depot has prints on S-8, we will then offer Tim Smith all the pictures on which we have prints.

"Now as regards the last paragraph of your letter about second runs, following shows the population of each town:

Morristown	5875
Harriman	3000
Newport	2753

"In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8, of the Crescent Amusement Company franchise, provides he can repeat any feature [fol. 1421] at a certain given price.

"We will keep you advised as to how we come out selling Tim Smith the first runs.

Very truly yours, Oscar A. Morgan."

[fol. 1422] Mr. Armistead: What is the date of that?

Mr. Wright: That is November 14, 1938.

The Court: Cross-examine him.

Mr. Armistead: Will your Honor indulge us about ten minutes so we can go over these?

The Court: Yes, we will have a short recess.

(Recess.)

Resumption.

Cross-examination.

By Mr. Armistead, for the Defendants Crescent et als.:

Q. Mr. Morgan, when did you first become connected with Paramount?

A. I think it was when they started the first picture, I think it was in 1915.

Q. Have you been constantly connected with it since that date?

A. With the exception of about 16 months, when I was with Harold Lloyd.

[fol. 1423] Q. When you were with whom?

A. When I was with Harold Lloyd.

Q. What positions have you held with that company?

A. Well, I started out in the shipping department; I think then I rose to salesman, salesman in the Philadelphia branch, Manager in Washington; went into the home office to publish the company paper; went into the theater department; from the theater department to Harold Lloyd, and back to Texas as sales manager; Philadelphia as branch, and in the Southeast as district sales manager; division sales manager for the South and part of the East; and now as salesman manager of short subjects and Paramount news.

Q. Now, what is the authority of a salesman—and when I ask what is the authority, I mean what was the authority from August 11, 1934 to August 11, 1939?

Mr. Wright: Excuse me just a minute. Now, if your Honor please, we brought this witness here for just one purpose, and that was to identify the fact that he wrote those letters and wrote them in the ordinary course of business. Now, to assume, while he is here, to save inconvenience and trouble to the defendants, if they want to use him to put in part of their case, if they want to, I think [fol. 1424] it should be understood, that when they are

doing so, it is as their witness and not the Government's.

The Court: Of course, as their witness, but not as on direct-examination.

Mr. Armistead:

Q. Will you answer that question?

A. Answer that question? Well, the salesman negotiates the contracts with the exhibitors, but he cannot close a deal; that is, he cannot approve the deal; it must be approved in the home office.

Q. Now, does that salesman take an application from an exhibitor?

A. The routine is that he negotiates with the exhibitor, writes up a contract, leaves the exhibitor a copy for himself; the contract provides that all approvals must be made in the home office, and the contract isn't valid until it is approved by one of the specified persons named in the contract.

Q. And is that stated in the face of the contract?

A. That is stated in the contract.

Q. Now, after that salesman obtains, we will call it an application, or as we say it is a contract—It is not a con-

[fol. 1425] tract until it is approved?

A. It is an application.

Q. Now, what does he do with that application?

A. He makes out his recommendation and forwards it to a branch manager, and the branch manager then looks it over, makes his decision as to whether he wants to approve it or not; the branch manager can approve it but he can't reject it; if he approves of it, he has the branch statistical department attach the necessary forms to it and sends it to the district manager's office.

Q. That is the district manager's office?

A. Yes.

Q. What does he do with it?

A. He has the right of rejection but not of approval but if he approves of it he adds his recommendation and sends it to the division sales manager.

Q. And does the New York office either approve or reject, is that correct?

A. That is correct.

Q. In other words, the New York office has the final say so?

A. That is correct.

Q. Now, has Paramount any uniform policy in selling pictures, or does it or not take into consideration the location [fol. 1426] of the theater, its appearance and conveniences, and the kind of management or financial ability of the exhibitor, his past record in carrying out his contracts, and the kind of product he has been using and whether or not he has been using the company's product in the past; do these elements enter into or have anything to do with getting the company to make a contract with the exhibitor?

A. Yes, decidedly so; because it has been our policy as long as I can remember for the representatives to place Paramount pictures to the best advantage of the company, the best representation for the company; and all those things and a great many more would enter into a decision as to who you would do business with.

Q. Now, have there been any instances where Paramount would sell a Crescent theater in some towns and would not be selling to it in other towns?

A. Will you repeat that, Mr. Armistead?

Q. Have there been instances where Paramount would sell its films to Crescent in some towns and not sell the films to it in all of its towns?

A. Yes, sir.

Q. In other words, sell some of the films to other exhibitors?

A. Yes, sir.

[fol. 1427] Q. Can you name some instances in which that occurred?

A. We sold pictures to Jack Crawford in Gadsden, Alabama, right up to the time Jack Crawford sold out to Crescent in Gadsden. We did business in Greenville right up to the time they sold out to Crescent. There were some other towns; I can't now recall.

Q. To refresh your recollection, do you remember Franklin, Kentucky?

A. In Franklin we sold the opposition.

Q. How about in Earlington, Kentucky?

A. In Earlington, Kentucky, we sold to the opposition right up to the time he went out of business.

Q. Now, you were questioned relative to Gallatin, Tennessee, and the proof in this case as given by Mr. Roth shows that after Crescent entered that town on or about

November 4, 1937, he made a complaint to the Department of Justice, and the department wrote Paramount, took the matter up with them; was that complaint or matter referred to you?

A. Yes, it was.

Q. At that time what position did you hold with Paramount?

A. District Manager in the Southeast.

Q. With headquarters in what city?

A. With headquarters in Atlanta.

[fol. 1428] Q. Now, did you investigate that matter?

A. I did.

Q. Do you recall about the year?

A. I think it was 1938 or 1939; I couldn't remember the exact year.

Mr. Armistead: Well, without waiving, may it please the Court, my objection to the introduction of the documents which were introduced when this witness was examined directly, I would now like to question him in regard to some of the correspondence.

Q. I hand you here a photostat of a letter dated February 21, 1938, addressed to Mr. J. J. Unger, New York, New York, and signed by W. F. Roth, and ask you if when you were making your investigation you discovered that original letter, of which that is a photostat or copy of it—No, the original?

A. If I recall, Mr. Unger referred the original to me and I sent it back to him, I think.

Mr. Armistead: We would like to introduce and have that letter marked Exhibit No. 67, I believe it is, to the defense evidence.

[fol. 1429] The Clerk: No. 48.

Mr. Armistead: No. 48, as evidence in the case. (So marked by Clerk)

Mr. Wright: If the Court please, it is a letter from Mr. Roth to Mr. Unger; I think it should have been offered at the time Mr. Roth was on the stand.

The Court: Yes; if it is offered for the purpose of proving any of the facts contained in the letter, of course it is not competent at this time.

Mr. Armistead:

Q. Wasn't this a letter sent to you in Mr. Unger's letter to you?

A. Yes, there is another letter from Mr. Unger in which he sent the letter to me and requested me to investigate it.

Mr. Armistead: May it please the Court, I think that would be competent if the Justice Department made a complaint and this witness began to investigate and found those letters.

The Court: For what purpose do you wish to introduce the letter?

[fol. 1430] Mr. Armistead: To show that he investigated the matter and made a conclusion, and he had to have those letters before he could make a conclusion as to whether or not the complaint of Mr. Roth was justified, and it would explain the evidence put in by the Government; I am trying to make a picture of what occurred up there; and this correspondence that I want to introduce would just give a complete picture of it.

The Court: Well, let me see the letter. (Court examines the letter.)

[fol. 1431] (Passed to the Court.)

The Court: As I recall Mr. Roth testified something about a letter of this kind.

Mr. Armistead: Testified about correspondence passing between him and the Company.

The Court: This letter also mentions receipts from Artists and models that were introduced, on direct testimony, in some documents—bring me those yellow sheets on my desk. Well, I saw Mr. Roth here in the court room this morning. You can get him as a witness if necessary.

Mr. Wright: This is just to show that a matter came to his attention, we have no special objection, but it is not material.

The Court: I do not think this is very material anyway, you have introduced some evidence in connection with this particular matter with this witness.

Mr. Armistead: This letter is as follows:

[fol. 1432] "It is dated February 21, 1938, Mr. J. J. Unger, "In reply to yours of the 17th, wish to advise you that I will not be in Atlanta any time soon,

as I have only made this trip three times in the last twenty years.

"As you know, I've been a consistent user of Paramount pictures for around 20 years and during that time have paid you plenty in overages and our relations have been very pleasant. I haven't asked any favors of you for quite a number of years, but am going to lay the cards on the table and think that you will agree with me that your product this year has been below par with the rentals higher.

"I am listing the pictures used along with rental and receipts for the engagement.

(Then there is a list).

"I discussed this with Mr. House when I was in Atlanta, but he seemed to think that the product was holding up satisfactory. Naturally, I've been in the business too long to think that; in fact, I have some product at $17.50 and $18.00 that has grossed more in one day than the above pictures have in two days and it wasn't on a Saturday.

Please check the above figures over and let me know what you think would be fair in the way of adjustments.

[fol. 1433] "Awaiting your valued reply, I remain,

Yours very truly (Signed) W. F. Roth."

The Clerk: Defendants' exhibit Number 38.

Mr. Armistead: There is another letter which I now hand you a photostat of, and ask you if you received that letter, which is dated March 10, 1938, from Unger to you? (Passed to witness.)

A. Yes, sir.

Mr. Armistead: Now this letter is as follows:

"Dear Oscar: Will you please advise me immediately if you have sent your salesman or Manager to Gallatin, Tennessee, to see Mr. Roth and make a deal for next year for half of Group S-10?

"I am also attaching hereto copy of letter received from Mr. Roth which indicates that he is losing considerable money on our product. Be sure that someone investigates this when negotiating a deal."

Q. Is that the letter that this February 21st letter refers to?

A. Yes, sir, that is the letter. I was under the impres-
[fol. 1434] sion that he sent the original letter back to him.

Mr. Armistead: We offer that letter in evidence as Defendants' Exhibit No. 49 to this proof.

Q. Now on March 14, 1938, did you write Mr. Unger as per photostatic copy which I now hand you?

A. Yes, I wrote that letter.

Mr. Armistead: Defendant offers that in evidence as defendants' exhibit No. 50.

Mr. Wright: If the Court please, it is obviously a self-serving statement written by Mr. Morgan here after the investigation got underway. I do not see that it is of any probative value.

The Court: Let me see the letter.

Mr. Armistead: It ought not to be objected to. All these photostats that I am offering in evidence, I think the Government will agree are photostats that were made when they went through Paramount's files, and made at our expense and furnished them a copy of them; is that correct?

[fol. 1435] Mr. Wright: That is correct.

The Court: Overruled. (Marked Defendants' Ex. No. 50.

Mr. Armistead: Now this is as follows: Dated March 8, 1938, signed by you:

> "Replying to your letter of March 10, in regard to Roth at Gallatin, Tenn., I am attaching hereto copy of letter from Mr. House to me on his visit there.
>
> "Briefly, House tells me the exhibitor absolutely would not commit himself as to whether he would take a split of the product, or whether he would even be willing to pay the same price for S-10 as he is paying for S-9. House says that Roth had his guard up completely and kept talking about waiting thirty days before discussing anything. House believes that Roth is trying to be cunning to force us to come to him with a direct proposition.
>
> "My instructions to House were to approach Roth on the basis that we had sold the product to Sudekum, but that we might see what we could do in regard to getting him a split. He refuses absolutely to commit himself. In fact, House said he was extremely non-committal about everything except that he wants a re-

[fol. 1436] duction on his present contract. Of course, I think, or rather I know, that his receipts must be very badly affected, because of Sudekum's new theatre.

"I plan to be in Nashville the end of next week and I think I will just borrow a car from Tony and drive over to Gallatin myself. I want to *fo* over the franchises with Tony completely before returning them to you.

"House's personal opinion of this Gallatin situation is that we should go right ahead and make our deal with Sudekum and forget Mr. Roth. He says he does not like Roth's attitude, nor the fact that he seems to think Paramount should lead the way and give him all of our pictures.

"It is just a question of policy, and I personally feel that the most we should do is split the product.

Yours very truly."

Now then on March 11, 1938, I will ask you if Mr. House wrote you a letter, photostat of which I now hand you?

Mr. Wright: If the Court please, we now have it offered [fol. 1437] here through this witness, the letter from Mr. House and I think we ought to have the same opportunity to cross-examine Mr. House, before any of his letters go in, to the same extent that Mr. Armistead has.

The Court: Yes.

Mr. Armistead:

Q. I hand you that letter, he doesn't know the purpose I am handing them to him for, to refresh his recollection if I can, if he can answer this next question I am fixing to ask him.

The Court: All right.

Mr. Wright: I think it will appear later, if the Court please, that this witness does not need any refreshing, because he has been around here two days being refreshed.

Mr. Armistead: He must have had the FBI around.

The Court: Why do you not ask the question?

Mr. Armistead:

Q. Did you offer Roth a split deal?

[fol. 1438] A. Decidedly, yes.

Q. Did he accept it?

A. No.

Q. What do you mean by a split deal?

A. A split deal is a very usual thing in this business, where there are competitive theaters and where both are customers, have been old customers of the company, that a fair division of the product is offered to both of them, and usually accepted, like this exhibitor, where there is a split deal, they themselves know in advance what picture he is going to get so he can advertise it ahead of time. Prior to the consent decree in the case he kept his program ahead, in fact it would be a rather foolish policy to do that, it would be dangerous to make pictures a year in advance and then find the public tast- had changed, therefore production was curtailed and for months. However, he would know this, the ow-er of the split deal therefore was well known, where distributors would announce, and would announce prior to the agreement would be to come in between the exhibitors, the fact that the exhibitors would split the product into two blocks with an equal interest, because one exhibitor would make the selection in that manner and the other the other time, one would select product for two months, split it, and the other exhibitor would make the choice, and then on the other two months the other exhibitor would make the division, and this exhibitor would select, and that would give a satisfactory split. [fol. 1439] Q. In other words, it was the purpose then to give each of those two exhibitors the same basis?

A. That is correct.

Q. On an equal basis?

A. Yes.

Q. Now, did you ever go over there to Gallatin?

A. Yes.

Q. Have you ever been in Mr. Roth's theatre?

A. Yes.

Q. Did you ever see pictures of the interior and exterior of the Crescent Theatre there?

A. I have seen the Crescent.

Q. How did those two theatres compare in appointment and appearance?

A. Well, I think it would be a little unfair to compare them. Mr. Roth's theatre is one of the most inferior theatres in the South; it was at the time when I saw it.

Q. Well, did you ever have any trouble with Mr. Roth in getting him to play his pictures?

A. Yes sir, we did.

Q. Do you remember any instances?

A. Yes sir, I do. When Mr. Sudekum had built his theatre in Gallatin and we were not serving Mr. Sudekum but serving Mr. Roth, and Mr. Roth quit playing our pictures [fol. 1440] and advised us that he would not complete the contract until we gave him an adjustment. We advised him that he had a contract, and he stated that did not make any difference, he wouldn't play any more pictures until he got an adjustment and he stopped playing the pictures for, I believe for about three months, until we sent Mr. House up there to look into the matter, after receiving a letter from Mr. Unger, that you introduced.

Q. As I understand, Mr. Roth had the 1937-1938 product?

A. Do you mean—Is it all right if I refer to a list?

Q. Yes.

A. We have a trade number for this product and we refer to it as S-so and so, we don't use the year. I can remember by the number instead of the year.

Q. I think you will find that to be S-9?

A. We served Mr. Roth with S-9, that is correct, 1937-1938.

Q. When did he finish playing S-9?

A. He finished playing S-9, I think in 1939, March 1939.

Q. Well, did you give Mr. Roth an adjustment?

A. Yes.

Q. When did you give him that?

A. We gave him that right shortly after the date of Cecil House's letter, which I think was March 11, 1938.

Q. Somewhere along in there?

A. Just a few days later; we gave him an adjustment on all the remaining pictures, a very substantial cut.

[fol. 1441] Q. Was there any provision in his contract requiring the Paramount to make that adjustment or to give him an adjustment?

A. No sir, none whatever.

Q. I will ask you if it is true—Well, in fact, it is admitted that the Paramount had been selling Mr. Roth for a long number of years and that finally there was a franchise made with Crescent. Now, Mr. Roth had that 1937-1938 product, that is, S-9, and I will ask you if it didn't continue to sell Mr. Roth, if you don't continue to sell Mr. Roth Paramount's product after Crescent entered, that is, after

1937-1938, after Crescent entered Gallatin on November 4, 1937?

A. Yes sir, we did.

Q. Now, when did Paramount first sell Crescent in Gallatin, Tennessee, and why.

A. Well, when we were negotiating a five-year franchise, which started with S-9, which was the season of 1937-1938, and having been advised that Mr. Sudekum was going to go into Gallatin and not knowing when, we went ahead and made an S-9 contract with Mr. Roth, that is, 1937-1938. That was the first year in the franchise. And we felt, however, inasmuch as it was uncertain at that time, when we were negotiating with Mr. Sudekum, when he would start, we felt free to go ahead and sell Mr. Roth. Mr. Roth ran those pictures, as I say, and did not complete the contract until March 1940.

Q. You mean, 1939?

[fol. 1442] A. 1939, yes, and Mr. Sudekum didn't start until the second year's product in that franchise as compared to his other towns. He didn't start until S-10, which he started to play if my memory is right, and I could refer to the same record that the Government has had access to, if my memory is right I think he started to play in the last part of September of 1939, Mr. Sudekum did, after Mr. Roth should have completed his contract in November of 1939.

Q. You mean, 1938, don't you?

A. I mean, 1938, pardon me. That is right.

Q. Now, there was just a four-year franchise, then, to Gallatin?

A. That is correct. And we went ahead and sold that year to Mr. Roth, then we offered him a split for the remaining four years. We didn't offer him a four-year deal, I don't want that misunderstood, but we offered him a split on S-10, which is 1938-1939, and felt satisfied from that point on, year by year, we could offer him an equal division, and he rejected it. Incidentally, he could have——

Mr. Wright: If the Court please, we object to what he says they were satisfied to do. The question is, whether they did offer him that.

A. We did offer Mr. Roth a split of the 1938-1939 pictures, and he rejected it.

The Court: You didn't offer him a split on any after [fol. 1443] that?

A. No sir.

Mr. Armistead:

Q. Now, does Paramount have any pride or desire to get in the best equipped theatres in a community, generally?

A. Well, it is perfectly natural with the men in the Home Office, who certainly can't know every city in the United States, that is left to their men in the field and those men in the field, certainly I feel, and I have felt I owed an obligation to the officers and the stockholders of the Company to place its pictures most advantageously in any situation.

Q. Now, then, we are going to come to Brownsville, Tennessee. I believe I asked you whether or not Mr. Roth played his pictures on time, and you said that 1937-1938 product he finally completed playing in March 1939, when he should have completed them in the Fall of 1938, is that right?

A. That is right.

Q. Did that influence you or have anything to do with or one of the reasons you saw fit to give the product to Crescent.

The Court: He had already given it to Crescent.

A. No, there is a point in there that ought to be brought out Mr. Roth asked thirty days in which to make his decision as to whether or not he would accept a split. In that thirty days, we gave him the adjustment, and he waited [fol. 1444] sixty days before he advised us he would reject the split. In other words, we gave him sixty days instead of thirty days, and in that time he got the adjustment, and he started playing the pictures, then along somewhere in April he played, he played one in April, and dropped out until March, 1939.

Q. In Brownsville, Tennessee, C. G. Lawing was the regular customer of Paramount?

A. No, I could hardly say he was a regular customer. He was what is known in the trade as an In-and-Out.

Q. When did he make the first deal with Paramount for its product?

A. I couldn't say that without looking at the records again.

Q. Well, to refresh your recollection,——

A. I think I can remember. I think I will have to refer to those years again. I think he made a deal the first year on 1932-1933. Tehn the following year he did not make a deal, if I remember right, that is for S-5.

Q. Now, let's go to this 1932-1933. Did Mr. Lawing play all of his pictures and shorts?

A. No, he did not.

Q. Or were some of them cancelled?

A. We had to cancel quite a few pictures.

Mr. Wright: Certainly there are records which will show exactly what kind of deal was made and what cancellations [fol. 1445] there were, if that is material to the case here. Mr. Morgan, I think, is testifying from memoranda there that he has that somebody else has handed him.

A. No, it is just the years.

Mr. Wright: Yes, the paper that was made up from records made up by the Company.

A. This is just to identify the trade name of the year. We have S-4, that would be 1932-1933; S-5 would be 1933-1934. I don't remember each of those years that far back.

Mr. Wright: I understand, but you are not compelled to refresh your memory to state what you did with exhibitors back in those years; you have a record of that.

A. Yes.

Mr. Armistead:

Q. You have examined your records upon which your answer is based.

A. Yes sir.

Mr. Wright: I think we are entiled to have the records of that, if it is material to this.

The Court: What is the year in question?

A. 1932-1933.

Mr. Armistead: I am trying to see whether he was a regular customer of the Company and whether he played [fol. 1446] out his contract.

The Court: Whether he played them out, all the pictures, Mr. Morgan testified that he had been a customer and that the Company cancelled a whole lot of them.

A. That is right.

The Court: Do you have records for that?

A. Yes, sir, we have records, and the Government had access to them, to those same records.

The Court: That is the best evidence.

Mr. Armistead: They have had access to the same records and it looks like it is fair for this witness to testify, when the Government has had access to every record the Paramount has.

Mr. Wright: We didn't undertake to examine any records back to 1932-1933 at all. If they want to bring them in, we will be glad to do it.

The Court: Is it very material what pictures he played or what pictures he didn't play, in 1932? That is, as far as the pictures are concerned.

Mr. Armistead: I just asked if he played all the pictures, and all the shorts?

[fol. 1447] The Court: You say you can examine the record?

A. Yes.

The Court: Do you know whether he did play all the pictures and all the shorts, under the 1932-1933 contract?

A. No sir, he did not. We have a record he cancelled quite a few, and before we could make him another deal, he insisted that we cancel those pictures.

The Court: All right.

Mr. Armistead:

Q. Now then, did you sell him in 1933-1934, that is S-5 product?

A. Well, we sold him in this way. The salesman couldn't make a deal with him that year, we stayed out the whole year. They went back the following year, in order to make a deal for S-6, that is for 1934-1935 and in order to make that deal, he insisted we include a clause in the deal, which was for 52 pictures, we should give him the right to make that selection of 52 out of both years product, over a hundred pictures.

[fol. 1448] Mr. Wright: If your Honor please, I don't think this gentleman carried on the negotiations with Mr. Lawing at all. At least, it doesn't appear. Were you the man that had the negotiations?

A. No. But I got the recommendations from the branch office. We made them for the next year.

Q. Whatever recommendations were made will appear on the records?

A. Yes sir, that is right.

Mr. Raftery: Mr. Lawing testified to this. Mr. Lawing testified on direct examination that he had the right to select them out of two years.

Mr. Armistead:

Q. Have you those original records here with you?

A. I don't think I have.

By the Court:

Q. What position did you occupy at that time?

A. I was district manager for the southeast.

Q. Did those records come before you?

A. Yes sir, they had to come to me first before they went into New York and I had to pass on them.

The Court: I didn't quite understand the answer that the [fol. 1449] witness made to the answer.

Mr. Armistead: I understood he said the deal was made for the 1934-1935 product.

Mr. Wright: He went further than that and he undertook to say what Mr. Lawing had insisted upon. Now, obviously he is not competent to say what Mr. Lawing insisted on when he made that deal with whatever salesman. The only person that could testify to that would be the man who negotiated the deal with Mr. Lawing on behalf of Paramount.

The Court: Well, I don't know. The records would come before him as district manager pertaining to that matter.

Q. How did you get your information as to what Lawing insisted upon?

A. Well, it was in the recommendation written on the form that is used, attached to the contract that comes from the branch office to me, and if my memory is correct, that recommendation said that in order to make that deal we had to make it include two products.

Mr. Armistead:

Q. I will ask you this question. Is it customary or was it [fol. 1450] customary for Paramount, in selling one year's product, to volunteer to the exhibitor the right also to choose from the preceding year's pictures?

A. No, hardly.

Q. When is that done?

A. It is only done as a last resort when late sales are made and the exhibitor has enough buying power to force such a situation or insist upon it.

Q. Now what kind of theatre in appearance was Mr. Lawing operating in Brownsville, Tennessee?

A. Well, I was in the theatre once some time prior to the time Crescent built there and if I remember rightly, it is a very poor theatre and having somewhere less than two hundred seats. And I remember it because it was unusual in this respect, it was one of the few remaining theatres in the country that has the screen in the front instead of in the back. In other words, you enter the theatre and the screen is in the front and you have to walk to the back and face the screen, but it was a very poor theatre.

Q. Did you ever go in the Crescent theatre at Brownsville?

A. No, I haven't but I have seen pictures.

Q. Have you seen pictures of the exterior and interior?

A. Yes sir, I have and we have had report from our own men as to the quality of the theatre, which is our practice.

Q. Now, did Crescent make a deal for the 1935-1936 product of Paramount in Brownsville, that is, S-7?

[fol. 1451] A. Yes sir, they did.

Q. What was the reason, if any, that the contract was made with Crescent rather than with Mr. Lawing?

A. Well, it was my opinion and the opinion of the branch manager also that we weren't obligated to Mr. Lawing in view of our experience with him in Brownsville and we saw no reason why we should not make a contract with Mr. Sudekum, for that reason, and the fact that we would be in a more representative theatre.

Q. Well, did the fact that Mr. Lawing hadn't played out his pictures for the preceding year and some pictures were cancelled have any effect?

A. Yes sir, it would have an effect. He was not considered a good customer.

Q. Now, I am going to come to the Earlington, Kentucky situation. Mr. Dozier was——

Mr. Raftery: If your Honor please, that witness did testify to that on page 809. In answer to a question he says: "Your contract for 1934-1935 was based on playing some of the previous year's product." And the answer: "It was for the year's release of pictures but it was out of two years. In other words, I had the privilege of playing whatever the total number of pictures was out of two years' product." That is Mr. Lawing's testimony.

[fol. 1452] By Mr. Armistead:

Q. Now, Mr. Morgan, my attention has been called to the fact that I didn't ask you regarding Government's Exhibit No. 147, which is a telegram dated March 20, 1935 from you to Mr. Bugie. When you sent that telegram did you have in mind the reasons that you just have given here? The telegram: "Have made deal with Sudekum for S-7 therefore void Paris contract and don't negotiate Brownsville or Union City." Did you have those reasons in mind as far as that is concerned?

A. As far as Brownsville is concerned, yes. As regard to just that and the use of the word "void", if I remember correctly—there is no correspondence on this—the branch manager advised me on the phone that he had contract with Union City. Now, the exhibitor understands that none of our contracts are contracts until they are accepted. They are applications, and I merely told him "void". What I meant by that "void" was to advise the exhibitor that we can't accept the contract.

The Court:

Q. Did you reject it?

A. It is a rejection. Void is the word, but we can't tear it up because the exhibitor would have to be notified.

Q. What is the date of that telegram?

Mr. Armistead: March 20, 1935, just about six weeks before Mr. Lawing opened his tent show in Paris.

[fol. 1453] Q. Now, in regard to Earlington, Kentucky, are you more or less familiar with that situation in Earlington and Madisonville?

A. I was pretty familiar with it and I refreshed my memory so I would be more familiar with it.

Q. Mr. E. W. Dozier was operating a theatre in Earlington, Kentucky. For what years did Paramount sell him its films?

A. Sell who?

Q. Dozier.

A. Well, I don't know what year Dozier started in Earlington but we sold him pictures every year right on up to the time he made some kind of deal and sold to the Crescent Amusement Company.

Q. Did you seel him first run Paramount pictures in the town of Earlington, Kentucky all the time that you were selling him?

A. First run in Earlington, yes.

The Court: He opened May 12, 1932 in Earlington.

By Mr. Armistead:

Q. Were you selling Crescent in Madisonville during that time?

A. We didn't sell Madisonville for the first three years that Mr. Dozier operated in accordance with his Honor's date he just gave me when they opened. We sold Dozier S-4, S-5 and S-6, that is, 1932-1933, 1933-1934 and 1934-1935 and we didn't sell Crescent anything at any of their situations for those three years.

[fol. 1454] Q. How about 1935-1936, did you seel Crescent at Madisonville then?

A. We sold Crescent at Madisonville 1935-1936. We also sold the product to Mr. Dozier in Earlington and he ran it. We then didn't sell Crescent in 1936-1937 and Mr. Dozier had the product again. We sold Mr. Sudekum for 1937-1938 but in some manner the contract was made with Earlington for that year with clearance over Madisonville and that contract was approved before I had finished negotiating the contract.

Q. Well, did Dozier for that year then have clearance over Madisonville?

A. Yes sir. I was getting to this point that I would like to point out, that the years, the first three years that Mr. Dozier operated we didn't sell Madisonville and therefore, he enjoyed automatically clearance over Madisonville, al-

though I don't know whether any clearance was express in his contract. I haven't seen those particular contracts. The year 1935-1936 we sold Madisonville with prior run, I believe it was, over Earlington. We sold it to Crescent and were advised by the Indianapolis office that their agreement with Mr. Dozier if and when we sold Madisonville they would have to reduce the Earlington contract, which was done, and he completed that contract. The following year he again enjoyed automatic clearance over Madisonville because we didn't sell Crescent. The following year, S-9, 1937-1938 he contended he had a contract with prior run [fol. 1455] over Madisonville with no understanding that he would get an adjustment and we finally agreed to let him play that product ahead of Madisonville and Madisonville played the first year of its franchise seven days back of Earlington.

Q. In other words, that was just a four year franchise insofar as Madisonville was concerned?

A. That is correct. It amounted to that. It amounted to four years. We also sold Mr. Dozier the following year's product, S-10, 1938-1939 to play behind Madisonville and it was during that year, I believe, that he made his deal with Crescent, I think.

Q. Now, did you ever hear of Buchanan down here at Athens, Alabama?

A. Athens, Alabama?

Q. Yes sir.

A. Yes sir.

Q. Did you sell Buchanan any product?

A. Yes sir, we sold Buchanan twenty one pictures.

Q. What year?

A. I don't remember the year. It was the year he came in. He came in just a few weeks, I think, after he had decided to put a theatre in. I had known Mr. Buchanan for many years and he wanted to buy the pictures that Mr. Rosenbaum didn't use, that is, the eliminations that he had under his contract and we sold him twenty one pictures.

[fol. 1456] Q. How many did he play?

A. He played one.

Q. Did he ever give any excuse why he didn't play the rest of them?

A. He just refused to take the pictures, refused to answer letters and told the salesman that he had plenty of pictures and that he had tried one of the pictures——

Mr. Wright: If your Honor please, we object to what he told the salesman.

Objection sustained.

By Mr. Armistead:

Q. Anyhow, he didn't carry out his contract?

A. He did not. He still owes us money for the twenty pictures.

Q. Now, we are going to come to Tim W. Smith. Did you ever hear of him before?

A. Yes sir.

Q. Peerless Enterprises?

A. Yes sir.

Q. Smith, in substance, testified, that in 1938 he was trying to buy some Paramount product for Morristown, Harriman and Newport and he was informed that under the franchise, some salesman or representative of Paramount informed him that under the Crescent franchise that Crescent was entitled to those second run, if they desired them. Now, I want to ask you first, before I get to that if Para- [fol. 1457] mount did offer Peerless Enterprises pictures to be exhibited in Morristown, Newport and Harriman?

A. Yes sir, we did.

Q. That is, for the unplayed S-8 features and some unplayed S-9 features?

A. That is correct.

Q. Did Paramount ever make a contract with Peerless?

A. I don't think we made a contract in those towns. I don't think he wanted any of the pictures.

Mr. Wright: I move to strike that last.

The Court: Yes.

By Mr. Armistead: Well, he was the head man in the southeast, here, may it please the Court.

By the Court:

Q. Well, did you have any application from him for those years?

A. I can't remember without looking at the records.

By Mr. Armistead:

Q. I will hand you a list of pictures and ask you if this list of pictures were offered to Peerless Enterprises for those towns?

A. Yes sir, this is the list. That is definite. He sent this list to the home office and asked to check off the pictures [fol. 1458] that they had prints on and they checked them off. We offered those pictures to Mr. Smith.

[fol. 1459] Q. I will ask you if those pictures were not offered to Smith prior to the time that you knew any complaint had been made by him to the Department of Justice?

A. Yes sir.

Mr. Wright: Well, that is a conclusion; I think we would get out a little better if counsel would ask him what he heard offered and what he heard of the complaint.

The Court: Yes.

Mr. Armistead: He can clear that up, may it please the Court, by examining him. I asked him if he ever offered those pictures to Smith before Smith ever made complaint to the department.

The Court: When did you offer them to Smith?

A. I don't know.

Mr. Armistead:

Q. Did you ever offer those pictures to Mr. Smith before Smith made complaint to the Department of Justice?

A. No; I have inspected some correspondence yesterday that showed that it was made prior to that time.

[fol. 1460] The Court: You say you inspected some correspondence?

A. Yes, sir.

Mr. Armistead:

Q. You used the word "inspected"?

A. Inspected.

Mr. Wright: If the Court please, as to whether the correspondence shows that or not would appear only from the correspondence itself.

The Court: Yes.

Mr. Armistead:

Q. I hand you a copy of a letter dated November 17, 1938, and addressed to Mr. Tim W. Smith, and ask you if you deposited that letter in the United States mail addressed to Mr. Smith, at Knoxville, Tennessee?

A. Yes, sir, I wrote that letter; those are my original initials on it.

The Court: Dated November what?

Mr. Armistead: November 17, 1938.

Q. Now, having seen that letter, does that refresh your [fol. 1461] recollection as to whether or not at that time you knew Smith had made complaint to the Department of Justice?

A. I don't think he had made any complaint; I didn't know of any complaint at that time.

The Court: When did you hear of the complaint?

Mr. Armistead:

Q. Was it after your letter of November 17th?

A. It was after that letter that I was advised.

The Court: All right.

Mr. Armistead:

Q. Now, Mr. Morgan, you spoke of a franchise you had, that Paramount had, with the Crescent Amusement Company; what is the purpose of a franchise?

A. Well, the general purpose of a franchise is to insure an outlet for your product for a period of years where you might have some doubt that you would have that outlet, and to have that outlet with a satisfactory deal for yourself with the distributors.

Q. Is the purpose of a franchise to freeze out any independent?

A. Definitely no.

Mr. Wright: Will you repeat the question?

[fol. 1462] The Court: "Is the purpose of a franchise to freeze out any independent?" He says "Definitely no."

Mr. Wright: I object to that; that is one of the things we are trying to find out in this lawsuit.

A. The answer is still no.

The Court: Well, he is speaking generally; the question in this case is whether this particular franchise was executed for that purpose or not; that, of course, is for the Court to decide.

Mr. Armistead:

Q. What led up to or what caused this franchise between Paramount and Crescent?

A. Well, we had been out of the Crescent Amusement Company for three years. We were able to make a deal on S-7; we were out again the following year; and we thought it best to try to negotiate a franchise in order to ensure ourselves that we would have a definite and continuing outlet for our pictures at the proper terms.

Q. Well, do you recall the date of that franchise? It has been made an exhibit here.

A. I don't remember the date just now; yes, I have got [fol. 1463] the dates here, pardon me, I have got them written down. Negotiations were started in October, 1936; the franchise was closed December 21, 1937; it was signed July 28, 1938, effective as of November 1, 1937?

Q. Now, there has been some testimony introduced here, in fact, a statement has been made by counsel for the Government that under that franchise the Crescent Amusement Company could wait indefinitely to state whether or not it would have a second-run.

A. Of repeat run.

Q. Yes, in Athens, Alabama. Now, at this time, to clear that up, I will read Section 8-e in that franchise.

The Court: All right.

A. (Speaking to the Court) He said Athens; he means Gadsden.

The Court: He said Athens and means Gadsden?

A. Yes.

Mr. Armistead:

Q. Section 8-e is as follows:

The Court: What is the section number?

Mr. Armistead: Section 8-e—little e:

[fol. 1464] "The exhibitor may, at its election, accept for a repeat exhibition any feature photoplays licensed

hereunder at any theater covered by this agreement upon the same terms and conditions applicable to the "Hop-Along, Cassidy" feature photoplays in respect to the feature system in the next schedule A; and the exhibitor agrees to pay his license fees for each feature photoplay during each such repeat exhibition the license fees payable hereunder for the said "Hop-Along, Cassidy" feature photoplays."

Q. Now, what do you mean by a repeat run referred to in this franchise?

A. A repeat run means a run back in the same theater, the picture first played, first run; that is "repeat;" a term used in your business. A complete difference under repeat is a definite run, such as subsequent run, second run, and third run. Repeat means in the same theater.

Mr. Armistead: At this time, your Honor, I would like to call your Honor's attention to the fact there is no provision in this franchise anywhere which says no second run could be sold to Gadsden, Alabama. In other words, the fact that [fol. 1465] an exhibitor has the right to a repeat run doesn't prevent the distributor from selling a second run.

Q. Now, when this contract was made, I mean when this franchise was made, was this picture theater in East Gadsden, Alabama, constructed?

A. Well now, I am not familiar with what happened in East Gadsden, Alabama, because that theater may have been built after I left the position of division manager. I know the situation there. If it was built prior to January 1st of this year, I would know about it, and my memory is clear but I don't remember at that time up to January 1, 1941 that we had made a deal with them; I know that up to that date that there had been some negotiations, but I don't remember if a deal was made.

The Court: Opened September 3, 1939?

A. 1939.

By Mr. Armistead:

Q. I notice in Government's Exhibit 152, in a letter dated November 14, 1938, where you wrote Mr. Unger, where you state this: "In any event, the only way we could sell

second run, even if we wanted to, in this particular town, would be after Sudekum had taken refusal," etc.

[fol. 1466] A. That point is simply this, that Tim Smith simply wanted to buy ten or twelve second-run pictures. It is obvious that if Mr. Sudekum was going to repeat, he would repeat only the big pictures and he would have the right of repeat run, which would destroy the value of those pictures as far as Tim Smith was concerned, and Smith wouldn't buy a whole contract.

Q. Who has the authority to make a franchise for Paramount?

A. Well, only the district manager and the division manager, of course, and the general sales manager.

Q. Well, does a franchise contract have to be approved by the home office?

A. A franchise has to go before the board of directors of the company and be passed on by them. There has to be a resolution issued accepting the franchise.

Q. Mr. Morgan, in these pictures, there has been some proof here about production numbers; do you understand what is meant by production numbers?

A. Well, every picture has to be given a production number in order to identify it in all the routine systems of shipping, book-keeping, and title—it takes too long to bill it out by title; so they use a production number for that purpose.

[fol. 1467] Q. Now, suppose we start out with production No. 800, and we will say the list of pictures would run to 825. Now, does that mean that the production of the picture which has been assigned production No. 800, that the films will be available to the public before, we will say, the picture bearing production No. 809?

A. No, not necessarily. The production number is given to the picture at the time it is originally set for release, but there are frequent changes in release dates, because of delays in production, and so forth, because there are a great many preparatory records used before a picture is released, and it is advisable not to change the production number; so you will find that the pictures are not released in chronological order.

The Court: In numerical order, you mean?

A. In numerical order, pardon me, I mean in numerical order.

[fol. 1468] Mr. Armistead: Just a moment.

Q. Now does Paramount have, and did it have, any understanding with Crescent Amusement Company, or Mr. Sudekum, or any of the individual defendants or exhibitors to suppress competition or any individual theater in any manner?

Mr. Wright: That is objected to Your Honor.

Mr. Armistead: If they had one we would certainly want to bring it out, I want to find out whether they did have one, they called for it.

The Court: You mean a written agreement?

Mr. Armistead: Any kind of agreement, oral or written, Your Honor. Did they have any agreement at all between Paramount and Crescent or any of these exhibitors to suppress any individual theater.

Mr. Wright: If Your Honor please, that is a pure con-[fol. 1469] clusion. We are trying to prove these matters, and I do not see how this witness could know about those things, I do not see how the witness can be of much assistance.

A. Except I wrote the franchises.

Mr. Armistead: They have been introducing letters here that he wrote, they say this is sufficient to make out a case of conspiracy, and I asked him if he did, and I think it is competent to deny what they are trying to prove.

Q. Did the Paramount have understanding or agreement with any of the individual exhibitor defendants or individual defendants to suppress competition of any individual theater, and does it have at the present time, and did it have it during this period of time, mentioned in the complaint?

The Court: That is a question the Court will have to determine from all the facts in the case.

Mr. Armistead: That is true, Your Honor. And Your Honor is going to take into consideration all the evidence in the case, oral as well as documentary, and here is a wit-[fol. 1470] ness here who had charge of this territory down here during that period of time.

The Court: He might say that he didn't have any express understanding or agreement; I might find otherwise.

Mr. Armistead: Yes, sir.

The Court: You can ask him if he ever made any express agreement, or have any understanding.

Mr. Armistead: Or have any knowledge of any such agreement or understanding.

The Court: Yes.

Mr. Armistead:

Q. Did you have any agreement or do you know of any agreement or understanding, or did you have any understanding with these exhibitor defendants, or individual defendants, whereby an individual theater was to be suppressed by *reasl* of any dealings between Paramount and these exhibitors and individual defendants?

A. No, sir.

[fol. 1471] Mr. Wright: Same objection.

The Court: All right, overruled.

Mr. Armistead: Now there is an allegation in the complaint that Crescent and these exhibitor defendants have combined to compel Paramount to do certain things, licensing of feature pictures, and by means of licensing agreements between Paramount and Crescent that these licences have been made.

Q. Has any such thing been done as a result of any coercion or suppression on the part of Paramount and Crescent or any of the other exhibitors?

A. No, sir.

Objected to.

Sustained.

Q. Is Crescent business so important to Paramount that Paramount does whatever Crescent calls on it to do, is that correct?

A. I am waiting for Mr. Wright.

Q. That is all right, do not pay any attention to him.

The Court: Go ahead.

A. Will you give me that?

Mr. Armistead:

Q. Is Crescent business so important to Paramount that [fol. 1472] Paramount would do anything that they suggested?

A. No, the Crescent circuit is a rather small circuit, as circuits go, as to Paramount's service, this is a very small circuit.

The Court: Crescent's circuit as circuits go is a very small circuit?

A. Yes, sir.

Mr. Armistead:

Q. You mentioned some years that Paramount did not make any contract with Crescent; why didn't they make those contracts, was it because they didn't want the deals? Or what was the reason?

A. Well when we came down here, the year I got here, was the year we were out, the first year we were out of the Crescent Circuit, and I endeavored to negotiate with Mr. Sudekum on prices, on the basis of prices, and we never could get together, we never could make it, I couldn't see his prices, he couldn't see mine, he offered some things and then I offered some, but we couldn't get together on that, and the third year I still tried to get together, but he wouldn't buy at our prices, and we turned his deal down, and after that he said that there had been certain promises made to him to turn over the Paramount Theatre in Nashville, Tennessee, if we decided not to operate it ourselves, [fol. 1473] and that theater was turned over to one of our other operators, and Tony didn't feel that he received the consideration he should, but the following year we sold him S-S again 1938-39, I think it was, and again it was a matter of price.

Q. In other words, you all were asking two prices, you wanted so much and he didn't want to give it?

A. By all means. He has a reputation of being a very close buyer, and we were prepared for it, and I guess he is.

Q. When you made this deal with Crescent to run these pictures here at Brownsville, was that taken into consideration there, that it was a circuit deal, or did you take Brownsville just by itself?

A. A. Well we took Brownsville by itself, because that same year we sold other towns that Tony was in, I can't recall whether Maryville or Greenville was in the Crescent Circuit, but we continued to sell the independents where we started, it was to our best interest to do so. We didn't consider it in Brownsville.

Q. Then did you receive communications from Mr. Lawing?

A. Yes, sir, we did.

Mr. Wright: I think we have records to show exactly [fol. 1474] what happened by various exhibitors.

Mr. Armistead: [redacted] the Government has them now I call for them, so they can be exhibited at once.

The Court: All right.

Mr. Armistead: While Mr. Simons is gone to get them, to get those records;

Q. What kind of a customer has the Crescent Amusement Company turned out to be, and has it been all along, did it play the pictures and carry out its contracts?

A. Paramount's records show for the period I have been in the South, which is constantly quite a few years, without a question of a doubt that Crescent Circuit has been the best customer that Paramount has had, and that goes to my whole division, of which I have intimate knowledge.

The Court: What do you mean by division, when you say Crescent is the best customer?

A. I mean that if a deal was made with the Crescent Amusement Company, it played the deal to the letter.

The Court: The only trouble is to get him to sign up at first?

A. Yes, sir.

[fol. 1475] Mr. Armistead:

Q. And those factors, that he played the deal to the letter, and that there was no trouble except to sign him up at the beginning, as he took the product, and paid for it, all those factors are factors that entered into the situation in influencing Paramount to make a deal with a theater?

A. That factor was one of the factors or things, that brought about the contracts and to accept the franchises, caused the board of directors to accept the franchise.

Mr. Wright: If the Court please, I do not think he is competent to say what influenced the board of directors, he can state his recommendation.

A. It was my recommendation, let me put it that way.

Mr. Armistead: That will be all, Your Honor, until I can find these play-offs.

Mr. Wright: If the Court please, Paramount has not produced the play-off of the time, 1934-35 season, as all we have is the Crescent for that season.

Mr. Armistead: They are not here.

Mr. Wright: No.

[fol. 1476] Mr. Armistead: Well that is all right then, get them down here so the witness can examine them.

Redirect examination.

By Mr. Wright:

Q. Now, Mr. Morgan, when did you first come to Nashville this time?

A. This time, I came here last Saturday, and I left on Sunday afternoon, I think, and when came back.

Q. When did you come back?

A. I came back Friday night of this past week.

Q. Have you been here since then?

A. Yes, sir.

Q. Have you had any discussion of your testimony with counsel for the defendants?

A. Yes, sir.

Q. And you have discussed all of these letters that were offered here with them?

A. No, I wouldn't say I discussed them all, I discussed them all with our own counsel, but I do not believe I discussed them all with defense counsel. Some might have been.

Q. Who are you referring to as your own counsel?

A. I am referring to Mr. Irvin Cohen.

Q. He came down with you from Paramount?

A. Yes, sir.

[fol. 1477] Q. You also discussed these letters with Mr. Austin Keough at the time they were first produced?

A. No sir.

Q. Anybody else of the Paramount?

A. No sir, except my son.

Q. Or any others? Your son is also in the Paramount Legal Department?

A. Yes sir.

Mr. Wright: I would like to have that letter in which Mr. Morgan referred to an inability to sell Mr. Smith second run because of the franchise——

The Court: What is the Exhibit Number?

Mr. Armistead: That is Exhibit No. 152.

Q. Now is this case of Exhibit No. 152, you say

> "In any event, the only way we could sell second run, even if they wanted to, in those particular towns, would be after Mr. Sudekum had taken the refusal, because Paragraph 2 of Article 8 of the Crescent Amusement Company franchise, provides that he can repeat any picture at a certain given price."

A. That is right.

Q. That statement was correct at the time you wrote it, was it not?

[fol. 1478] A. It was, yes sir.

The Court: Is that the clause in that franchise that was later modified?

A. Yes.

Mr. Wright: Yes sir, that was later modified in 1939, to provide they had to exercise the option within thirty days after they completed the first run. This provided they could apparently exercise it at any time.

Mr. Armistead: At that time—Excuse me for interrupting, but that amendment in 1939 was for the purpose of clarifying clause 8-E.

Mr. Wright: As to what its purpose was, you may offer testimony, but it says in the contract he is to exercise the option within thirty days after the first run.

Q. Now, the same situation that you described in the contract I have just referred to would provide, under that clause, for any town covered by the franchise and where Mr. Sudekum operated, isn't that a fact?

A. That is a fact, yes, up to the point of the clarification of that rider.

Q. Now, you negotiated that second run option, so-called in Paragraph A, Article 8, with Mr. Sudekum?

[fol. 1479] A. It was not a second run option. It is a repeat option.

Q. Whatever it was, you were the one who negotiated that with Mr. Sudekum?

A. Yes sir, that is correct, with Mr. Stengel and Mr. Sudekum.

Q. At the same time?

A. At the same time the deals were made.

Q. The option apears in the same clause in Mr. Stengel's contract, the clause bears the same number?

A. I think it does.

Mr. Wright: By the way, I would like to offer that in evidence.

A. (Continuing:) I think it does, I am not positive, I am not sure that it does. I don't think it does have the same clause number, Mr. Wright.

Mr. Wright: I want to offer in evidence the franchise made for the Rockwood Amusement Company, and its subsidiaries, dated the same date as the franchise with Paramount, and have that marked with the next P-number, and also the contract made on the same date with the City of Nashville.

A. I don't think that is the City, I think that is first run Nashville, Mr. Wright.

Mr. Wright:

Q. Covering the first run, Nashville?

A. Yes sir.

[fol. 1480] Mr. Wright: And the modification letter, dated May 25, 1939, from Stengel to Paramount and agreed to by Paramount, by Mr. Morgan, modifying the Rockwood franchise, which is a previous Exhibit P-29.

Q. The next franchise you have there is first run, Nashville?

A. Yes.

Mr. Wright: I ask that that be made Government Exhibit P-30, and modification of P-30 would be P-31.

Q. When was it you first dissussed this paragraph E. of Article 7 with Mr. Sutlekum and Mr. Stengel?

A. Oh, that would be hard to remember. We negotiated that franchise over a period of many months and all these various things were brought up and discussed at the time. I can tell you, we started discussing the details of the franchise in October, 1936 and then on the question of picking out each clause——

Q. Do you remember when you started talking about this particular clause?

A. No, I couldn't remember. You mean, with the Crescent people?

Q. Yes.

A. No, I couldn't remember the exact date.

Q. Approximately?

[fol. 1481] A. No. We negotiated over a period, I think, of over a year or more.

Q. That was a clause which you also had some discussion about with your Legal Department, wasn't it?

A. No, not until the Tim Smith matter came up and I wrote Mr. Unger and Mr. Unger wrote back and he said he thought that was a bad clause as it was written and that there should be a limitation place on the time of selection, and I agreed with him and we intended that that clause, it was intended to have a limitation on it, but it was drawn up with no limitation, because there is a limitation in the franchise on the period in which they must pay for the pictures and a period within which they must make a selection——

Q. Let's see if we can get an answer that is responsive to the question. You can bring in all these other things later.

A. I just wanted to make it clear.

Q. You can't fix the time, can you, even for the year within which this question of the repeat run provision in the franchise first came up?

A. Yes, I will fix the year for you. It was some time between October 1936, and December 1st, 1937.

Q. Do you remember who suggested that the franchise have in there that that provision be in the franchise?

A. Well, I don't think the seller would suggest that those things be in the franchise.

[fol. 1482] Q. That was a provision that——

A. The buyer would like to have it.

Q. That was a provision that was calculated for the benefit of the Exhibitor?

A. Necessarily, if the terms are right.

Q. Now, apart from the other terms, the plain purpose of the provision is to give the exhibitor additional protection, is it not?

A. No, no, you are writing something into the franchise that is not there, Mr. Wright. It might be also the fact that the exhibitor might think that, having the opportunity to repeat better pictures, that he might eliminate the poorer ones and be able to hold up his business better.

Q. I am not asking you what might be?

A. I am answering your question. I am telling you what is——

Q. I want to know what it is, when this was written?

A. That was the purpose of the clause.

Q. What was said about the clause at the time it was negotiated, can you tell us?

A. Yes, I can tell you, in general, what was said.

Q. Let's have it?

A. They stated this, that there were some pictures, they would like to play all the pictures and not eliminate any, not even in the cancellation clause that was in all the [fol. 1483] contracts at that time. But they would like to have the privilege, if it was agreeable to us, whereby they could repeat some of those pictures and still take the cancellation of the poorer ones and both of us would possibly be in a more profitable position, and that I agreed to.

Q. Was there anything said at that time about a possibility of your selling other exhibitors who might be in those towns, or who might appear in those towns, an additional run of Paramount pictures?

A. No, there was nothing said; as a matter of fact, no exhibitor ever asked us for a second run until Tim Smith asked for it. That was when that provision was first discussed, that it had no limitation.

Q. Did you ever hear of the fair trade practice, as it is called, that a distributor worked?

Mr. Raftery: Your Department worked on——

A. I have heard of it.

Mr. Wright:

Q. You had heard of it at the time you were negotiating this clause, had you not.

A. Yes, I had heard of it. I would like to know——

Mr. Armistead: There was no question asked about that on direct examination.

Mr. Wright: There was no question asked about the purpose of this clause.

[fol. 1484] The Court: Go ahead.

Mr. Wright: I want to show the background of those negotiations.

Mr. Armistead: You make him your witness.

The Court: He didn't question him very extensively about 8-E, Mr. Armistead is the one who brought that out.

Mr. Wright: What?

The Court: Mr. Wright didn't question him very extensively about 8-E, Mr. Armistead is the one who brought out the execution of that. Go ahead.

Mr. Wright:

Q. You may answer the question.

(Question read by the Reporter.)

Mr. Wright:

Q. At the time you were carrying on these negotiations, you were also familiar with the fact that the Government had instituted its suit against your Company and other distributors in New York, in July, 1938? That is correct, isn't it?

A. I can't remember that. I suppose if I sat down and checked the date, I could remember. I don't remember. I don't think I was thinking about that at all when I was negotiating, I don't think so.

[fol. 1485] Q. Back about the time the suit was filed, you heard about it?

A. I can't say, unless I knew the dates. How can I say?

Mr. Waller: The suit was filed in July, 1938.

A. That is after the franchise was negotiated.

Mr. Wright:

Q. Had you had any notice that a suit might be filed by the Government at this time this was negotiated?

Mr. Armistead: Nobody can tell when the United States is going to institute a case; how could anyone guess at that?

The Court: Unless you can show he had notice, I don't see.

Mr. Raftery: Mr. Arnold didn't get to Washington until the end of March, 1938.

Mr. Wright:

Q. It is a fact, isn't it, Mr. Morgan, that at the time you were negotiating this franchise, you were aware of the many complaints that had come to your Company and the other distributors, to the Department of Justice, about exhibitors not being able to buy some run of your pictures?

A. No, Mr. Wright, no. We——

Q. You have heard of such complaints?

A. Maybe I had, a couple, myself, but I couldn't be aware of the others, no sir.

[fol. 1486] Q. Well, you had heard of those complaints?

A. I have heard them all my life, since I have been in the film business.

Q. That has been one of the stock complaints?

A. No, it has not been one of the stock complaints, I just heard of them once in a while.

Q. You had heard of it at the time you were carrying on these negotiations?

A. Heard of what? You speak about general complaints, all of the United States? I say no, I couldn't have heard of them.

Q. At the time you carried on these negotiations, had you ever heard of any exhibitor complaining that he couldn't get a run of Paramount pictures in a certain situation?

A. What situation.

Mr. Armistead: Just a minute. I submit that question will not throw any light on any of the issues in this case. Any exhibitor; it might be some fellow way up in Kalamazoo, Michigan complaining about something that is not in this lawsuit at all.

[fol. 1487] The Court: All right. I don't see where it is material. What is the object or purpose of it?

Mr. Wright: Well, if the Court please, this provision was, on its face, expressly designed to prevent anybody from getting the relief that was contemplated, either in the— or by decree that would make it possible for an exhibitor to get a run of pictures where there was strong circuit opposition. That is the effect of it, possibly.

Mr. Raftery: That is a very unfair statement, may it please the Court, of the clause, and I heard the clause read here this morning. That clause doesn't prevent any exhibitor from getting any run. It is a clause that gives the right to a repeat run. He could play second or fourth or fifth or tenth run before the repeat run was had in any particular theatre. It is a very common practice to repeat big pictures in theatres and that is all that is taken care of in that paragraph and it doesn't say you can't sell a second run, or third run or tenth run.

The Court: No. The question was whether he had heard some exhibitors complain that they couldn't get films.

A. No, I can't answer that. I can't answer that question [fol. 1488] without making a fool out of myself. And I don't care to do that right now.

The Court: Well, I wouldn't answer it then.

A. Thank you, Judge.

By Mr. Wright:

Q. Do you recall whether, at the time you carried on those negotiations anything was said about what the effect of this clause might be upon competitors of the Creseent and Rockwood circuits who might seek to buy or run your pictures in the towns where those circuits operated?

A. No, Mr. Wright. Nothing was discussed about that at all. There was no such intention. It wasn't the purpose of it at all.

Mr. Wright: I move to strike that as unresponsive. Just confine yourself to answering the questions, Mr. Morgan, and we will get along fine.

Mr. Armistead: He has answered that question.

A. I just repeated what I said.

The Court: Well, he said he never discussed—the question was whether anything was discussed as to the effect of the clause, and he said, no, there was nothing discussed [fol. 1489] about it and then added, that was not the purpose of it.

By Mr. Wright:

Q. When you were framing this franchise did you give consideration at all to what effect that franchise might have upon exhibitors who were competing with the Sudekum circuit?

A. Yes sir, I gave full consideration to those things.

Q. Did you discuss that with Mr. Sudekum and Mr. Stengel?

A. Well, in what respect?

Q. In any respect. Did you discuss what the effect of the franchise would be upon independent exhibitors competing with them in the situations where they operated theatres?

A. We wouldn't have accepted the franchise——

Q. Now, just answer the question. I asked you what you discussed——

By the Court: Just answer and then make your explanation.

A. All right, Sir. Ask the question again, will you, Mr. Wright?

(Question read by reporter.)

A. No, there was no such discussion.

Q. Did you discuss it with anybody?

A. No. Certainly I discussed it with nobody. I want to explain this. Judge, let me add to that.

The Court: Go ahead.

[fol. 1490] A. We certainly wouldn't have accepted a franchise with no discussion with a distributor in which we felt and knew that there was something in his franchise that would give Sudekum the right to freeze out the small exhibitor. I want to make that very clear.

Mr. Wright: I move to strike that. That is entirely unresponsive.

Objection overruled.

Q. Well, as you explained it in your letter, with respect to Tim Smith, the effect of this provision was to prevent you from selling — the independent exhibitor a run of your pictures unless Mr. Sudekum previously waived his right under the franchise, is that correct?

A. That is hardly correct, Mr. Wright. They sold a run, I believe, to this theatre in Gadsden. I can't call the name of it. They had that run at Gadsden.

The Court: He is asking about Tim Smith.

A. In the case of Tim Smith, Judge, that letter will have to be explained and I did explain it to the effect that Tim

Smith had asked for only ten or twelve pictures, second run, and I said that we would not and it was not our policy to sell any exhibitor a short field of ten or twelve pictures out of fifty to sixty five pictures, according to the number released that year, and, I therefore, stated it would [f. l. 1491] be impossible for us to sell Mr. Smith without giving Mr. Sudekum, our regular account, an opportunity to repeat those bigger pictures in the same theatre. That is what the letter means.

By Mr. Wright:

Q. What difference would it make if he had offered to buy all the pictures?

A. That is a different thing. He did not.

Q. What difference would it have made under the franchise?

A. If he was a good exhibitor we might have sold him second run. I doubt if we would have sold Tim Smith.

Q. You couldn't sell him second run on any of those pictures that were covered by the franchise until you found out whether Mr. Sudekum wanted to repeat them at his theatres?

A. We could still sell a second run under that clause of that contract, Mr. Wright.

Q. Well, the clause in the contract, as I understand it, provides that Crescent may repeat any picture covered thereby at any of its theatres, in the same theatre,—at a certain rental?

A. That is right, Mr. Wright.

By the Court:

Q. Does that mean now—suppose Crescent would show a picture on one occasion and they have a competing theatre there in that town that had a contract with you for second run pictures. After Crescent had shown that particular [fol. 1492] picture one time in its theatre would anything in that clause prevent the independent theatre from proceeding to show that same picture on the second run before Sudekum showed it on the repeat?

A. No sir, there is nothing in that clause that would prevent that.

Mr. Wright: If your please, the clause says that Mr. Sudekum has the right to repeat any of the pictures covered at any of his theatres. That is what it says, on its face.

A. That is correct, Mr. Wright, but it doesn't say you can't sell second run or third run or fourth run.

By the Court:

Q. Well, do you have any instances to arise where that was done under the contract?

A. No, Judge, that is what I explained—it never came up to Paramount. Nobody ever asked Paramount for a second run until Tim Smith asked for Gadsden and then I wrote the letter.

Q. Not in Gadsden.

A. In those towns, Newport, Harriman and Morristown and I wrote to New York and Mr. Unger said that was a bad clause the way it was written and a limit should be put on it.

Q. That is the reason you changed it and put in the thirty day limit?

[fol. 1493] A. Yes sir.

Mr. Wright:

Q. Without the limit—let's get this straight. You couldn't sell a second run until you knew whether they were going to exercise the option, is that right?

A. Mr. Wright, I will let the clause speak for itself, exactly the way it is worded in the franchise.

The Court: If it was amended and a limitation put in, unless you had some particular evidence as to why that limit was put in there, I think we should consider the franchise with the limit of thirty days on 8-(e) as being the contract, because the witness has said that they had no instance to come up under the contract.

A. That is correct.

The Court: Or where any independent exhibitor wanted a second run except Tim Smith.

Mr. Wright: Well, it doesn't matter how many there were. The situation came up and this is the way the contract was interpreted.

The Court: And I wasn't so forcibly impressed with Tim Smith.

[fol. 1494] Mr. Wright:

Q. Let's find out why the modification was made. When did you discuss modifying this clause?

A. I just explained that. As a matter of fact, I can say very honestly there was never any intention to leave that clause without a limit in the length of time because after all I think no one could make contracts and let him have the right of selection for forty years.

Q. In other words, your testimony is this, that the way the clause was written was an oversight?

A. Now, the fact that there was no limit on it——

The Court: What I had in mind—You gentlemen didn't follow me. What I had in mind, if the distributor, after making a franchise of that kind, saw that it might operate to the prejudice of the independents or to themselves on the occasion that came up, such as in the instance of Tim Smith, and then voluntarily change it, I say they should have credit for that.

Mr. Wright: I think they are entitled to credit for changing it. The fact remains that as they originally made it and even as they changed it, it continued to prevent any second run competition.

[fol. 1495] The Court: The fact that they changed it voluntarily later on would indicate to the Court that it wasn't put in there, in the first place, for the purpose of elimination of independent theatres.

Mr. Wright: I think that is a matter to be inferred from all the facts in the case.

The Court: All right. Let's adjourn Court until 1:30.

(Recess for lunch)

[fol. 1496] The Court: Mr. Wright, is it the theory of the Government that this clause 8-e in the franchise was not modified until after the complaint had been made to the Department of Justice and other distributors had been complaining?

Mr. Wright: That is right, your Honor. We think it still has not been cured as it was written on its face; it doesn't eliminate second run competition in the towns where they operated.

The Court: Well, from that standpoint, accepting that as true, it would be an elimination for a period of thirty days?

Mr. Wright: Yes, but you see the point is this, your Honor: They have within 30 days after the showing of the picture first run after the showing of each picture in which to decide whether they want to play or not; then they have the next 120 days in which to play. Now, it is obviously impossible to sell somebody else a second run under those conditions, because you never know whether Mr. [fol. 1497] Sudekum is going to exercise his option to play in one of his houses until after the expiration of the 30 days.

Q. As I understand it, Mr. Sudekum has to decide before the expiration of thirty days before he plays the picture whether or not he will ask for a repeat performance?

A. Yes.

Q. And of course, if he doesn't ask for a repeat performance, they could let any one else have the picture for a second run within 30 days after he shows the first run; if he does ask for thirty days, it would be 120 days additional?

A. Yes, he has 120 days in which to date it.

Mr. Raftery: The life of the run has nothing to do with the second run. This type of clause, I mean the play and repeat form, is an exception rather than the rule. If an outstanding picture comes along, for instance, "On the Road to Zanzibar" an exhibitor, as Mr. Morgan describes it, might say, I would like to play a repeat run on that picture in the same theater, rather than play one of the weak sisters; and he eliminates the weak sister in his commit- [fol. 1498] ment; he may have a commitment to play 40 out of 52 pictures; by playing the repeat he gets an elimination then of 11 instead of ten.

The Court: Your theory is, then, that if there is a second run contract that, subject to whatever clearance provisions might be made in the second run contract, that otherwise second run could be made at any time?

Mr. Raftery: That is right.

The Court: Within thirty days.

Mr. Raftery: At any time; take the Gadsden situation, where the man plays within 60 days after the first run. Sudekum might play and only have top pictures in the

Princess Theater. On the 60th day after first run that picture would be available in East Gadsden and would play; under the repeat clause, Mr. Sudekum might say, I want to repeat "On the Road to Zanzibar", he figured he could get a good crowd, get a good repeat.

[fol. 1499] The Court: Suppose he wanted to repeat within sixty days before the sixty days clearance was up.

Mr. Raftery: And then Gadsden would get the same availability.

The Court: And what run would that be?

Mr. Raftery: It would be a third run. It is the uncommon situation.

The Court (To Witness:) All right. Have a seat in the box.

Oscar A. Morgan, Recalled for further examination, testified further as follows:

By Mr. Wright, For the Plaintiff:

Q. Now, Mr. Morgan, did you have any discussion with Mr. Stengel or Mr. Sudekum, with respect to modifying that section or clause 8-e of the franchise?

A. Yes, sir, I did.

Q. You had a large volume of correspondence with both of them about that, did you not?

A. No, I don't think there was any correspondence about [fol. 1500] it. I think it was all conversation. I think I came up to Nashville and told them we would have to modify that clause, that we couldn't leave a clause in that gave them an indefinite privilege.

Q. Did they say anything about a greater—the length of time within which they were to exercise that option?

A. Well, there is no question but what there was some discussion as to when it would be, but we still stuck to our original thought in the matter; the way it is written was the way it was originally put to them; they wanted a longer time and we wouldn't give it to them.

Q. Was there anything said with respect to the effect of the modifying clause would be as to the exhibitor?

A. No, sir, at the time the clause was written the Crescent Amusement Company was playing no regular second runs in any of the other towns, and there were no second runs in those towns.

Q. A very large number of the towns were large enough to support a second run, are they not?

A. Well, I think that is mostly up to an exhibitor to decide; you can't go by population.

A. As far as you were concerned, I take it you had no objection to selling second runs in the towns, or you wouldn't have made this clause?

[fol. 1501] A. That is correct; we would have sold a second run at any time.

Q. Now, these Crescent and Rockwood franchises are both dated March 23, 1939; is that about the date the modification was made?

A. I think that is the date, yes, sir.

Q. I show you a letter here, dated June 22, 1939, from Mr. Sudekum to you and ask you to read that letter and see if it refreshes your recollection on this point?

A. Yes, it does; we didn't agree with this; they tried to argue with us that we might not be able to supply the prints to them within the period of time, and there is a letter somewhere stating that we wouldn't worry about that, that we would guarantee to supply the prints during that period.

Q. I call your attention to the letter of June 22, 1939.

A. Well, I didn't notice the date on there. I can't swear as to the date of that amendment, because I haven't looked at the date.

Q. It is possible that the amendments that are dated May 25, 1939, might have been agreed upon at a later date and then dated back?

A. No, no, nothing like that. I think it is possible that Stengel might have called this to Sudekum's attention, that the clause was written and wanted to re-modify it, which [fol. 1502] we refused to consider. I know at the time he said, what if we cannot supply the prints, we said we would guarantee to supply them within the time.

The Court: Were those modifications of that clause made in 1939?

Mr. Wright: Yes; so on that date there were a whole series of modifications; those are both dated May 25, 1939.

Q. Now, Mr. Morgan, Mr. Sudekum is referring here to a 90 day period—

A. In which they date to play the pictures after they have made the selections.

Q. I don't see any reference to any 90 day period in this modification; it is dated May 25th, 1939.

A. May I see that modification; it may be a different one from what I know anything about?

The Court: That was what was confusing me.

A. (After examining paper) Well, I can't explain that. This says 120 days in which they have to play the pictures. I was under the impression, Mr. Wright, that the Crescent modification—I haven't looked at that modification—was 90 and the Rockwood was 120; that is the impression that I [fol. 1503] was under.

Q. It is quite possible, isn't it, that sometime subsequent to this letter of June 22, 1939 with that reference to a 90 day modification, that they made an agreement and that was modified in an agreement and dated back to May 3, 1939.

A. There is no attempt on my part to explain that, because all I have to stand on is a modification and the date is was signed.

Q. Do you know whether or not it was actually signed on the date it bears?

A. As far as I know, yes, sir, from the correspondence.

Q. Well, this correspondence would indicate that it was signed at a subsequent, later date?

A. If you are wishing to imply that——

The Court: He is not only wishing to imply, but he is.

A. May be I should say that that letter was dated April 22nd, or May 22nd, I don't know how it is dated; it speaks for itself.

Mr. Wright:

Q. And it might have been signed at a subsequent, later date, is that right?

A. Well, I don't get what you mean by that; if you mean that the legal department would leave the original date in [fol. 1504] there, as to when it was signed, you will have to have the legal department in, sir. I can't——

[fol. 1505] Q. This letter of June 22, 1939, from Mr. Sudekum to you, suggests to your mind that they were still

negotiating trying to get together? That there were negotiations going on?

A. That there were still negotiations going on.

Q. You wrote and sent this modification, on that date, it shows that does it not?

A. I am not going to attempt even to explain that rider, the rider speaks for itself, that is all I can say regardless of the correspondence. I do not have any independent recollection.

Q. You do not have any independent recollection when you actually did make the modification agreement, the modified agreement, which is dated May 25, 1939?

A. No, sir, I have no independent recollection on that.

Q. When was it you said you started this investigation of Mr. Roth's complaint?

A. Just as soon as we got the letter from Mr. Roth.

Q. It was after you got that letter you started the investigation and decided that Mr. Roth was not an acceptable account?

A. No, it was my recommendation that we sell the product to Crescent, and not to Roth.

Q. When was it you wrote that, do you recall?

A. Well it was sometime before that, it was some time in [fol. 1506] the period that Mr. Roth was playing the pictures, and prior to the time he made any complaint at all, I can't remember the exact date, but I think the correspondence will show it. We have correspondence that will show that.

Q. Can you produce that for us?

A. I think we can.

Q. I call your attention to a letter dated February 11, 1937, from Mr. Unger to you, in which he says:

> "You state that Mr. Roth has been a good account, and I feel under the circumstances that we should protect Mr. Roth with our pictures for next year."

A. This is when we made the S-9 agreement with Mr. Roth.

Q. That was in the summer of 1937 that you made that deal?

A. I will have to check the date on that, that was in answer to one of the letters I think you showed me this morning that I wrote Mr. Unger that, that said to sell the S-9 product to Mr. Roth.

Q. And at that time you regarded Mr. Roth as a satisfactory account, is that right?

A. In that particular town, because we didn't know as I explained this morning, I had no definite ideas if and when Crescent was going to open that theater in Gallatin.

Q. And your complaint to Mr. Roth, or about Mr. Roth not playing off the 1937-38 pictures, and about that, did [fol. 1507] not arise until after he had complained to you about selling the next season's product to Mr. Sudekum, isn't that correct?

A. It just depends that—it just happens that he made two complaints in the same letter; he complained about selling away, if you recall that letter you introduced this morning; you will see in the same letter he said that our pictures had not been good, that our pictures had been very bad, and he wanted an adjustment.

Q. And that came up about that, and that was the first time there was anything to indicate to you that that kind of an account was not a desirable account?

A. You may have a different understanding of a desirable account, I never said he was a desirable account, not even this morning; I was asked the question if he had played his contract, and I said no, he had not.

Q. Now, Mr. Morgan, you referred this morning to a policy of your company to offer a split deal on pictures for any season wherever you found yourself in the embarrassing position of having two old customers who are both ready to buy.

Mr. Armistead: I submit that the witness did not testify that he found himself in any embarrassing position, that is not in the record.

The Court: Well state it now.

[fol. 1508] A. I don't think, Mr. Wright, I testified it was a policy, I think that I testified to the fact that it was not unusual for the company to split the product in many cases in the United States.

Mr. Wright: I understood you to say that there had been a policy that you had developed in the course of the years?

A. I don't think I said it was a policy of the company, I think I said it was not unusual to do that in many cases.

Q. Is it usual or was it usual to go back and offer a split after you had sold the entire product?

A. No.

Q. That was not usual?

A. No, indeed.

Q. Now, Mr. Morgan, you testified this morning at length about all the factors that went into the determination as to whether or not you would sell or continue selling the particular account; did you name all the factors you considered there?

A. I didn't even number all the factors that Mr. Armistead named, I do not even remember them, but I said those factors and probably many others that would leave it to the judgment of the man in the field as to whether or not he should leave his product there or sell it to another account.

Q. Now the size and character of the theaters involved [fol. 1509] was only one of the great many factors that you considered, isn't it?

A. Yes, that is correct.

Q. And in many situations an inferior theater may yield Paramount a much higher rental for its pictures than a good theater.

A. Yes, possibly that is right, that is possible, may be not as inferior as that situation, but that is possible.

Q. Did you take the trouble to determine how the rentals you got out of Crescent at Gallatin for the 1938-9 season compared with the results you previously had, compared with the rentals you previously got from Mr. Roth?

. . . . . .

A. He had asked for an adjustment himself.

Q. He paid you substantially more for the feature films that he exhibited through the 1937-38 season, than the Paramount paid you for 1938-39 season?

[fol. 1510] A. You mean Crescent?

Q. Yes?

A. I do not think it was substantially more, I would like to see the record, but I do not think it is substantially more.

Mr. Wright: The Paramount also does not have the play-off records of Gallatin here.

A. I recall this, Mr. Wright, it is pretty close to the same figure, I don't think it was substantially more, but you have all these exhibitors like that, he could not have continued on that contract; obviously, the testimony that is introduced would show that.

Mr. Wright: That is a matter of argument, and I object to it.

A. It is a matter of evidence.

The Court: Yes.

Mr. Wright:

Q. State whether he could or could not continue?

A. He could not have continued to pay the film rentals he had previously paid, Judge, based on the receipts where he was paying thirty-five dollars, and Crescent forty-five.

Mr. Wright: I move to strike out this testimony.

[fol. 1511] The Court: All right.

Mr. Wright:

Q. Mr. Roth did not ask you for any reductions on the film rental until after he had requested you and talked to you about having sold the 1938-39 product away to Crescent?

A. I do not recall those dates, it was either at that time or very shortly after that, he wrote Mr. Unger. He didn't write me.

Q. I believe you testified this morning, Mr. Morgan, that the deal you made with Crescent for Brownsville on August 22, 1935, was not a circuit deal?

A. No, that was a circuit deal.

Q. It was a circuit deal, wasn't it?

A. Yes, sir.

[fol. 1512] Q. And the same date you sold the rest of the Crescent Circuit under that contract to them?

A. That is correct, yes sir.

Q. I believe you also referred to some buying power of Mr. Lawing which had enabled him to get from you, for the preceding season, a selection of both the 1933-4 and 1934-5 pictures. Now just what were you referring to there?

A. Maybe the use of the word "buying power" isn't quite the right word. The point is there, that in selling these small accounts that have no opposition in their town, and he had no opposition when we made that deal with him; we couldn't sell him the year before, if you follows me.

Q. And when any exhibitor is left off, you say he demanded it?

A. I don't get that. But he got a selection of 52 pictures out of 104; in other words, his S-6 contract had a clause written into it that he could buy any of the pictures released the previous year and cancel one of the pictures released that year.

Q. You would have been perfectly willing to sell him all of the unplayed product?

A. I didn't get clear this account and the 104 pictures. He negotiated with the salesman and got him to make that kind of a deal.

Q. You were not able to get your product played in any- [fol. 1513] where in the Crescent Circuit for any of those years?

A. That is correct, but I wanted to make the point about buying power. What I meant was, to get into one of those small towns that had no opposition, that occasionally, in a very unusual case, you would allow an exhibitor to make a selection of 52 pictures using two years product. Because if that was the policy, it normally follows that exhibitors would leave you out every other year and get that kind of a deal. That is the point I wanted to get over this morning. I know there are reasons to make the deals, but it is a very unusual case to make that kind of a deal and I assure you it is not a practice in this business.

Q. Now, I think that you said something about Mr. Lawing not being your old customer in Brownsville, at the time you took the product away from him?

A. Oldest?

Q. You didn't regard him as your old customer?

A. No, I said I didn't regard him as a good customer.

Q. He was at that time a far superior customer to the Crescent Amusement Company, was he not?

A. In that particular town, yes.

Q. Well, in any town?

A. I don't think that you get what I mean. Whenever we had done business with the Crescent Amusement Com- [fol. 1514] pany, whenever we had signed a deal with them, they played the contract out as it was written.

Q. Yes, but you hadn't been able to make any deal to get any pictures played in the Crescent towns for the past three seasons?

A. That is true.

Q. At the time you sold Mr. Lawing? Isn't that correct?

A. Yes, because we would not take their deal.

Q. Mr. Lawing had bought three seasons product in Brownsville, hadn't he?

A. Yes, but you don't still get the point. We wouldn't take the Crescent deal, but Mr. Lawing wouldn't do any business with us at all, he wouldn't even talk to us.

Q. Now, just a minute. Did you offer any of your 1935-6 pictures to Mr. Lawing before you made the circuit deal with Paramount—With Crescent, I mean, on August 22, 1935?

A. I don't know, but I don't think so.

Q. Well, you don't know that your did not?

A. No, I don't know that the salesman didn't, but I don't think so.

Q. Now, you testified at length this morning as to what these salesman's recommendations were. The records show; can you produce for us these records that you have testified to on this Lawing situation?

A. I think we can if you talk to our attorneys here. [fol. 1515] They have got them, I believe. I understood that you had had access to all of those same records and still have.

Q. Your understanding was not correct.

A. I think it is.

Mr. Armistead: Just a minute.

Mr. Wright: You can produce them for us and turn them over here today?

A. What about it?

Mr. Cohen: That is right, you had access to all of these records.

Mr. Wright: We haven't the 1932-1933, 1933-1934, or the 1934-1935.

Mr. Cohen: I don't know what you have looked at; you were shown everything we have here.

Mr. Wright: Are you willing to have them here today for us to examine?

Mr. Armistead: We are not willing to. It is every day and every night they have called on us for something. We have to try this lawsuit.

Mr. Dobey: I think the record will show the defendant Exhibitors have not turned over anything to us.

Mr. Armistead: The record will show for itself.

The Court: Do you wish to see the records? If so, you [fol. 1516] will have an opportunity to get them.

Mr. Wright: We would like for the Court to see them and perhaps with the right of cross-examining this witness on such testimony as he bases on these records.

The Court: Just what records do you want, what records are they?

Mr. Wright: The records that he referred to in his examination this morning, recommendations regarding cancellation of pictures which related to the purchase of Paramount pictures by Mr. Lawing, for the seasons, 1932-1933, through 1934-1935, inclusive.

Mr. Armistead: I understood he objected to the introduction of those this morning.

Mr. Wright: I didn't object to the introduction of the record, I objected to him testifying without the records.

Mr. Armistead: We had correspondence here and you objected to that, as I recall.

The Court: Do you have those records here?

A. I think our attorneys have got them, I don't know whether they are here or not. I would rather lean to the decision of our own Counsel, Paramount's Counsel.

[fol. 1517] Mr. Cohen: If he will tell us exactly what he wants I will try to get them.

Mr. Wright: I said the records here.

Q. Can you tell him so that he can understand the records that you referred to this morning when you were testifying about Mr. Lawing?

A. I am referring to what is generally known as a recapitulation sheet, which I understood you had access to.

Q. Is there anything else that you were referring to?

A. No, that is all, that is all I did.

Mr. Cohen: I think we can furnish that.

Mr. Wright:

Q. Mr. Morgan, you referred this morning to the factors you had in mind when you sent this telegram, dated August 22, 1935, that was introduced in evidence this morning. Now, when was it that you decided or were able to recall just what you did have in mind when you sent this wire?

A. How do you mean? I wish you would enlarge on that a little.

Q. You hadn't seen this wire for at least six years prior to the time you came down here, had you?

A. That is right, yes, that is right.

Q. Then you discussed it here with your Counsel, from Paramount?

A. No sir, I did not, I never saw that wire for six years until you showed it to me this morning.

[fol. 1518] Q. You didn't discuss this particular piece of evidence here with anyone, is that right?

A. No, that is correct.

Q. With the Paramount Counsel?

A. Now sir, I never recalled that wire until you showed it to me this morning.

Q. The first time you had any recollection that that happened or the factors or reasons you might have had in mind at the time you sent the wire, was when you were asked by me this morning?

A. That is right.

Q. This morning, as to what you had in mine?

A. That is right, when you showed me the wire.

Q. Now, it is possible, isn't it, that what you might have had in mind, also, is the number of theatres that were involved in that possible deal that was in sight for the Crescent Circuit, isn't that correct?

A. No, I don't think that is possible. The very fact is that we made the deal with Crescent Amusement Company, as far as those towns were included, it included those towns, I knew he had a deal in those towns, one of them anyway.

Q. You realized the Crescent Theatre you had in mind, as compared with what you might realize from Mr. Lawing in Brownsville, was one of the factors that was in your mind at that time that you sent this wire?

[fol. 1519] Yes that factor is always in a persons's mind; not to the detriment of the Company, but they can't eliminate the fact.

Q. Just answer the question?

A. I will answer it.

Q. If you had that factor in mind this morning?

A. (No reply)

Mr. Morgan, I believe you testified this morning that you had Mr. Rosenbaum's opposition in Athens, buy some of your pictures?

A. That is right.

Q. Those were all pictures that Mr. Rosenbaum had decided were not suitable for his theatre, were they not?

A. Under the terms of the contract throughout the United States, which govern exhibitors, there are certain eliminations in their contract and those were eliminated pictures.

Q. But it is also a fact, is it not, that after Mr. Buchanan had opened this opposition theatre in Athens, you then permitted Mr. Rosenbaum to play his pictures second run in Athens in the new house that he had built there, the Plaza, which had been contracted for in the towns of Tuscumbia, Sheffield and Florence, isn't that correct?

A. I think that is correct. I don't recall that, honestly. I mean, I think that Mr. Buchanan was out of the town. Let us make this very clear: Mr. Buchanan never tried to [fol. 1520] buy second run in Athens, Alabama.

Q. Did you have the negotiations with Mr. Buchanan?

A. I did negotiate with Mr. Buchanan, personally.

Q. When you say he never tried to buy, you mean, in his negotiations with you?

A. I mean absolutely he made the statement he didn't want second run, he wanted first run, and that is the reason he was willing to buy the eliminated pictures Mr. Rosenbaum wouldn't take for a period of three *or three* years prior to that.

Q. Now, you do remember, though, that you did permit Mr. Rosenbaum to show second run pictures in his Plaza Theatre, pictures which he had previously committed for the theatres he operated in Florence, Tuscumbia, and Sheffield, isn't that correct?

A. I don't follow that at all. No. I can't agree with you on that.

Q. Perhaps I misunderstood you. I thought a few minutes ago you thought that happened.

A. No, I couldn't remember. He might have got second run in Athens, but he was not permitted to play pictures in other towns and then run them in Athens and in that way get rid of them on his contract.

Q. Does it appear from records of your Company that he had been permitted to do that?

A. I would be wrong if they showed that, but I can't recollect anything of that kind.

[fol. 1521] Q. You do keep records at the Atlanta Branch office which show whether an exhibitor has been able to discharge his commitment in one location by playing the pictures in another?

A. If such a thing is allowed, it is contrary to my recollection. That is one of the things we don't allow.

Q. Why don't you allow it?

A. Because we feel if the pictures are good enough to play in a town, they are good enough to buy in the town.

Q. I call your attention to a form here entitled "Contract Modification, dated October 23, 1940, which had a "Recommendation" which says:

> "We are substituting S-11 features over commitment in Athens, Alabama, for low allocated features in Florence, Alabama. This is customary procedure with this circuit inasmuch as it is sold with the understanding that the four contracts provide for a total number of runs rather than a set number in each house. The entire service for these accounts is on weekly payment play and all payments are up to date."

[fol. 1522] A. I would have to see the original contract. The original contract must provide that I was mistaken about that.

Q. This sheet that I just showed you is labelled "Contract modifications."

A. Well, it says here that it provided for the total number of runs rather than a set number in each house.

Q. The fact that it is necessary to make that contract modification indicates to you, does it not, now that there was a modification made?

A. Oh yes, I admit that.

Mr. Raftery: What is the date of that, Mr. Wright?

Mr. Wright: October 24, 1940.

A. The latter part of 1940, when he was just getting ready to open the theatre down there.

Mr. Armistead: May it please the Court, that is something that happened subsequent to August 11, 1939.

A. Oh yes, it all happened after Buchanan got out of there.

Mr. Mitchell: The Government proved this morning that Buchanan closed his theatre in December, 1939.

The Court: Where would that be relevant in this case now after the theatre had already closed?

[fol. 1523] Mr. Wright: I think we will show that is when the opposition theatre closed.

A. It may have if it says that in the original contract, *and if it says that in the original contract.* I am not familiar with the original contract.

Q. I call your attention to a contract modification dated October 25, 1939 which stated: "We are substituting above features in Athens, Alabama for five features not designated on Sheffield, Alabama contract. Both of these theatres are part of Muscle Shoals Theatres and inasmuch as all the exhibitors are served and paid for on a weekly payment plan and the substitution is from one contract to another, we feel that entirely justifiable. And that was the agreement upon the sale of the group S-10 contract that the exhibitor might over-play in one situation and cancel in another."

A. If that is in the original contract, and you must have it there——

Q. Well, this refers to some agreement that was outside the contract as written or it would have appeared in this contract?

A. Oh, you are wrong now. In order to keep our records in New York straight this modification has got to go through identifying the pictures; otherwise we wouldn't know which pictures they were.

[fol. 1524] Q. Well, you would know then if they appeared on the face of the contract?

A. What contract?

Q. The S-10 contract that is referred to here.

A. Oh, you see, the original contract—you wouldn't know which pictures were not being played and also what films had played in Athens unless you had some identifying form showing the home office where they played, and that is the reason for the modification. That doesn't mean the home office contract—that is a misnomer, as far as that form is concerned, because that form is used for a great many purposes.

Q. Now, you have—here is one dated December 11, 1939, which refers to cancellation of contract: "Since spot booking contracts dated 11/3/39 were forwarded to New York on above subjects, we have agreed to allow substitution of those second runs on original S-10 contracts for Muscle Shoals Theatre. We are, therefore, cancelling spot booking contracts and forwarding contract modifications covering second run."

A. In a case of that kind, there again we go back to the run because that is not the franchise. Rosenbaum had no franchise but we gave him the privilege of repeating those pictures and cancelling out those four subjects that Mr. Raftery spoke about this morning.

Q. You gave him the privilege at or about the date this cancelled contract is dated?

[fol. 1525] A. I will admit that.

Q. You stated this morning that you offered Paramount pictures to Mr. Smith on November 17th, 1938 via letter of that date from you to Mr. Smith, that was offered in evidence, is that right?

A. Yes sir.

Q. That was the first time you offered him pictures?

A. Yes sir, that is the first time I had written him. There are some salesmen's reports somewhere that came in from him and which caused us to get that record asking what pictures were open that he was interested in first run only.

Q. Have you got your salesmen's reports?

A. I don't know whether they are here. I am recalling the thing from memory; otherwise, I wouldn't have written the letter. I wouldn't have written a letter to Mr. Smith stating "I understand you are interested in some pictures second run."

Q. You think it was a salesman's report that caused you to write that letter?

A. Yes sir, I think it was.

Q. One salesman employed by you was Mr. Pickett?

A. Yes sir.

Q. I show you this letter dated November 4, 1938 from Mr. Cecil House to you and ask you if you received that shortly after the date it bears?

A. Yes sir, I remember this letter.

[fol. 1526] Q. Have you read it?

A. Yes sir, I have read this letter yesterday.

Q. Now, that you have read this letter, does that refresh your recollection as to when you offered the pictures with reference to the time you heard about the Department of Justice complaint?

A. Yes, I think,—I am inclined to think that is the first thing I got when he says he was interested in the first runs in these towns, on Tim Smith.

Q. Didn't you say something also with reference to the time you first heard of the complaint from the Department of Justice? Does that appear in there?

Mr. Wright: This letter refers to and quotes from a letter from Mr. Smith, in which the statement is made, it says: "He was in Washington, D. C. last week with the Department of Justice" and that he intends to press his claim to get available first runs and second runs. It also mentions the Department of Justice again on the second page.

A. Well, Judge, by my answer to that, I hardly would be influenced by what Mr. Smith said he was going to do to force me to offer him any pictures.

By the Court: What is the date of that letter?

Mr. Wright: This letter is dated November 4, 1938.

[fol. 1527] By the Court: Now, while we are on that point, there was an exhibit here this morning making some mention of the complaint that Mr. Roth at Gallatin had made to the Department of Justice. I believe it was Exhibit No. 150. Will you see what that says in that connection? It says that Mr. Roth has made complaint to the Department of Justice.

A. That was a memo, Judge.

By the Court:

Q. What is the date of that?

Mr. Simon: February 16, 1938.

By Mr. Wright:

Q. Mr. Morgan, the list of unplayed pictures that you identified this morning as those that were to be offered to Mr. Smith is the list that was attached to this letter from you to Mr. Unger, dated November 11, 1938, is that not right?

A. That is the list but I stated to him also in there that he should have on S-8 these pictures checked off in red, on which the film depot had prints and return it to me.

Q. You also referred in that letter to a letter you had written Mr. Phillips about the situation, did you not?

A. Yes sir, I did.

Q. Who is Mr. Phillips?

[fol. 1528] A. He is Louis Phillips, one of our legal counsel, in the legal department.

Q. You had written Mr. Phillips then, taken the matter up with the legal department before you wrote this letter of November 17th, which offered the pictures to Mr. Smith, is that correct?

A. Presumably so, yes.

Q. So that you were mistaken this morning when you testified that you had offered the pictures to Mr. Smith before you had had any knowledge of his complaining to the Department of Justice, is that right?

A. Let me ask you if you mean I had knowledge—you mean Pickett's letter, that he had been in Washington, etc.?

Q. The question speaks for itself.

A. Well, in answering——

Q. If you want to change the testimony that you gave this morning to the effect that you didn't offer or that you didn't, hadn't heard of Mr. Smith's complaint to the Justice Department at the time you made this offer of films to Mr. Smith?

A. Yes sir, I will change the testimony if that is what I said——

The Court: That is what you said. You said you had offered him pictures before you had heard he had made a complaint.

A. Well, if I said I hadn't I would like to change that statement because the letter contradicts that.

[fol. 1529] Mr. Wright:

Q. Are there any other changes that you would like to make in your testimony? Do you think of any other mistakes you might have made, either on my examination this afternoon, or on the examination this morning?

Mr. Armistead: Now, may it please the Court, I object to the question—Do you want to take back anything you testified to this morning? That is what it means; and I object to the form of the question.

Mr. Wright: ——

Q. I am now asking if there are any other corrections that occur to him that he now wants to make in his testimony?

A. Not that I know of.

Mr. Wright:

Q. That is all subject to the right to re-examine Mr. Morgan on documents counsel produced this morning. I believe you referred to the Crescent circuit as a small circuit as compared to what you would call good size circuits in the United States?

A. I said the Crescent circuit, Sudekum circuit, was considered a very, very small circuit.

Q. Now, how many independent circuits can you name? [fol. 1530] A. I can name quite a few: Robb and Rowley, Texas; Griffith in Texas, Griffith in Oklahoma and Kansas City.

Q. Wait a minute; the Griffiths are all one circuit?

A. No, sir, they are not all one circuit, I beg your pardon, Mr. Wright; they may be in your set-up, but in our selling, they sell R. E. Griffith in Texas and sell L. C. Griffith in Oklahoma and Texas.

Q. Any others?

A. You take Roy Martin; he is larger than Crescent.

Q. Roy Martin?

A. Yes.

Q. Where does he operate?

A. In Georgia.

Q. How many theaters does he have?

A. 50 or 55 theaters.

Q. How many theaters does the Crescent have?

A. The Crescent itself has a great many; are you talking about Rockwood and Crescent?

Q. Crescent and Rockwood?

A. They are separate circuits.

Q. Well, you sell them as a one circuit?

A. No, we sell Tony Sudekum for the Crescent, and Mr. Sudekum never buys for the Rockwood.

Q. Mr. Morgan, do you want the Court to understand that [fol. 1531] you never discussed the Rockwood franchise that you made that is in Court with Mr. Sudekum?

A. No, I don't want the Court or you to understand that, but I want the Court and you to understand that the terms were settled with Mr. Stengel and not with Mr. Sudekum.

Q. And the fact they were dated that same date is a pure coincidence?

A. No, sir, it isn't a pure coincidence; they were all negotiating at the same time, but as far as the film terms, the deal was settled with Stengel.

Q. Now, have you named all of those circuits?

A. No, I haven't. I am afraid you are trying to tax my memory a little too much, Mr. Wright; if you would like to give me time, I could give you a considerable number of them.

Q. I wish you would give us a list of those you regard as larger than the Crescent circuit; and when I say the Crescent circuit, I am referring to Mr. Sudekum and his affiliates.

A. I understand; I have mentioned Robb and Rowley, and Griffiths, Schine and many others in the northeast, New York City.

Q. Could you supply us with a list of the others?

A. I beg your pardon, I didn't get that?

[fol. 1532] Q. Will you supply us with a list of the others?

A. Yes, we will.

Mr. Raftery: Is this for the government for the purpose of cataloguing purposes? I can't see the need of it.

Mr. Armistead: I would like also to ask when the Government asks for that list, whether they want the number of changes, the amount of revenue that comes in, and the amount of seats in the theater.

The Court: No, sir; the witness was asked, on account of the statement the witness made on cross-examination how the Crescent circuit compared with a small circuit.

A. Judge, can I explain exactly what I mean by a small circuit?

The Court: Yes, sir.

A. We stayed out of the circuits, including Rockwood and all, because we wasn't satisfied with them, we stayed out of the Warner circuit to the tune of three million dollars for one solid year; and we stayed out of others. I don't think, if we couldn't make the proper deal with the Crescent cir-[fol. 1533] cuit that we would hesitate to stay out; that was the point I was trying to make.

Mr. Wright: I move to strike out this gratuitous argument this witness has furnished us as to that.

The Court: Yes.

Mr. Wright:

Q. One more question about your relations with the Crescent: When you got back into the Crescent with the franchise, you also made a deal with Mr. Sudekum to turn over the Paramount Theater here in Nashville to him to operate it, isn't that correct?

A. That is right, Mr. Wright.

Q. And that is one of the reasons you were able to get back into the circuit, isn't that right?

A. That is correct, Mr. Wright.

Mr. Armistead: Now, here is the document counsel for the Government asked this witness to produce; and I am informed it was subject to inspection by the Government over a week ago, and in view of the fact they want to reserve further examination until after they have examined it, I will [fol. 1534] hand it to Mr. Wright now, and if he desires to examine it, and after he examines it, I will have a few questions I would like to ask him.

Mr. Wright:

Q. I will hand you this document that Mr. Armistead has just handed us, and ask you to tell us what that is?

A. Mr. Wright, this is what we call a contract recap. that must be attached by the branch office to the contract when it gets to the district office; when it comes to the office with the recommendations for making this contract——

Q. Who performs that?

A. The branch manager performs it for the salesman.

Q. Who performed that?

A. William Bugie, the Branch Manager at Memphis.

Q. Branch Manager at Memphis?

A. Yes, sir; and it has the particular salesman's name on the back.

Q. Can you see anything on that recommendation there, anything on that paper, which suggests to you that the branch manager didn't want to sell Mr. Lawing and two others——

[fol. 1535] Mr. Armistead: Just a minute——

. . . . . .

Q. Point it out; read it?

[fol. 1536] A. I will read it: "The exhibitor has the right to decide."

Q. Can you read the rest of it?

A. Do you want the rest of it read.

Q. Is that all on there?

A. You asked me if there was anything else on here——

Q. Just a minute; is there anything on which you base your testimony that Mr. Lawing by the exercise of his buying power had been able to compel you to sell him both season's product?

A. I don't think I said, Mr. Wright, that I formed my entire opinion from this piece of paper this morning; if I did I didn't mean that, I was in Memphis every two weeks, and I was pretty familiar with what was going on.

Q. Your testimony now is—what you are telling is not based on the records but what Mr. Bougie told you then?

A. I will say this: it was based on my reading these records and my knowledge of the situation, because, obviously you can't write everything on here that I know.

Q. What was it you knew that doesn't appear on that?

A. I knew they hadn't been able to sell the man the previous year's product; I knew I had discussed the contract, as I had discussed many others before them that went through.

[fol. 1537] The Court: What do you mean by buying power.

A. I think I explained that this morning.

The Court: You may have explained it satisfactorily to Mr. Wright, but you didn't explain it satisfactorily to me.

A. What I mean by this—I will make it a little plainer; there is always a great effort made by the salesmen and the branch manager, and also by the home office, to sell every possibility of the year's product to a representative in the town.

The Court: Well, what is buying power supposed to be based on?

A. That is exactly the point; us wanting to get into this town, with a good reputation; knowing that, he would want the same power, to get the same deal for himself too.

The Court: All right, sir.

A. There is something else on here, however, Mr. Wright, that I would like to read in answer to your question: "We couldn't sell this exhibitor S-5"; in fact we had to cancel quite a few S-4" etc.

[fol. 1538] Mr. Wright:

Q. Is there anything unusual about that? Anything unusual about that?

A. Well, it is not usual; we will only occasionally make adjustments for exhibitors that we sell.

Q. Mr. Morgan, I dare say there is one received in the Paramount office every day, is there not?

A. Well, it is true, but it is not a practice Mr. Wright; but if is done.

Q. It is done frequently, isn't it?

A. Well, it is done frequently, if you want to consider 15,000 accounts, yes; it depends on what you call frequently.

Q. You did approve the deal as agreed?

A. Yes, I did approve the deal.

Mr. Armistead: Now, May it please the Court, I want to make this statement, and of course, if, after the Government checks this contract recapitulation concerning Lawing deal and the contract recapitulation concerning Crescent which had the product of Paramount for the year 1935-1936 in Brownsville, Tennessee, I see that the Lawing contract, recapitulation shows that Paramount received $581.00 for the 1934-1935 product, and it received from Crescent for the 1935-1936 product $785.00.

[fol. 1539] Mr. Armistead:

Q. Now, Mr. Morgan, you were questioned about a letter of November 4, 1938, from which there was a paragraph read to you, I will ask you if that letter, does not contain this paragraph, if this is not contained in it?

> "Smith will not buy now. Claims he must have pictures for Morristown, Harrim-n and Newport, and that he prefers to wait and see what happens in those three towns, as he may have to consult the distributor in Fountain City who supplied him in those three places. I think you will agree to that? I notice in the letter he refused to buy at Fountain City unless we sell him at the other towns."

A. Yes.

Q. I will ask you in comparing the revenue that Paramount received from a theater in one town with the amount of revenue it received next year, from a theater in that town,

in which you may have a franchise, if that is a fair percent, if on the contrary it is not necessary to take into consideration what the distributor will derive in revenue through that whole four or five year period, the term of the franchise?

A. Well there is no question of that, that is one of the reasons we made our franchises, as I said this morning.

Q. Was to insure a business in those towns for a period of five years?

A. Yes, sir.

[fol. 1540] Q. And those franchises you have with Crescent go up five per cent every year?

A. Yes, sir, it does, it accumulates.

The Court: Of course it would be more to the benefit of your company if they were doing business with an independent in a small town, which also had a chain house there, and the chain had fifty other theaters, it certainly would be more to your benefit to make the franchise with the chain of theaters and take the contract away from the independent in this small town and put it with the chain, in order to get the other forty-nine theaters, wouldn't it?

A. That is true, Judge, but the record shows we stayed with the independents all through our negotiations or deals, our dealings, rather, with the Crescent Amusement Company, over the nine years I was in the south, competitive places, we never took the pictures away; I went back clear to the time this morning, we never took the pictures away at Earlington, or at Gallatin; they played the pictures the first year of the franchise. Mr. Sudekum came in and we offered him a split. We couldn't offer him the four of course, but we never took the pictures away from those exhibitors.

Mr. Armistead:

[fol. 1541] Q. Did you ever hear that the theater playing Paramount product, made only a gross of forty-five dollars out of a film, when he was paying thirty-five dollars?

A. He made the complaint and I went up there and sent Mr. House to recheck those figures with Mr. Roth, and they are contained in that correspondence, and I think that is about the proportion.

Q. Did Louis Rosenbaum ever have a franchise with Paramount?

A. Never had a franchise, he had a contract and deal I think at one time, I think he has got a contract yet, a year deal now.

Q. Just an agreement?

Q. That is all, may it please the court, a deal.

Mr. Armistead: That is all.

Mr. Mitchell: May I ask the witness a question?

The Court: Yes, sir.

Mr. Mitchell:

Q. I am sure you know Louis Rosenbaum, of the Muscle Shoals theaters?

A. Yes, sir, I have known him a long time.

Q. In some of your recent testimony there was a suggestion as I understood it, that at the time of the execution [fol. 1542] of a franchise with Crescent, and franchises were executed with other Crescent affiliates, your statement to that effect did not include Muscle Shoals theaters, or Rosenbaum's?

A. No, sir, did not include all the other affiliates?

Q. As a matter of fact in the history of your office Rosenbaum has negotiated his own contracts?

A. That is correct, we have never made a contract with anybody except I had with Mr. Rosenbaum.

By Mr. Wright:

Q. Regardless of the negotiations you had with Mr. Rosenbaum, were they discussed with Mr. Sudekum?

A. No, they never were.

Q. At that time or any other time?

A. No, sir, never were.

Q. Mr. Sudekum was not interested in the negotiations with Mr. Rosenbaum?

A. Apparently not.

Q. Did you know his wife owned any of the theaters which Mr. Rosenbaum had?

A. Mr. Wright, I never knew that until after we had that deal negotiated.

Q. How long had you been a close friend to Mr. Sudekum?

A. For twenty-one years.

Q. That fact did not appear?

[fol. 1543] A. No, sir.

Q. You did recall that Mr. Sudekum had been president of the Muscle Shoals Theater Company from the time of your connection?

A. I thought Mr. Sudekum was interested in that someway, I found out after the franchise was closed, Mr. Sudekum—it was Mrs. Sudekum, Mr. Sudekum never told me that.

Q. You were not aware of the fact that Mr. Sudekum's interest had been transferred to Mrs. Sudekum?

A. I still think Mr. Sudekum was the one that was in there.

Q. Is your testimony the same as to the period with Muscle Shoals Theaters Corporation, following the operation of the theaters, you never discussed that Muscle Shoals deal with Mr. Sudekum?

A. No, I never discussed that Muscle Shoals deal with Mr. Sudekum.

Q. Not even when he was president?

A. No, sir, not even while he was president, I couldn't tell you when he was president.

Mr. Mitchell: One other question, May it Please the Court.

Q. There were years in which Crescent did not buy your product but Muscle Shoals Theaters did?

A. That is correct, I think, but I can't remember positively.

[fol. 1544] (Recess.)

The Court: Call your next witness.

Mr. Wright: If the Court please, we are now going to offer the rest of the Paramount correspondence, which can be done without the necessity of introducing witnesses, due to the fact that Mr. Armistead has kindly agreed to stipulate that if these men were called they would testify that they wrote the letters on or about the date they bear in the ordinary course of business.

The first letter is dated February 10th, 1938, from Mr. J. J. Unger to Mr. Oscar A. Morgan, and the stipulation for that letter reads that if Mr. Unger were called to the stand he would testify that at the time he wrote this letter, February 10, 1938, he was the eastern division salesman of the Paramount Pictures, Inc., of New York City, New York, that he wrote the letter pursuant to his duties as such

manager, and that the letter was received by Mr. Morgan. I will ask to have it marked.

The Court: Suppose you just go ahead and read it, and they can be marked that way, and we will save a little [fol. 1545] that way—they can be marked while you are reading the next one.

Mr. Waller: I think, Your Honor, we ought to read into the record the stipulation.

Mr. Wright: I thought I did.

Mr. Waller: That stipulation is made with certain reservations.

The Court: Exceptions as to competency, relevancy and materiality.

Mr. Waller: It is a little more than that, of course we do not concede that *that* Paramount was or is a co-conspirator, or that oral or written declarations of Paramount officers or employees are competent against our clients, and we reserve the right to object to said letters on that ground, as well as to object to any and all statements contained in said letters, which would be hearsay, and because the evidence would otherwise — objectionable, if the writers of the letters were testifying in person.

The Court: You can read the letter and I will pass on any [fol. 1546] objection.

Mr. Wright: Letter of February 10, 1938 of Mr. Unger to Mr. Morgan, has attached to it a letter from Mr. Roth dated January 22, 1938 to Mr. Unger, which is already put in evidence.

Mr. Unger's letter to Mr. Morgan reads as follows:

> "Dear Mr. Morgan: The attached copy of letter speaks for itself. Was it absolutely necessary for us to include Gallatin in the Sudekum franchise?
>
> "Please write me in connection with the attached so I may reply intelligently to this exhibitor.
>
> Very truly yours."

The next letter written by Mr. Unger to Mr. Morgan is dated November 23, 1938, and carries the same stipulation with reference to what Mr. Unger would testify to if called. The letter is as follows:

[fol. 1547] Mr. Wright: We counted in four of the letters, and we are using only two of the four, as I understand.

I will ask to have this marked as Government Exhibit No. 154, and is as follows:

"DEAR OSCAR: I note in your letter of November 14th regarding the Tim Smith Circuit, in the next to the last paragraph that you say that Mr. Sudekum "has a refusal on all second runs" in Paragraph E of Article 8 in our contract. It would seem to me that this is a very bad clause inasmuch as it is impossible for your Exchange to make a sale until after Crescent Amusement Company waives their right to those second run pictures.

I think the way to handle this would be for Crescent Amusement Company to send in their rejections of second run pictures at least quarterly and then you would be able to sell these pictures to the Tim Smith Circuit in the same way. What do you think of this idea? I speak of this idea so as to keep out of constant legal trouble.

Yours very truly."

That is all that we are offering on Mr. Unger.

Now, we have some more letters from Mr. D. Prince, who was at the time Branch Manager of the Paramount Ex- [fol. 1548] change at Atlanta; the first one is dated April 12, 1934, a letter from Mr. D. Prince to Mr. J. T. Howard, Branch Manager, Indianapolis Exchange.

The same stipulation applies, that is that Mr. Prince was at that time Branch Manager of the Paramount Exchange at Atlanta, that he wrote the letter on the date of April 12, 1934, pursuant to his duties as such Branch Manager.

The Court: And the same exceptions noted above.

Mr. Wright: This letter reads as follows:

DEAR MR. HOWARD: Answering your letter of the 9th, about the Sudekum Circuit with headquarters in Nashville, the situation is simply this:

Prior to the time that Paramount owned its own theatre in Nashville, Sudekum had only one competitor in the first run field, that being the Loew house in Nashville, and up to the time our theatre was built, Sudekum bought all of our product for his entire circuit. Even after our theatre opened, so long as we operated it ourselves, Sudekum continued to buy our

product, with the exception of Nashville, where Paramount pictures play the Paramount Theatre.

[fol. 1549] However, when we turned our theatres over to another party to operate for us, as we did when we made the deal with Bob Wilby, who operates the Nashville house in conjunction with a number of other houses in this territory, Sudekum felt that he should have been the man who should have been taken into the partnership arrangement. That was two years ago, and his contention is now that so long as he must do without Paramount product in Nashville, he can do without Paramount product throughout the remainder of the circuit. We have been out of the Sudekum Circuit entirely for two seasons. I am hoping that something will be worked out so that we will not have to remain out for another year.

Very truly yours, —— ——."

The next letter is one from Mr. Prince to Mr. Howard, Branch Manager, Indianapolis, dated October 16, 1935 and carried the same stipulation with reference to what Mr. Prince would testify to, if called.

It is as follows:

"Dear Mr. Howard: Your letter of October 14 came to me today, and I can appreciate just exactly what your position has been so far as Earlington and Madisonville are concerned.

[fol. 1550] We have had identically the same situation in several spots here in the Atlanta territory. For instance, being unable to sell Sudekum in any of his towns for the past three years, we have been able to make some very satisfactory deals with towns like Hartsells, Alabama, which is about eight miles from Sudekum's town of Decatur, Alabama. The same thing applies to the independent account at Attalla, Alabama, which town is just about five miles from Gadsden, Alabama, another of Sudekum's towns. Inasmuch as Tony Sudekum bought practically everything excepting Paramount, naturally these little independent exhibitors became exceptionally good accounts of ours. Each year they would buy, fearing that Tony Sudekum would buy Paramount, but hoping he would not.

I can appreciate the fact that in your situation it is a little bit different, because, while the Sudekum busi-

ness involves some $40,000.00 or $45,000.00 for the Atlanta Exchange, the little bit of business you get out of Madisonville does not even compare favorably to the business you have been getting from Earlington. It is just one of those situations where possibly you get a little bit the worst of it, while the Atlanta Exchange derives most of the benefit. However, the Company [fol. 1551] gets a lot more money in the long run.

No doubt you know that Sudekum is a tough buyer. He is a marvelous fellow personally—the kind of fellow who would rather give you a $10 bill out of his pocket, rather than agree to pay 50¢ more on a newsreel contract.

He also thoroughly understands the situation between Madisonville and Earlington, and I think after the three pictures mentioned in your letter have played, everything will go along without any difficulty whatsoever.

Kindest personal regards,

Very truly yours —— ——."

The Court: Who wrote that letter?

Mr. Wright: That was from Mr. Prince, Atlanta Branch Manager, to Mr. Howard, Indianapolis Branch Manager.

That is all we have for Mr. Prince.

The next we will offer is a memorandum dated September 2, 1938, made by Mr. William F. Bugie, Paramount Branch Manager, at Memphis, Tennessee. The stipulation referred to, it is a letter, but I believe that it appears on its face that it is a memorandum, and the stipulation will be that Mr. William F. Bugie, if called to the stand, would testify that on that date he was Manager of the Paramount Branch [fol. 1552] at Memphis, and that he wrote this memorandum dated September 2, 1938, pursuant to his duties as such Branch Manager.

The memorandum is as follows:

"McKenzie, Tenn.

On 8-9 this account had a prior run over Huntingdon, Tenn. This season all nearby Sudekum towns have a clearance over this town. This exhibitor naturally resented being handicapped and being placed in the position of finding it necessary to play Para-

mount pictures after Huntingdon, Paris, and Milan, who attract theatre patrons from the same nearby small towns that in the past he has been able to gain revenue, for the reason that he would play the product prior to them. To get the exhibitor to continue to play Paramount pictures, it was necessary for us to grant some concessions.

After several visits to the town, we have been able to work out a deal for 40 pictures at the best rental the exhibitor feels he can pay under the clearance that has been set against him. We also had great resistance from the exhibitor in buying Paramount pictures as he bought his Metro and Fox deals without any clearance set up as Sudekum has not apparently made his next [fol. 1553] season's deals with these companies and they therefore did not provide a clearance for Sudekum.

This is the best deal that we can work out with this exhibitor under the circumstances, and we therefore recommend that it be approved."

The next is a letter dated April 2, 1935, from Mr. Bugie, to Mr. Oscar A. Morgan, which is offered now under the same kind of stipulation with respect to what Mr. Bugie would testify to, if called. The letter is as follows:

"DEAR MR. MORGAN: I have not heard anything more as to whether Mr. Sudekum has closed for our S-7 product in Brownsville, Paris, Dyersburg, or Union City.

Both the Union City and Brownsville exhibitors have been in the office several times trying to learn whether or not our S-7 product is available for them.

I have advised them that we have a deal pending with Mr. Sudekum for Brownsville and Union City and until this is either rejected or approved, I cannot consider service in these towns.

Will you kindly advise me when these deals are approved so that I may act accordingly.

Very truly yours."

[fol. 1554] The next is a letter dated January 27, 1939, from Mr. Bugie to Mr. H. F. Wilkes, at the District Office,

which is being offered under similar stipulation. It is as follows:

"Dear Mr. Wilkes: Mr. J. D. Henry is constructing an opposition theatre to the Crescent Amusement Co., in Union City.

He has requested that we sell him service and has offered to pick up She Asked For It, Partners In Crime, Daughter of Shanghai, Bulldogs Peril, No Man of Her Own, Blossoms on Broadway, Bulldogs Revenge, Shanghai Express, Sign of the Corss, and Horsefeathers at a rental of $12.50.

He has, also, offered to select 16 pictures from the S-9 releases—5 to be at $15.00, against 30% of the gross; 11 at $15.00 flat, together with 32 selected Shorts at $2.00 each. He has also, agreed to buy a selective deal on the S-10 product second run—30 pictures, rentals from $13.00 to $15.00 with 6 of the pictures to carry a percentage sharing agreement.

The Sudekum franchise provides for an option on second run in any of his towns.

Will you kindly advise me whether I should consider a second run in any of his towns, from Mr. Henry. [fol. 1555] Also, whether I should sell him the above listed first run pictures, which were passed up by Sudekum, under his Code elimination privileges and a few reissues, which Mr. Sudekum would not consider.

The theatre that Mr. Henry is constructing will be called the Roxy Theatre and will open about February 15th at an admission price of 25¢, however, if Mr. Sudekum opens up another house he is anticipating constructing in the town and charges in this "B" house an admission of 15¢, Mr. Henry would want the right to show any product played second run at 15¢.

Very truly yours . . . ."

Mr. Wright: Those are all for Mr. Bugie.

The next letters are from Mr. J. T. Howard, who was the Branch Manager at Indianapolis, Indiana, for Paramount. The first is dated September 20, 1935, from Mr. Howard to Mr. C. M. Reagan at the Home Office. The stipulation is, if Mr. Howard were called, he would testify that he was Manager of the Paramount in the Indianapolis Branch at

the time he wrote this letter and that he wrote it pursuant to his duties as such Branch Manager, and that it was duly received by Mr. Reagan. The letter is as follows:

[fol. 1556] "DEAR MR. REAGAN: I have your letter of the 16th wherein you advise us that it will probably be necessary for us to make some concession in price at Earlington as a result of the Company selling Madisonville, Kentucky our S-7 product. There is no doubt but what this revision will be necessary.

However, in comparing the S-7 deal in Madisonville with that of Earlington, it seems rather unjust to allow Madisonville clearance over Earlington, providing Madisonville dates their pictures within sixty days of national release date. I note the total revenue which we will receive for S-7 in Madisonville is $1590.00, whereas the Earlington S-7 total was $1660.00. Further, Earlington is a 100% sale whereas Madisonville is a partial sale. Also prices on Color Classics in Earlington is $5.00 as compared to $2.50 in Madisonville, and prices on Popeye and Betty Boop cartoons in Earlington are $3.75 as compared to $2.50 in Madisonville. Our minimum short price is $2.50 in Earlington as compared to $2.00 for a partial short deal in Madisonville.

At any rate, we will try to weather the situation as best we can, although the above facts do make this matter look very unfair.

Yours very truly * * *."

The next letter is from Mr. Howard and is dated October [fol. 1557] 14, 1935, and addressed to Mr. D. Prince, Branch Manager at Atlanta, Georgia and is being offered under a similar stipulation.

The letter is as follows:

"DEAR MR. PRINCE: Under date of October 3rd I wrote you relative to some pictures which we had set in at Earlington, Kentucky prior to the Madisonville date. I am a little bit apprehensive that my letter was not entirely clear to you, and accordingly I want to explain further.

For the past few years Earlington, Kentucky has banked on Paramount as the back-bone of his business, because our product was not playing in Madisonville.

He made the same plans for 1935-1936 and we sold him at a very early date. All of his dates had been set in when you advised us that you had closed with Sudekum for Madisonville. The result was if we had unceremoniously yanked all of the dates on Earlington, we would have placed him in a very embarrassing position by forcing him to make quick deals with other companies who would take advantage of him, knowing his desperate need for quick bookings.

[fol. 1558] Accordingly, we agreed to allow Annapolis Farewell to stand as booked October 19-21st, Two for Tonight October 26-28th, and Last Outpost November 2-4th. These three pictures are either day and date or just ahead of Madisonville. After these pictures have played, all future bookings in Earlington will be after Madisonville, according to the terms of the clearance on Madisonville contract.

Earlington, Kentucky has been a very splendid account for us and we really felt obligated to assist him as outlined above. Furthermore, our Earlington contract totaled more money than the revenue we will derive from our Madisonville deal. I trust that you can make Mr. Sudekum see our problem on the three pictures named above.

Kindest regards.

Yours very truly * * *."

[fol. 1559] Mr. Wright: We have here a letter from Mr. Reagin. I think he will be here Wednesday. I think that completes our offer of Paramount correspondence.

I think that, in addition to the correspondence, a stipulation has been offered with respect to two spot booking contracts, both dated March 30, 1939 for the Ritz Theatre operated by Crescent Amusement Company at Morristown, Tennessee.

The Court: Those were the contracts that were objected to sometime ago, were they not?

Mr. Wright: Yes sir, I believe they were and the stipulation with respect to those is, I believe, that Mr. J. H. Kirby, the manager of the Paramount Atlanta exchange at the time these documents were prepared would, if called, testify that he held that position and that these contracts were prepared pursuant to his direction and the recommendations which appear on here were made by him in the course

of the performance of his duties as such branch manager, with the same reservations as they other stipulation.

These documents refer to, each refers to five different pictures and each says: "We are spot booking the above group S-10 features for repeat run engagements at terms [fol. 1560] equal to the Hopalong Cassidy situations. This is additional business and is in accordance with the general agrement made with Sudekum at the time the five year franchise was drawn."

(Documents filed and marked as Exhibits P-33 and *P*-33.)

Now, call Mr. Willingham.

Mr. Waller: Before the other witness is called, I want to call your Honor's attention to the fact that in these letters, some of them written by branch managers and others, there are a great many opinions expressed by different persons connected with the Company. In these last exhibits there was the construction of a written contract by a branch manager. We insist that all of that is incompetent, would be incompetent if the witness were here.

Now, in addition to that, with respect to the documents as a whole, we, of course, are insisting that any possible relevency would be confined to the alleged conspiracy between Paramount and the defendant exhibitors. It couldn't possibly come in on the other conspiracies alleged, and particularly on a conspiracy which the Government alleges took place among the defendant exhibitors themselves. Of course, the Government can't prove a conspiracy among [fol. 1561] the defendant exhibitors by what a representative of Paramount said. Of course, they can't prove any kind of a conspiracy by the declaration of a co-conspirator. If the Government has proven a conspiracy between Paramount and Crescent these letters wouldn't add anything; the Government has proved their case. The only relevancy then would be to show some overt act and an overt act is not necessary, so it looks like to me they have got a dog chasing his tail. In other words, they are introducing these letters saying they are going to make them competent by proving a conspiracy just like they have been doing thoroughout the trial. All of these declarations or contracts made by Paramount with independents and what not are introduced on the theory that they are going to make them competent. Now, they introduce these letters on the theory they are going to make them competent by

proving a conspiracy. Now, it seems to me what the Government is doing is introducting letters and saying they are going to make them competent and then they say "We have proved a conspiracy by the letters." Now, I want to point that out to your Honor because I think that is the theory on which they are being introduced.

[fol. 1562] J. F. WILLINGHAM, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. J. F. Willingham, 158 Vance Street, Memphis, Tennessee.

Q. What is your occupation?

A. Manager of Metro-Goldwyn-Mayer, Memphis.

Q. You are employed by Loew's, Inc.?

A. Yes sir.

Mr. Raftery: Mr. Wright, this evidence is not being offered against Columbia, Universal or United Artists?

The Court: No sir.

Mr. Waller: I would like to ask if the Government agrees with my statement, if the gentlemen even contend that the evidence is admissible on the blanket conspiracy, that is, the conspiracy among the defendant exhibitors?

Mr. Wright: We certainly do not.

Mr. Waller: In other words, they are insisting that a representative of Paramount can write a letter back four [fol. 1563] or five years ago and that that letter is competent in the alleged conspiracy among Crescent, Rockwood, Sudekum, etc., that is the Government's contention? Of course, we are objecting to the evidence on that ground.

By Mr. Wright: (Resuming examination):

Q. Mr. Willingham, were you the branch manager of Metro at Memphis on May 30, 1935?

A. Yes sir.

Q. I will show you this memorandum of cancellation of contract and ask you if the initials JFW that appear there were put on there by you?

A. Yes sir.

Q. That was prepared under your direction and in the course of your duties as Memphis branch manager?

A. Yes sir.

Mr. Wright: Do you want to cross-examine him on each of these?

Mr. Waller: No, I would suggest you go ahead and put them all in.

By Mr. Wright:

Q. How long have you been branch manager for Loews at Memphis, through what period?

[fol. 1564] A. September, 1926 to date.

Q. I hand you a letter dated July 2, 1935 from you to C. E. Kessnich at Nashville, Tennessee and ask you if you signed and wrote that letter on or about the date it bears.

A. I did.

Q. And that letter was written in the course of the performance of your duties as Memphis branch manager?

A. Yes sir.

The Court: Let it be marked for identification.

(Letter marked Government's Exhibit No. 163.)

By Mr. Wright:

Q. I will also show you a letter from you to Mr. T. J. Connors at the home office dated July 13, 1935, and ask you if you wrote that letter on or about the date it bears, in accordance with the performing of your duties as Memphis branch manager?

A. Yes sir.

Q. I also show you a letter dated July 30, 1935 from you to Mr. Kessnich at Atlanta, Ga. and ask you if you wrote that letter in the course of your duties as branch manager at Memphis?

A. Yes sir.

Q. I also show you a letter from you to T. J. Connors at the home office dated July 31, 1935 and ask you if you

wrote that letter to Mr. Connors and if it was in connection with your duties as branch manager at Memphis.

[fol. 1565] A. Yes sir.

Q. I also show you letter dated November 26, 1935 from you to Mr. Kessnich at Nashville, Tenn. and ask you if you wrote that letter on that date in the course of your duties as Memphis branch manager of Metro?

A. Yes sir.

Q. And I also show you a letter from you to Mr. H. Postman at the home office in New York dated January 22, 1936 and ask you if you wrote that letter on that date in the course of performing your duties as Memphis branch manager?

A. Yes sir.

Mr. Wright: I will offer these in evidence as Government's Exhibits Nos. 162 to No. 168, inclusive.

Mr. Waller: We make the same objection.

The Court: Suppose you read them one at a time so that I can see what they are. The reason I like to have those exhibits read at the time is that I am going to endeavor to decide this case within a day after you gentlemen complete your argument, and if I have to read all this mass of correspondence, and records in order to decide the case, [fol. 1566] I will be some months in getting that done, and if I can hear them as I go along and make notes as to the ones I think are important, why, it will enable me to facilitate the deciding of the case. I am just afraid that if I take this case under advisement that I don't know when I will be able to wade through all these documents, letters and testimony and decide it, and, as I say, I am going to give you gentlemen ample opportunity to argue it just as much as you feel it is necessary to, and then I am going to try to decide it or rather I am going to decide it. I don't know whether it will be a very satisfactory decision to some parties or not but——

[fol. 1567] Mr. Wright:

Q. With reference to the cancellation of contract dated 5/3/35 with reference to the Old Opera House at Union City operated by Crescent Amusement Company, second run, contains the following statement——

The Court: What exhibit is that?

Mr. Wright: That is Exhibit No. 62.

"This second run house was opened by Mr. Sudekum in opposition to an independent exhibitor who had opened a theater in this situation in opposition to Mr. Sudekum's first run house. In as much as Mr. Sudekum has now closed this second run operation, we are cancelling the contracts to clear our records.

The Court: Now, how is that? That is the opinion of the man that made that contract?

Mr. Wright: May it please the Court, I think it shows a high degree of cooperation between Mr. Sudekum and Metro and Crescent Amusement Company, which, after the oppo- [fol. 1568] sition has been disposed of, why he, then, Mr. Sudekum, was then closing the house he had opened for that purpose; and he was able to cancel his contract without any liability.

The Court: Read that again, please, sir?

Mr. Wright: "This second run house was opened by Mr. Sudekum in opposition to an independent exhibitor who had opened a theater in this situation in opposition to Mr. Sudekum's first run house. Inasmuch as Mr. Sudekum has now closed his second run operation, we are cancelling the contracts to clear our records."

The Court: Well, I think that is competent; that shows the contract was cancelled; that is, the contract with the Opera House?

Mr. Wright: This is entitled "Cancellation of Contract" and then specifies the list of numbers of films, rentals of the pictures which were cancelled, etc.

The Court: All right.

[fol. 1569] Mr. Wright: The next letter is dated July 2, 1935, and is from Mr. Willingham to Mr. O. E. Kessnich, Nashville, Tennessee, as follows:

"Dear Mr. Kessnich:

Received your wire stating you and Mr. Avey are leaving this afternoon for Nashville, Tenn. and if I wish to join you there Wednesday morning, I may do so.

Upon second thought, do not believe I would be doing anything but wasting the company's money by coming

over there as you and Mr. Avey can take care of the situation very capably without my presence. I know of nothing I could possibly do other than what you will do or already have done, in order to consum-ate a deal with Mr. Sudekum.

I do, however, want to drop one thought and this is, we have a customer in Brownsville, Tenn. that has been playing our product ever since he has been running the theater there 100 percent. He has bought and played everything we have released without any trouble every season. Now, Mr. Sudekum has gone into the situation and sat down on top of him. Miss Brockett was in our office and told the writer that Mr. Sudekum wanted us to hold the product for him. Therefore, we have refrained from negotiating a deal [fol. 1570] Mr. Lawing, although he has requested us to write up a deal many times.

Mr. Sudekum has aligned himself now with Mr. Pouncey and we understand they are in partners on a 50/50 basis. Mr. Pouncey owns the Milan Theater, Milan, Tenn. He and Mr. Sudekum bought both theaters in Humbodt, Tenn. the Rex and the Main Street. Mr. Pouncey has not bought our product in Milan for two years and advises his time in Milan is filled for the 1935-36 season and he cannot possibly use our product, but could work out some kind of a deal with us for Humboldt, due to the fact that they have two theaters there.

We do not believe it would be fair for Mr. Sudekum to be privileged to buy the product in Humboldt, where he has two theaters and leave us out of Milan, Tenn., and at the same time for us to sell him the product in Brownsville, Tenn., in preference to a customer that was there before he was and wants to buy our product. Won't you, therefore, please insist that Mr. Sudekum buy our product for both Milan and Humboldt if you sell it to him for Brownsville.

Will also appreciate your having Mr. Sudekum instruct Mr. G. W. Haynes who has also recently aligned [fol. 1571] himself with Mr. Sudekum as a partner on a 50/50 basis, to buy our product at the same terms as Mr. Sudekum pays, that is, insofar as the number of percentage pictures, etc. are concerned. The towns

where Mr. Haynes and Mr. Sudekum have theaters on a partnership basis are as follows:

Tiptonville, Tenn.	Strand Theater
Ridgely, Tenn.	Palace Theater
Earle, Ark.	Strand Theater
Parkin, Ark.	Ritz Theater
West Memphis, Ark.	Strand Theater

They also have a first run house in Fulton, Ky. but we do not want to do business with them in this situation as we have a franchise with Warner, but in all other towns listed above in which Mr. Haynes is operating, we believe we are entitled to representation.

Attached you will find cut-offs on all of these towns so you will be able to talk intelligently as to price and terms with Mr. Sudekum.

The writer is leaving town for a trip through Arkansas and believe from this point on, you will be able to see a decided improvement in the sales of the Memphis Office. Note a national outdoor billboard campaign has already been posted on China Seas in this territory. This is going to be a great help and [fol. 1572] stimulant to our sales and we are going to take advantage of it as quickly as possible.

Mr. Waller: Your Honor notes in that letter, that the writer of that letter says Mr. Lawing has played the product 100 per cent. Of course, the records would be the best evidence of whether he did or did not play 100 per cent. That letter would not be the best evidence on that. We want the records on that. The writer of the letter, of course, was the manager of the branch office at Memphis.

The Court: I overrule the objection.

Mr. Wright: The next letter is dated July 13, 1935, marked Government's Exhibit 164, from Mr. Willingham to Mr. T. J. Connors:

"Dear Mr. Conners"—The first paragraph I don't think is material. I will try to eliminate from now on that that is not material. If they want to read them they may.

"We can sell the Southland Theater, Brownsville, Tenn. any time we are agreeable to doing business

with the exhibitor we have been doing business with for years.

[fol. 1573] We have deferred making a deal with this exhibitor up until the present time due to the fact that Mr. Sudekum has opened an opposition house in this situation.

Now that Mr. Kessnich has visited Memphis he has instructed us to go ahead and sell the Southland Theater in Brownsville and we will be able to send you a deal next week.

We have not had representation in Milan, Tenn. in two years. This exhibitor is now a partner to Mr. Sudekum but he still does all buying and booking. He has bought all product he can use for next season, therefore, has left us out in the cold another year."

The next letter is dated July 30, 1935, and if from Mr. Willingham to Mr. Kessnich at Atlanta:

"Attached hereto is contract for the 1935-36 product in the Southland Theater, Brownsville, Tenn. As you know, this is the town in which Mr. Tony Sudekum opened a house in opposition to our regular customer.

We believe it very much to our advantage to continue doing business with Mr. Lawing, therefore recommend acceptance of the deal attached.

Also attached is contract for the Strand Theater, Whiteville, Tenn. as this situation is also owned by [fol. 1574] Mr. Lawing and no doubt, in the event we do not accept the Brownsville deal we will have to forego the business in Whiteville.

We will appreciate your approving these contracts and giving them to Mr. Connors for final approval."

The next letter is dated July 30, 1935, from Mr. Willingham to Mr. T. J. Conners: (Reading)

"The writers's activities for week ending July 27th are as follows:

Memphis, Tenn. Daisy (colored) Theater. Sold 100 per cent new deal.

Brownsville, Tenn. Southland Theater. Mr. Mock secured a deal in this situation several weeks ago which the writer rejected. Went back into the town and improved the deal, so that it is acceptable, placing six pictures in the top bracket instead of three and

secured a slight increase on the lower bracket pictures. This deal is being forwarded you with a special recommendation as Brownsville is a Tony Sudekum town. Mr. Lawing has been buying our product for years and Mr. Sudekum came into his town and built an opposition house. Inasmuch as he was in the town first and has always played our product, believe it nothing but right that we continue to serve him. However, wish to [fol. 1575] go on record now that if anything comes up with reference to selling the balance of the Sudekum towns that I will not be held responsible for the selling of this contract. In the event you do not think we have used good judgment, please reject the deal. We might add Mr. Kessnich on his last visit to Memphis, told us to go ahead and sell this contract as Mr. Lawing was entitled to our product.

And there is a report with respect to——

Mr. Waller: Of course, that is objected to as hearsay, if your Honor please; I mean in addition to the other objections.

The Court: All right; overruled; go ahead.

Mr. Wright: The report with respect to Milan, Tennessee:

"Milan, Tenn. Milan Theater.

Humboldt, Tenn. Rex Theater.

Greenfield, Tenn. Greenfield Theater. Mr. Pouncey who operates theaters in these three towns is a 50/50 partner with Mr. Tony Sudekum. He advises he has bought all of the product he can use. Therefore, is [fol. 1576] unable to use our product under any circumstances. Think some pressure should be brought to bear on Mr. Sudekum to see if he can influence Mr. Pouncey to buy our product in these three situations inasmuch as he is a 50/50 partner. Might add Mr. Pouncey is now making plans to open a theater in Trenton, Tenn. in opposition to Mr. Washmon, our present account. Mr. Pouncey has not bought our product for two years and contends the reason he has been buying around us is that our product grosses less than any on the market."

Now, the report with respect to Ridgely, Tenn.:

"*Ridgely, Tenn. Palace Theater.* Mr. Haynes, another partner of Mr. Sudekum owns and operates six

theaters. Was unable to catch him in town, but talked to him on long distance on telephone in one of his other towns, and he still states he is not doing any buying as yet."

The Court: Is that very material, Mr. Wright?

Mr. Wright: I think it is very material as far as the Brownsville, Tennessee report is concerned.

[fol. 1577] Mr. Wright: It is quite apparent that in this correspondence the reason that the product was taken away in Brownsville, Tennessee, was because it had to be taken away in order to make the deals with the Sudekum circuit.

The Court: All right, the fact that it might be and might be something different, occurred to me as a different proposition.

Mr. Wright: I don't think it does offered by itself, I think it contains a part of that which is an issue in the suit, but with respect to this particular situation.

Mr. Waller: Your Honor, we contend that one letter or ten letters or twenty letters, written by Metro or any other Company, which are only written declarations, could not prove a conspiracy, they are only competent after the conspiracy has been proved.

The Court: Mr. Waller, in all these cases that have been decided under the Sherman Act, of course they did not [fol. 1578] sit down and write out an agreement, and you can prove it by all these facts.

Mr. Waller: By overt acts from which you can draw inferences.

Mr. Wright: There are only two more of these, if the Court please, a letter dated November 26, 1935, to Mr. Willingham, by Mr. Willingham to Mr. Kessnich, Government's exhibit number 168, and reads as follows:

"Inclosed find applications we took from Mr. C. C. Lawing for Brownsville and Whiteville, Tenn.

"We are sending you these contracts so that in the event you sell Mr. Sudekum for Brownsville though you would be interested in knowing how much money as well as news service that he can get or have secured from our old, regular account. Also, please take into consideration that if we sell Mr. Sudekum we will lose the Whiteville, Tenn., contract.

"Also inclosed is our complete file with reference to unplayed 1934-5 product in Humboldt, Tenn., together with a list of all unplayed product under contract in Humboldt, Tennessee, features, one reelers and two reelers, showing prices. We will appreciate your having Mr. Sudekum settle for this contract while there, if possible.

[fol. 1579] *possible.*

"Just as a reminder, when negotiating with Mr. Sudekum, please do not overlook selling him for the last two towns he acquired in our territory Milan and Humboldt. Certainly, if we take our product away from our old customer in Brownsville and give it to Mr. Sudekum in that situation, he should reciprocate by buying our product in Humboldt and Milan.

"Please return these contracts and file after they have served their purpose, and oblige."

The next is letter dated January 22, 1936, from Mr. Willingham to Mr. H. Postman, at the home office, marked Government's exhibit number 167, I will skip the first two paragraphs, the third, is—first four paragraphs, and reads as follows:

"As you know, this exhibitor operates the Southland theater, Brownsville, Tenn. He has been using our product in Brownsville ever since he has been in business and paid excellent rentals. However, we refused to sell him the 1935-36 product in Brownsville this season because Mr. Tony Sudekum has opened a theater in Brownsville and we had to sell our product to Mr. Sudekum.

[fol. 1580] The Court: What is the number of that exhibit?

Mr. Wright: That is No. 167.

Mr. Waller: Your Honor he said he had to sell, but of course that is a conclusion.

The Court: He did sell it to him, didn't he?

Mr. Waller: We object to it, Your Honor.

The Court: You can ask the witnesses about that, is that in the direct examination, you can ask the witness, that is exhibit No. 167.

Cross-examination.

By Mr. Waller:

Q. Mr. Willingham, I believe you say you were the branch manager at Memphis for Loew's, Incorporated?

A. Yes, sir.

Q. Where did you first know Mr. Lawing?

A. I met him when he opened the theater in Brownsville for the first time.

Q. Was that in 1932 or 1933?

[fol. 1581] A. I think it was in 1932.

Q. Do you know whether or not he previously had known you in Memphis, or whether or not you knew him previously in Memphis?

A. No sir, I did not.

Q. You saw him pretty frequently while he was operating the theater there in Brownsville?

A. Yes, sir.

Q. And you made contracts with him for Metro product?

A. Yes, sir.

Q. Do you keep records there at the Memphis office that would show what those contracts were, the date they were played off and what money the company received from them?

A. Yes, sir.

Q. You have those records here in Nashville?

A. Up in the hotel room.

Q. Now in addition to the letters that were introduced by the Government, did you write other letters from time to time in which Mr. Lawing was mentioned?

A. Lots of them.

Q. Do you have some of those letters here?

A. Yes, sir.

Q. Have quite a file, a complete file?

A. Yes, sir.

[fol. 1582] Q. Up in the hotel room?

A. Yes, sir.

Q. Will you bring in the morning with you the records which show the terms of the deals you made with Mr. Lawing at Brownsville, from the time he entered the town in 1932 or 1933, down to the time he quit doing business there,

and also the records as to the deals made with Crescent Amusement Company in the same town, from then on, the money received by Lawing from those deals?

A. Yes, sir.

Q. Will you also bring with you in the morning any letters you may have written to any officers or representatives of Lowe's in which you may have used expressions about Mr. Lawing's record, which are different from the expressions in these letters?

A. Yes, sir.

Q. Now taking up the first Government exhibit, which is a memorandum dated June 24, 1935 about Union City, in which it is stated that an independent exhibitor opened a theater in Union City, in opposition to Mr. Sudekum's first run house; do you remember who that independent exhibitor was?

A. Mr. J. W. Haynes.

Q. That was not Mr. Henry then?

A. No, sir.

[fol. 1583] Q. Mr. Henry came in there several years later?

A. Later, yes, sir.

The Court: Then what is the date of that?

Mr. Waller: That is dated June 24, 1935.

The Court: Mr. Henry didn't open in, at Union City until 1937.

Mr. Waller: He said this was Mr. Haynes that this memorandum referred to and not Mr. Henry, referred to in examination in chief, as to what their intent was and I just asked the witness, who was the independent, it was shown in the examination in chief that an independent came in, I just asked the witness who the indepen-t was, that was referred to, and he said it was Mr. Haynes. In other words, it was not the same Union City situation that is referred to and has been brought into this proof.

The Court: I understand it, I thought it was the other man.

Mr. Waller: I thought Your Honor might have had that impression.

[fol. 1584] The Court: I did have that impression.

Mr. Waller: Mr. Haynes is with the Strand Enterprises, one of the defendants in this case, and is at the present time?

A. Yes, sir.

The Court: How does that document shed light on the issues in this case?

Mr. Wright: Because Mr. Haynes was an independent in opposition to Mr. Sudekum in this city, the defendant Strand Enterprises was formed with Mr. Sudekum interested to the extent of a half interest in the business, and Mr. Haynes left Union City to Mr. Sudekum, and operated a series of theatres in a number of other towns in Arkansas and Mississippi, which were shown on their partnership with Mr. Sudekum. At the time this memorandum was written, he was not a partner of Mr. Sudekum, he was independent.

Mr. Waller: Only subsequently a partner.

[fol. 1585] Mr. Waller: When that memorandum was written, he was not a partner of Sudekum, he was an independent. As I understand it, the Corporation was organized in July or August, 1935. I take it the Government intends to prove those facts to let this memorandum in. They don't insist it is competent now. They started in 1934, I believe August, 1934, and went to August, 1939.

The Court: This was in 1935?

Mr. Waller: In 1935.

The Court: All right. The reason I was mixed up on that, there was some evidence by Mr. Henry, who testified, and there was a contract introduced here, that had first run at Crescent Theatre and second run at the Opera House, and the Opera House was closed at that time. All right, go ahead.

Mr. Waller: I take it, it must have been when it was closed.

The Court: I don't know.

Mr. Waller:

Q. Now, Mr. Willingham, there is a letter here of July 2, 1935 which is Government Exhibit No. 163, in which the statement is made:

> "We have a customer in Brownsville, Tennessee, that has been playing our product ever since he has been running a theatre there 100 per cent. He has [fol. 1585] bought and played everything we have released, without any trouble, every season."

Now, your records that you bring tomorrow will show the extent to which that was true?

A. (No reply.)

Q. It is next said, in the letter:

"Now Mr. Sudekum has gone into the situation and sat down on top of him."

What did you mean by that, Mr. Willingham? Do you mean by that, that the Crescent Amusement started a theatre in Brownsville where Lawing already had a theatre and Mr. Sudekum or Crescent Amusement Company's theatre was better and got most of the opposition's business?

Mr. Wright: That is pure argument. The letter there states what he says, it doesn't need any elaboration, except by way of argument. I don't think the witness is competent to just say yes to Mr. Waller's argument, about what it means.

The Court: On cross-examination, he may ask him what he meant by it.

Mr. Wright: In cross-examination on the subject the Government brought him here for. We brought him here as a hostile witness.

Mr. Waller: We object to that statement.

[fol. 1587] Mr. Wright: Mr. Willingham was brought here by the Government for just one purpose, because the defendants wouldn't stipulate the fact, that could easily have been determined, of course, the fact that he did write letters in the course of his employment. They are within their legal rights, that he be brought here for that purpose, but not so that they can have him to put on so much of their case as they want to get out of him during our case, they can't do that with him as our witness. It is enough of a good thing that we have to bring him here so that they can use him to identify the letters.

The Court: After all, they didn't ask you to file this lawsuit against them and when the Government files a case of this kind, it is incumbent upon the Government to make out its case; they don't have to agree to anything.

Mr. Wright: I say, he is well within his legal rights in having him come here; we are also within our rights to insist that the cross-examination be confined to the issue that he was brought here, that he did these things in the ordinary course of his business.

[fol. 1588] The Court: You have introduced the letters that he wrote and introduced statements made in his letter, then they have the right to cross-examine on any other statement.

Mr. Wright: I deny that he has a right to cross-examine on, that the only proper scope of the cross-examination of this witness is that made by the direct, did he or did he not write these letters in accordance or in the performance of his duties as Branch Manager.

The Court: I disagree with you on that.

Mr. Waller: There could be no such thing as cross-examination if you had to stick to the direct examination; just ask the same questions over again.

Mr. Wright: That is the Federal rule.

The Court: I never have been of the opinion that it was a very equitable rule. But that is neither here nor there, on this matter; they have the right to cross-examine about anything that is in the letters that you have introduced.

Mr. Wright: I don't see how that could be. If we had put him on the stand, if the Court please, and asked him to [fol. 1589] testify to the subject matters that are in the letters, and say what he thought about Mr. Lawing, or what he didn't think about it, then I think this kind of cross-examination would be proper.

[fol. 1590] The Court: For what purpose are you introducing those letters? To show the Court what they contain, what he was doing?

Mr. Wright: To show the Court the business——

The Court: That they couldn't sell Mr. Lawing any more pictures on account of the fact that Mr. Sudekum was buying in Brownsville? That is apparently the purpose that the letters were introduced for, it seems to me.

Mr. Wright: That is right.

The Court: Then he has got the right to ask about anything pertinent to that.

Mr. Wright: There is no question about his right to rebut that evidence and have this witness explain it or offer any other testimony that may throw light on these issues. The precise point is whether he is entitled to do that with Mr. Lawing as his witness or with Mr. Lawing as my witness, and I say that when he does that he is making Mr. Lawing his witness and putting on his case.

[fol. 1591] Mr. Waller: Your Honor, it seems the Government's idea is that when they file a complaint alleging anybody is a conspirator, that makes them a conspirator, and therefore he is our witness.

The Court: I overrule the objection. Adjourn Court until 9:30 in the morning.

Thereupon Court adjourned until 9:30 in the morning.

[fol. 1592] VOL. ELEVEN

Tuesday, July 22, 1941.

Court met pursuant to adjournment.

J. F. WILLINGHAM, cross-examination resumed.

By Mr. Waller:

Q. I do not find what I had yesterday—here it is. Now, Mr. Willingham, I was asking you about Mr. Sudekum coming into Brownsville and sitting down on top of Mr. Lawing; will you describe Mr. Lawing's theater and the Crescent theater which was competing with it, with respect to seating capacity, appointments, etc.

A. Mr. Lawing's theater which had about a hundred and eighty-three seats in it, a very small house, converted store building for it, to put the theater in, poorly equipped. The new theater which was built had about two and a half times as many seats and was modern and up to date.

Q. Well, such things as rest room facilities, did Mr. Lawing's theater have any?

A. Not that I know of, it was too small.

Q. I believe you overlooked bringing those papers, they are on the way down?

A. Yes, sir, they are on the way down.

Q. Now in your letter of July second, 1935, that I was ask-[fol. 1593] ing you about on yesterday, in which you used that expression, about Mr. Sudekum sitting down on top of Mr. Lawing; what do you mean by that phrase? Did you mean by that that Mr. Sudekum's theater was a larger, more up to date theater and attracted the patronage from the town of Brownsville from Mr. Lawing's theater?

Mr. Wright: Same objection, Your Honor, that was made yesterday. I do not think he is entitled to put the answer in the witness's mouth.

The Court: It is rather leading, I did not get the impression that was what he me-nt at all, I got the impression from the letter that Mr. Lawing had a theater there in operation and Mr. Sudekum just came in and opened up a theatre in opposition to him, or in competition, rather, and pre-empted his territory. You might ask what he knows about it.

Mr. Waller: Your Honor ruled I could cross-examine him.

The Court: No, I didn't say that, I said the question was leading.

Mr. Waller: I meant it to be leading, Your Honor.

[fol. 1594] The Court: Yes, that is right, you have a right to ask leading questions on cross-examination. I will overrule the objection.

Mr. Waller:

Q. What did you mean by that phrase, did you mean Mr. Sudekum had put up a larger, more up-to-date theatre, and that by doing so he was able to attract the patronage which Mr. Lawing had previously enjoyed?

A. That is a poor phraseology I used, coming in and sitting down on him; nevertheless, that is what I said. I meant that Mr. Sudekum came in and built a new, modern up-to-date theatre in opposition to one that was already there, which was a smaller house.

Q. That is all you meant by that?

A. Yes, sir.

Q. Is that a phrase that is used in the industry, sitting down on somebody?

A. Yes, sir.

Q. That is when a man is in a town and somebody comes in in competition?

A. Yes, sir.

The Court: All these gentlemen understood that when [fol. 1595] you said, It is generally understood when you sit down on somebody you do it to squelch them.

A. Not in the film business.

Mr. Waller:

Q. In this letter of July second you said this:

"We do not believe it would be fair for Mr. Sudekum to be privileged to buy product at Humboldt where he has two theaters and leave us out of Milan, Tennessee, and at the same time for us to sell him the product at Brownsville, Tennessee, in preference to a customer that was there before he was and wants to buy our product. Will you therefore please insist that Mr. Sudekum buy our product for both Milan and Humboldt, that you sell it to him for Brownsville.

Now, Mr. Willingham, who was buying product for those two towns, Milan and Humboldt?

A. This man Pouncey, he was already taking or buying for those two towns.

Q. And you were trying to get a contract for them too, to use the fact that you were selling Crescent in Brownsville to get Mr. Sudekum to use his influence with Mr. Pouncey to buy the product in those other towns?

A. I was trying to get Mr. Sudekum to use his influence so I could get to make all I could of the pictures, because I [fol. 1596] was there to sell him pictures in Milan, we hadn't done anything in two years.

Q. In your letter of July 30th to Mr. Conners which is Government exhibit 166, you say that Mr. Lawing secured a deal there at Brownsville at the Southland theatre several weeks ago, and the contract changed and that he then got a new application; do you recall that?

A. Yes, sir.

Q. Now I see in your letter of July 30th to Mr. Kessnich that you forward to him what you call a contract for the 1935-36 product in the Southland theatre, by the word contract, did you mean that application?

A. Yes, sir, I mean the application. A contract is not a contract until it is approved.

Mr. Waller: Your Honor, I intended to ask him about the papers he was going to bring but they have not gotten here, but they are on the way down here.

[fol. 1597] Q. I have here, Mr. Willingham, a photostat furnished us by the Government of a letter written by you to Mr. Connors at the Home Office, on May 28, 1935 pur-

porting to come from the Loew's files. I show you that letter and ask you if you wrote it on or about the date it bears?

A. Yes sir.

Mr. Waller: We offer this as Defendant's Exhibit No. 51.

Mr. Wright: May I ask what is the purpose for which the letter is offered?

Mr. Waller: That is in response to a letter offered by the Government and we want to show the whole picture instead of just a part of it.

The Court: What is the date of that letter.

Mr. Waller: May 28, 1935.

Mr. Wright: That has nothing to do with the Lawing letter.

Mr. Waller: I will read the parts that I think are pertinent.

The Court: Read the parts that are pertinent.

Mr. Waller: The letter is a photostat from the files of Metro which the Government examined: (Reading)

"Brownsville, Tenn., Southland Theatre. This exhibitor wants to buy our product but contends he cannot pay as much as he paid last year due to the fact [fol. 1598] that Tony Sudekum has come into his town and opened a theatre, dividing the business. Did not believe it advisable to make a deal with him at this time, under the circumstances.

Milan, Tenn. Milan Theatre.—This exhibitor advised on our first visit here this week, which was Tuesday, that he could not buy, or make us any kind of a deal as he was working on a deal to buy out Mr. Legg's Theatre in Humboldt, Tenn. and until after a deal had been made, he did not know just what he could do. Returned to this situation on Friday and a deal had been consummated whereby he had bought out both Mr. Legg's Rex Theatre and the opposition house in Humboldt, the Main street Theatre. He agreed to assume all companies' contracts in both houses and it developed they had more pictures bought in those two houses than he could run in the next two years. He stated it would be necessary for some of the film companies to make a great number of cancellations and do a great amount of trading between the two towns in

the three theatres before he would be in a position to know just how he stood insofar as number of pictures under contract in the two towns is concerned. He re-
[fol. 1599] fused to buy anything from us other than split service contracts and requested cancellation in Humboldt, although we have been out of Milan for two years. For your information, this man has affiliated himself with Mr. Sudekum, however, Mr. Pouncey will do the buying for both Humboldt and Milan and also will do the booking. Naturally, we refused to sell him the new product for either of his towns unless he bought 100 percent. We intend having an interview or session with Mr. Sudekum to see if we can't force Mr. Pouncey to buy our product in the two towns.

Q. Mr. Willingham, was it true that Lawing stated to you that he couldn't pay as much as he paid last year, due to the fact the Tony Sudekum had come into his town and opened a theatre, dividing the business?

A. I think that is what I have in the letter.

Mr. Wright: I object to his leading the witness at this point. This is a part where he makes him his witness.

The Court: What is the date of the letter?

Mr. Waller: May 28, 1935.

Mr. Waller: I will change the question to say——

Q. Was it or not, to take care of it?

A. My letter says he did ask that, doesn't it?

[fol. 1600] Q. Yes.

A. He must have or I wouldn't have written it.

Q. What did you mean by forcing Pouncey to buy your product in those two towns?

A. I meant that I was going to get Mr. Sudekum to use his influence on his partner to buy Metro-Goldwyn-Mayer product in the two towns he was buying and going the booking for.

Q. You were going to use your selling power on Pouncey?

A. No, we don't have any selling power.

The Court: Is this the 1935-1936 contract that you were trying to sell Lawing, that you had reference to?

A. Yes sir, to see if we could sell in all three of the towns of Humboldt, Milan and Brownsville.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 662

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 663

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 664

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL., APPELLANTS,

vs.

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Order dated November 9, 1943 allowing plaintiff extension of time in which to file its counter praecipe	3247-R	1504
Petition for appeal filed by defendants October 29, 1943	3248	1505
Assignment of errors and prayer for reversal filed by defendants October 29, 1943	3250	1506
Order allowing appeal entered October 29, 1943 in behalf of defendants The Crescent Amusement Co., et al.	3271	1520
Appeal bond of defendants, The Crescent Amusement Co., et al. (omitted in printing)	3272	
Citation by defendants entered October 29, 1943 (omitted in printing)	3276	
Stipulation for shortening record on appeal	3287	1521
Praecipe filed November 5, 1943 by defendants requesting certain enclosures in the transcript of record	3300	1523
Amended Praecipe filed by defendants November 26, 1943 designating certain portions of the record be included in the transcript	3302	1523
Order dated November 26, 1943 enlarging time for filing record	3308	1527
Order dated January 11, 1944, directing that affidavit of Kermit C. Stengel be filed and made a part of the record	3309	1527
Affidavit of Kermit C. Stengel dated January 10, 1944	3310	1528
Stipulation as to record on appeal	3312	1529
Amendment to Sec. 107 of Judicial Code as amended, changing the terms of the Court for the Middle District of Tennessee	3314	1530
Certificate of Clerk	3315	1530
Statement of points and designation of record—Cases No. 662 & 663	3316	1531
Statement of points and designation of record—Case No. 664	3318	1533
Order postponing further consideration of the question of jurisdiction	3325	1537

Mr. Waller:

Q. You were not trying to sell Lawing in those other towns were you?

A. No, Lawing had nothing to do with those towns.

Q. He only had a theatre in Brownsville?

A. That is all.

Mr. Waller: We ought not to delay the Court on account of these papers, which are on the way here.

The Court: You can recall him when the records arrive.

Mr. Waller: There is some other correspondence that we have stipulated with the Government about, that could be [fol. 1601] brought in at this time. We will also stipulate that Mr. Kessnich is here but he is ill and unable to come into court and we will have the same stipulation.

Mr. Wright: All right. The first letter we are offering is written by Mr. Kessnich, dated July 25, 1935, to Mr. H. Postman at the Home Office, Re: Brownsville, Tennessee.

The Court: What exhibit is that?

Mr. Wright: It has not been numbered yet.

The Court: All right, read it then you can have it numbered. What number will it be.

The Clerk: No. 169.

Mr. Wright: We have a stipulation, I believe, if he were called he would testify, at the time he wrote this letter, he was Southern District Manager for Metro-Goldwyn-Mayer and that he wrote the letter in the course of performing his duties as such Manager. The letter reads as follows: (Reading):

> "Memphis has sold a contract for Brownsville, Tennessee.
>
> You had better hold up approval of this contract [fol. 1602] until we get into our negotiations with Sudekum, for the reason that Sudekum has also gone into Brownsville with an opposition theatre to our present account in Brownsville."

[fol. 160] There is a stipulation that Mr. Postman was employed as contract clerk at the home office when he received this letter.

The next letter is dated November 4, 1937 from Mr.

Kessnich to Mr. T. J. Connors at the home office, which carries the same or a similar stipulation. It reads:

"Dear Mr. Connors:

"I closed a deal with Tony Sudekum for his 22 situations for the Sudekum Junior Circuit of 24 situations. I am not at all pleased that I could not improve the deal, but I am frank to tell you if I had not closed the deal with Sudekum at the time I was there, I am afraid we would have been out of the situations because, as I pointed out to you on the telephone, Sudekum was insisting on a blanket reduction of 20% in all of his situations and he showed me box office statements in many of his theatres that proved conclusively that his grosses were substantially off." • • •

And the next paragraph simply recites the negotiations that were going on. I don't think I need to read all of it at this time. I will go down to the next to the last paragraph, in which he says:

"Sudekum doesn't operate in big towns, as you probably know. The majority of his situations are the smaller type operations, with the exception of [fol. 1604] Decatur, Bowling Green, Gadsden, Hopkinsville, and Kingsport. The Sudekum Junior Circuit, or Stengel situations, are the smallest towns in the Tennessee territory and in those situations Sudekum showed me box office statements on our pictures, United Artists pictures, etc., showing that many pictures only gross $5.00, $7.00, $8.00 and $10.00 per day." • • •

There is more of the letter but that is the only part that we regard as significant.

(Letter filed as Government's Exhibit No. 170.)

And I believe that that is all from Mr. Kessnich. Now Mr. Connors, is he going to appear?

Mr. Waller: Yes.

Mr. Wright: Are there any others stipulated besides Mr. Kessnich?

Mr. Waller: Mr. Postman.

Mr. Wright: A letter from Mr. McGuire dated February 20, 1938 is written to Mr. Roy M. Avey, manager of Loews

office at Atlanta. The stipulation on this is that at the letter was written Mr. McGuire was employed as salesman [fol. 1605] in the Atlanta branch of Loews and that he wrote this letter on that date in the course of performing his duties as salesman and that it was duly received by Mr. Avey. The letter reads as follows:

"Dear Mr. Avey:

"Answering your office memo of the 16th, I have noted copy of Mr. Andy Anderson's letter to you dated the 11th together with your reply dated 16th, and you are in error as to Mr. Anderson having more product features under contract that he can use. He wanted to contract for about twenty of current and same number of 36-37 feature product second run in Hopkinsville, and naturally wanted the big ones and his prices ran from $12.50 to $15.00 top including score. I told him I did not even have cut-offs as his town was an office account and I did not know whether second run had been sold or not, but would contact office and have office take up direct with him. Would use a like number of shorts and one and two reel subjects paying $2.00 a reel, altho he claimed most of companies selling him second run for $1.50 per reel."

I would like to have that filed with the next Government's number.

(Letter filed as Exhibit No. 171.)

The first letter from Mr. Postman dated August 1st, [fol. 1606] 1935, is addressed to Mr. J. F. Willingham at the Memphis exchange. The stipulation with reference to this letter is that Mr. Postman, if called to the stand, would testify that he was on that date employed as contract clerk in the New York office of Loews, Inc. and that he wrote this letter on that date in the course of performing his duties and that it was duly received by Mr. Willingham. The letter reads as follows:

"Dear Mr. Willingham:

"Mr. Kessnich has asked me to acknowledge your letter of July 30th addressed to him regarding the 1935-1936 contract submitted for Southland Theatre, Brownsville, Tennessee, and the Strand Theatre, Whiteville, Tenn.

"Mr. Kessnich suggested that we withhold action on these contracts for a few days and when we hear from him will advise you further."

We ask that that be given the next Government number.

(Letter filed as Exhibit No. 172.)

The next letter is dated August 20, 1935 and it is from Mr. Postman to Mr. Willingham and carries a similar [fol. 1607] stipulation.

"Dear Mr. Willingham:

"With further reference to our letter of August 1st we are returning herewith, unapproved, applications for contract submitted for the Southland Theatre, Brownsville, Tenn. and the Strand Theatre, Whiteville, Tenn.

"Discussed this matter with Mr. Kessnich yesterday and he suggested that you hold these contracts in your desk until you hear from Mr. Sudekum regarding the 1935-1936 deal at which time final disposition can be made of these applications."

I ask that that be given the next number.

(Letter filed as Exhibit No. 173.)

The next letter is dated December 31, 1937 and is from Mr. Postman to Mr. Kessnich and carries a similar stipulation:

"We received Sudekum contracts yesterday and approved all of them with the exception of the Roxy Theatre at Gallatin, Tennessee. According to our records, we have sold the New Palace Theatre in this situation for many years and neither Mr. Connors nor the writer recalls your having mentioned it when we discussed the Sudekum deal generally. The terms of the Roxy Theatre are not as good as the terms we had [fol. 1608] last season for the New Palace Theatre both on features and shorts but Mr. Connors requests that we withhold action on the contract pending receipt of further advice from you as to reasons for not continuing with our old customer in this situation."

Please give that the next Government number.

(Letter filed as Exhibit No. 174.)

The Court: This witness may now stand aside to be recalled later when your papers come.

Mr. Wright: I expect, your Honor, that we might take this opportunity to dispose of Mr. Avey.

The Court: All right, call Mr. Avey.

Mr. Waller: Here are the papers now.

Mr. Wright: I think we might as well finish with Mr. Willingham.

The Court: Well, let Mr. Avey retire a few minutes and call Mr. Willingham back.

[fol. 1609] J. F. WILLINGHAM, Witness for the Plaintiff, resuming the stand, testified as follows:

Cross-examination (Continued).

By Mr. Waller, for the Defendants:

Q. Now, Mr. Willingham, I asked you about a letter that you wrote to Mr. Connors on May 28, 1935, which has been filed as Defendants Exhibit 51. I will ask you if you received a reply to that letter from Mr. Connors, dated June 3, 1935, and if you now have that with you?

A. Yes, sir.

Mr. Waller: We offer this letter as Defendants Exhibit No. 52.

(Letter marked as Defendants Exhibit No. 52.)

(Reading:)

"This will acknowledge receipt of your letter of May 28th, outlining your activities for week ending May 25th.

We note that in Brownsville, Tenn., exhibitor contends he cannot pay as much as last year due to the fact that Tony Sudekum has come into his town and opened a theater.

The thought occurs to me that it might be advisable to sell our product to Mr. Sudekum in this situation

if you are unable to secure a satisfactory deal from [fol. 1610] the Southland Theater.

Suggest you discuss this with Mr. Kessnich and that you jointly decide where our interests would be best protected.

We are very much interested in your report as to the situation at Milan, Tenn., and after you have discussed the situation with Mr. Sudekum we would like to have a further report as to Mr. Sudekum's instructions to Mr. Pouncey."

The rest of it is about other situations. Now, Mr. Willingham, in May, 1935, had you agreed with Mr. Lawing on reducing the terms of his existing contract with Metro; do you find a memorandum or document dated May 17, 1935 in your files relating to that?

A. Yes, sir, this is the reduction.

Q. There was a reduction made in the terms of Mr. Lawing's contract, that is, in his film rentals, pursuant to this memorandum?

A. What is the question?

Q. I say, was there actually a reduction made in the terms of Mr. Lawing's contract, that is, in his film rentals, pursuant to this memorandum?

A. It is actually reduced there in that alteration contract.

[fol. 1611] Q. I mean, this sets forth what was actually done?

A. Yes, sir.

Mr. Waller: We offer this as Defendants Exhibit 53.

(Marked Defendants Exhibit No. 53.)

Q. I will ask you if you find a letter of June 6, 1935 that you wrote to Mr. Lawing with reference to that reduction in his terms?

A. Yes, sir.

Mr. Waller: We offer this as Defendants Exhibit No. 54.

(Marked Defendants Exhibit No. 54.) Being a letter dated June 6, 1935:

"Mr. C. G. Lawing, Southland Theater, Brownsville, Tenn.

DEAR MR. LAWING:

We are very happy to advise our Home Office has approved our recommendation that you be granted the following reductions:

Regular releases on the 1934-35 product have been reduced from $12.50 film rental to $10.00 film rental, plus $3.00 score.

The $20.00 flat rental specials have been reduced to [fol. 1612] $15.00 film rental, plus $3.00 score.

We sincerely hope this reduction will materially aid you in the profitable exhibition of our product.

Sincerely, Metro Goldwyn Mayer Dist. Corp.,
J. F. Willingham, Branch Manager."

The Court: What is the date of that letter?

Mr. Waller: June 6, 1935.

The Court: What years does that refer to, 1935-1936 or 1934-1935?

A. 1934-1935.

Mr. Waller:

Q. At that time Mr. Lawing was playing the 1934-1935 product?

A. Yes, sir.

Q. I will ask you if you find in your file a letter that you wrote to Mr. Lawing sometime after this reduction was made, namely, a letter dated August 28, 1935?

A. I have one here.

Q. May I see it. (Letter handed to Mr. Waller.) Now, [fol. 1613] was this a registered letter sent with return receipt requested?

A. Yes, sir.

Mr. Waller: We offer the letter and the return receipt as Defendants Exhibit 55. (Marked Defendants Exhibit No. 55.) This being dated August 28, 1935:

"Mr. C. G. Lawing, Southland Theater, Brownsville, Tenn.

DEAR MR. LAWING:

Inasmuch as our Booking Department has made numerous requests for feature dates, which requests have been to no avail, we are making the following

bookings, setting up arbitrary dates, according to the terms of your contract. The bookings are as follows:

One New York Night	Sept. 12-13
Baby Face Harrington	Sept. 19-20
Reckless	Sept. 26-27

Sincerely yours, Metro Goldwyn Mayer Dist. Corp., J. F. Willingham, Branch Manager."

[fol. 1614] Q. Was it true that Mr. Lawing had ignored request for dating your product in accordance with your contract?

A. Yes, sir.

Q. Did you find in your file a letter which you wrote to Mr. Lawing on October 25, 1935, in regard to his 1934-1935 contract?

A. Yes, sir.

Mr. Waller: We offer this as defendants' exhibit 56, being a letter dated October 25, 1935, to Mr. C. G. Lawing, Southland Theatre. It is as follows:

"The writer has just reviewed your account and finds it to be in a most deplorable condition. I never realized until now that you are absolutely ignoring our product and not giving us any dates whatever.

"Attached is notice of availability for features and short product and if there is another account in the United States in a worse condition, we would like to know just who it might be.

"We are going to insist that you give us dates in abundance, playing two pictures per week in Brownsville, starting immediately, in order to catch up as you are so far behind this will be the only possible way [fol. 1615] you can catch up on your playing arrangement.

"The writer was under the impression you told me last week while here in Memphis that you had dated our product, but from the looks of the attached notice of availability, evidently some one was in error.

"When you come to Memphis Sunday or Monday or next week, would like to have a personal, heart to heart talk with you.

"Sincerely, Metro Goldwyn Mayer Dist. Corp.,
"J. F. Willingham, Branch Manager."

Q. Mr. Willingham, were the statements of fact contained in that letter true at the time you wrote the letter?

A. Yes, sir.

Q. Do you find in your file any record as to the condition of Mr. Lawing's account, that is with reference to your 1934-1935 product, at the time he closed his theater in 1936, that is as to whether or not he complied with his contract by playing off the pictures?

A. You have reference to a cancellation of unplayed product?

Q. Yes, and do you have some letter you wrote to him listing the product, features he had not played, cancelling them, something of that kind? May 22, 1936?

A. Yes, that is the letter.

[fol. 1616] Q. Did you on that date write to Mr. Kessnich?

A. No, sir, Mr. Sudekum.

Q. This is a letter of May 22, 1936, to Mr. Kessnich, which refers to a list which is attached; I want the list, if you have it?

A. I do not have the list.

The Court: He says he does not have it.

Mr. Waller: Do not have a list of unplaid product? The unplayed records?

A. I have an exhibitors record, gives pictures that were not played.

Q. That is what I want to get, the pictures that were not played; that is, how far he was playing his contract with you in May, 1936.

A. I think there are three features that remained unplayed.

Q. Weren't there a number of features that remained unplayed, a good many more than three?

A. Sir?

Q. Weren't there a good many more than three, what about short subjects?

A. Quite a lot of those short subjects and news reels, but only a few features that I can see here.

[fol. 1617] Q. What I am asking for is the list attached to your letter of May 22, 1936, if you do not find it there will you attempt to find it for me?

A. Yes, sir, I will. I did not bring it.

Q. All right, sir; now, Mr. Willingham, there has been introduced as Government exhibits 46 at page 776 and page

777 of the transcript a letter that you wrote to Mr. Sudekum on December fifth, 1935, some weeks after your letter of October 25, 1935, to Mr. Lawing, in which you start off with, enclosed you will find contracts for your Capitol theater, Brownsville, Tennessee, in accordance with our long distance conversation yesterday—and at the same time there was marked and offered Government's exhibit L-9, which is a contract between MGM and Crescent for 1935-1936 product, dated December 14, 1935, as I caught it, the inference was the contracts enclosed with the letter of December 5th were actually made, and I want to ask you whether or not those contracts or proposed contracts were rejected by Mr. Sudekum and *and* a new contract originated which was then made between Crescent and MGM after December 5, 1935?

A. Rejected by Mr. Sudekum?

Q. Yes, that is the contracts were not enclosed in your letter to Mr. Sudekum of December fifth, 1935; did you find where Mr. Sudekum wrote you a letter and returned these contracts and suggested he wanted a reduction in terms? [fol. 1618] *Q.* I do not have anything like that.

Q. Do you find the letter of the 13th, 1935, that you wrote Mr. Sudekum?

A. Yes, sir.

Q. Sending the revised contracts?

A. Yes, sir.

Q. You have handed me your letter of December 13, 1935, to Mr. Sudekum, which we will offer as defendants' exhibit No. 57.

Mr. Wright: You are not offering the letter of May 22, 1936?

Mr. Waller: Not offering that. The letter reads as follows:

"December 13, 1935, Mr. Tony Sudekum, Crescent Amusement Company, Nashville, Tennessee.

Dear Mr. Sudekum:

"In accordance with telephone conversation which you had with Mr. Kessnich today we are attaching hereto feature contract for Brownsville, Tennessee, which carries the prices enumerated in your letter to us dated December 5th. You already have contracts for one reelers, two reelers, trailers and News reels.

"We shall appreciate your signing all of these con-

tracts and returning at your earliest convenience along [fol. 1619] with contracts for Dyersburg, Union City and Paris.

"Yours truly, Metro Goldwyn Mayer Dist. Corp.

"J. F. Willingham, Branch Manager."

Mr. Wright: That is a copy of a letter that is already in evidence.

Mr. Waller: No, you introduced a letter of December fifth, not the letter of December thirteenth.

Mr. Wright: No objection.

Mr. Waller:

Q. Does that refresh your recollection, that the actual contract for feature pictures was not made with Mr. Sudekum until after December 13, 1935?

A. The best of my knowledge that application, took one application, we only took one application, and that was at that time with Mr. Sudekum.

Q. Prior to the time that Mr. Sudekum's theater was opened in Brownsville, had you had trouble with Mr. Lawing in regard to playing product? I will ask you to refresh your memory, if you can find in your papers there a letter you wrote to Mr. Connors on January 16, 1933, also a letter you wrote to Mr. Connors on August 15, 1933; do you find [fol. 1620] those two letters?

A. Yes, sir.

Q. This letter covers a number of other situations besides Brownsville, does it not?

A. Yes, sir, they cover several.

Q. In place of offering these letters in evidence, will you read what you said in each of them about Brownsville or permit me to read it?

A. Yes, sir.

Q. Your letter of January 16, 1933, letter to Mr. Connors covering your activities for the week ending January 14th,

"Brownsville, Tennessee, this exhibitor had refused to date our product, due to his receipts not justifying rentals. We adjusted his contract, giving him reductions, and we are forwarding them on to New York today for your approval, which is the only way we could liquidate our contract. The reductions requested by the exhibitor are fair and we believe you will allow them, as they do not amount to a great deal of money."

Now the letter of August 15, 1933:

"The Southland Theater, Brownsville, Tennessee, the exhibitor is overbought and advises that he is not in a position at this time to buy any product whatever."

[fol. 1621] Q. I will ask you, Mr. Willingham, if that refreshes your recollection, and if it was not true that you were having trouble with Mr. Lawing as far back as 1933?

A. The letters speak for themselves, we had trouble with him.

Q. Do you recall that in 1933 and 1934, you also had considerable trouble with Mr. Lawing about dating and playing news reels and other short reels and short subjects?

A. We always had trouble with him about the news reels and short product.

The Court: What exhibitor is that?

Mr. Waller: I did not offer those last two, I only read from them into the record.

[fol. 1622] Q. That is the list that was played at the time in May when Mr. Lawing closed his theatre?

A. Yes sir.

Q. I believe you were correct there were some features and the rest were shorts that he was behind on?

A. Yes.

Q. There was quite a list of short subjects he was behind on?

A. Yes sir.

Q. That was about how long after the end of the 1934-1935 season? The seasons usually close about September 1st)?

A. They start the first of September and run to August 31st.

Q. That would have been August 31, 1935?

A. The product is released up to August 31, 1935.

Q. Mr. Willingham, can you give us a comparison of the film rentals that your Company obtained from Mr. Lawing during the time you were doing business with him and the film rentals you received from Mr. Sudekum during a corresponding period of time after you started doing business with the new Theatre in Brownsville?

A. Yes sir.

Q. Have you made a memorandum from the records, or how do you have that?

Mr. Wright: If the Court please, Mr. Willingham, I believe, has the records with him, which show what pictures [fol. 1623] were played and if he is going to make a comparison, I think he ought to put in the original record.

Mr. Waller: I suggest the records be produced and let him read from his memorandum, unless they insist on having the records. They are pretty hard to understand, unless you know this business pretty well.

The Court: Of course, the records are the best evidence. If he has made up a tabulation from the record I expect his tabulation would be more helpful to the Court than to have to examine the records.

The Court:

Q. Do you have the records here?
A. Yes sir.

Mr. Waller: They are subject to inspection, of course.
The Court: Why is it difficult to tell from the records?

A. Well, it is quite complicated and rather hard to go through all this information because of the——

Mr. Waller: I think Mr. Wright knows how to interpret those records a lot better than I do.

Mr. Wright: We asked in the interrogatories that were [fol. 1624] served upon Loew, just as all the other distributors, for the play-off sheet for Brownsville and these other situations. They reported that because the play-off for that theatre after Lawing took over for the season beginning 1935-1936, they reported that they did not have a contract with Brownsville for the season 1934-1935 and did not furnish us any play-off for Brownsville for 1934-1935 season. Now, I think the proper way to handle this is they furnish us all the play-off for the 1934-1935 season, along with the other four seasons which they did furnish. Apparently there was some oversight there in not preparing the 1934-1935 record for Brownsville.

The Court: What period of time does your tabulation cover?

A. 1932-1933 season up through 1938-1939, both theatres, Southland and Crescent.

Mr. Waller: Up to when?

A. 1938-1939 season.

Mr. Raftery: In all probability, your Honor, what Mr. Wright refers to is that while they were still defendants, these interrogatories were propounded, but the answers were not made; isn't that right? You left them out of the case.

[fol. 1625] The Court: They got all the years except 1934-1935, I understood.

Mr. Raftery: Every time a picture is played off, whether a feature or short, he has got a book keeping entry, and what he had done is to make a compilation of all the book-keeping entries, and the suggestion of Mr. Waller is that he turn over to Mr. Wright all of those records, so that they can check the accuracy of the compilation.

Mr. Wright: We are entitled to examine the records, they don't speak for themselves. It is rather complicated, as they have already suggested.

The Court: Let the records be filed and he can testify from his compilation, and it can be checked against the records.

Mr. Waller:

Q. How many of those books of records are there?

A. A book for each year.

Q. What else?

A. We have an exhibitor's record and play-off record that shows the date it was played.

Q. Then you have a play-off record for each season?

A. Yes.

Q. That will be 14 documents all together?

[fol. 1626] A. Yes.

Q. Will you file those——

The Court: What is it you want to prove by this, Mr. Waller?

Mr. Waller: I want to prove MGM got a great deal more money out of the Crescent Amusement Company at Brownsville than they ever did out of Lawing; they had a right to select their customer and had a very good business reason for contracting with Mr. Sudekum instead of Mr. Lawing.

The Court: Don't you have a record that will show the

amount at the end of the season, rather than putting in a daily, or weekly, or monthly bookkeeping record?

Mr. Waller: That is what I thought we could do.

The Court: Do you have any records of the Company that will show the amount at the end of each season?

Mr. Waller: I don't know; I will just ask the witness?

A. Our Office Manager compiled this list from the actual records and books in the office and sent it over to us.

The Court: If the Government insists on the books they have a right to have them.

Mr. Waller: The ordinary procedure, I have this in a number of instances, the ordinary procedure in instances [fol. 1627] of this kind is to permit the witness to testify from the tabulation, then be cross-examined from the original records without encumbering the record with the original records.

The Court: The original records, we haven't got them here.

Mr. Waller: They are here?

A. They are the Exhibitor's record cards.

Mr. Waller: We can put them in, if your Honor wants them.

The Court: All right, put them in evidence.

Mr. Waller: We offer them in evidence, at the suggestion of the Government as Defendants' Collective Exhibit L-7.

A. Do you want this compilation with them?

Mr. Waller:

Q. I want you to read the compilation.

A. The Play-off of the Southland Theatre is as follows:

Season 1932-1933, Total	$66.77

The Court: What season is that.

A. The seasons 1932-1933.

Season 1933-1934	$1124.80
Season 1934-1935	1086.69

Q. All those were with Mr. Lawing?

[fol. 1628] A. That is the Southland Theatre with C. G. Lawing. Crescent Amusement Co. Theatre, 1935-1936, they secured—

Season 1935-1936, Total	$1596.95
Season 1936-1937, Total	1604.20
Season 1937-1938, Total	1645.38
Season 1938-1939, Total	1730.67

Q. Will you file this tabulation as——

Mr. Waller: We offer it in evidence as Defendant's Exhibit No. 58. May I have the other correspondence?

Q. Mr. Willingham, I want to call your attention to Government's Exhibit No. 173, which is a letter to you from Mr. Postman dated August 20, 1935, and referring to the unapproved applications submitted for the Southland theatre at Brownsville, Tennessee, and Strand Theatre at Whiteville, Tennessee, in which it is stated that Mr. Kussnich suggested that you hold these contracts in your desk until you hear from Mr. Sudekum regarding the 1935-1936 deal, at which time final disposition can be made of these applications. Those are the applications that you took after your salesman had taken some that you had rejected?

A. Yes sir.

Q. Did you hold these applications in your desk, as suggested in this letter from Mr. Postman?

A. Yes sir.

[fol. 1629] Q. Did you continue to hold them in your desk until sometime in November or December, 1935?

A. I think the correspondence proves that, doesn't it?

Q. I think it does, but I can't find the letter I am thinking about.

The Court: Which letter is it you refer to? No. 173 is the one which he held?

Mr. Waller: No. 173 is the one he held.

Q. Well, didn't you hold them?

A. December 5, 1935, yes.

Q. Did you write a letter in which you sent those exhibits on and asked that they be borne in mind when they were dealing with Sudekum, sometime in November? I recall some such exhibit as that, but regardless of that, you

did hold those applications until the Sudekum deal was approved or about to be approved?

A. Yes sir.

Q. So there were only two applications that were taken from Lawing, one by the salesman and one by you?

A. That is all I remember having been taken.

The Court: Mr. Willingham, on December 21, 1937, Mr. Postman wrote you a letter to the Roxey Theatre at Gallatin?

A. No sir, not me.

The Court: That is right, he wrote Mr. Kussnich.

[fol. 1630] The Court: Is Mr. Kessnich going to testify?

Mr. Armistead: He is sick today, your Honor.

Redirect examination.

By Mr. Wright:

Q. You were subpoenaed as a witness on behalf of the Government, were you not?

A. Yes sir.

Q. When did you get to town?

A. I got in here last Saturday afternoon.

Q. And you were accompanied by your attorney, Mr. Nusbaum?

A. No, I came from Memphis, Tennessee.

Q. What did you do when you got here? Who did you get in touch with?

A. No one. I went up to the room.

Q. Did you make any effort to get in touch with any representation of the Government?

A. No sir. I was instructed to get in touch with the Government in Room 245 at 9:30 a. m. Monday.

Q. And did you get in touch with any of the other attorneys in this case?

A. What do you mean?

Q. Did you talk to them or see them?

A. Well, I saw Mr. Waller.

[fol. 1631] Q. When was that?

A. Monday, I think I met him, or Sunday night at dinner. I wasn't—I didn't have dinner with him, however.

Q. And did you talk to any of the other attorneys in the case there?

A. Sir?

Q. Did you talk to any other attorneys for the parties in the case?

A. I didn't talk about the case but I met Mr. Miller of RKO.

Q. And did you discuss your testimony with Mr. Waller?

A. No sir, I did not.

Q. Who instructed you to produce the document that you brought with you today?

A. Our attorney from New York.

Q. Who was that?

A. Mr. Nusbaum.

Q. When did Mr. Nusbaum instruct you to do that?

A. Well, these—you mean this resume here?

Q. I mean all of this correspondence that you brought here and the records going back to 1933 and 1934?

A. When did he instruct me to do it?

Q. Yes.

A. Well, that was done, I think, about a week ago or more.

Q. And sometime prior to that you had been asked to forward correspondence to New York, hadn't you, that had anything to do with this suit?

[fol. 1632] A. Not that I know of. I don't understand that question.

Q. I say sometime prior to the time you assembled this correspondence, which you say was last week, you had been instructed to assemble and forward correspondence subsequent to January 1, 1934 that dealt with this case to the New York office pursuant to a subpoena that was served upon the Company?

A. Yes sir, we sent it up there.

Q. Did you send up what you produced here?

A. We sent up everything but this break-down of that. We didn't send that.

Q. I am not talking about the break-down. I am talking about the correspondence you brought with you to court today.

A. I think so. I am not positive because I didn't handle it. One of the clerks in the office handled that.

Q. Then when did you get it back here?

A. Well, I remember shipping it over here last Friday.

Q. Then you took it out of your files at the exchange?

A. At the exchange, yes sir.

Q. You never had sent it to New York, isn't that right?

A. Sure. I imagine everything that New York asked for we sent up there long ago.

Q. When was that?

A. You will have to ask our counsel; I don't remember. That is quite sometime ago.

Q. And who was it that asked you to have this tabulation made up that has been identified here as Defendant's [fol. 1633] Exhibit No. 58?

A. Our counsel.

Q. You are again referring to Mr. Nusbaum?

A. Yes.

Q. Did he tell you what he wanted to use it for?

A. Yes sir.

Q. Did you discuss this tabulation with Mr. Waller or any of the attorneys for the defendants in the case?

A. No, I did not.

Mr. Armistead: May it please the Court, I don't see where these questions are material. Certainly a witness has got a right to discuss with counsel on either side.

Mr. Waller: Your Honor, I had lunch with this gentleman and his associate yesterday and I talked to him about five minutes about the case, the only time I have ever mentioned it to him. All my contacts have been with his counsel.

The Court: I don't know that it is reprehensible for you to talk to him.

Mr. Armistead: I didn't know it was a crime, may it please the Court, for counsel representing a defendant in an antitrust case, to talk to any witness.

[fol. 1634] Mr. Waller: I haven't discussed the case with him since he was on the witness stand, your Honor.

Mr. Armistead: It is getting so I am afraid to put a newspaper in my pocket—they will ask me what I have got there.

By Mr. Wright:

Q. It is a fact, Mr. Willingham, is it not, that Mr. Nusbaum instructed you not to talk to counsel for the Government, is that right? He refused to permit you to talk to me, is that correct?

Mr. Waller: I object to that unless he points out that request was made after his cross-examination had started.

Mr. Wright:

Q. Just answer my question.

Mr. Waller: I was familiar with what happened. During the cross examination counsel for the Government wanted to talk to him. They ought to talk to him before they put him on the stand, your Honor.

The Court: Overruled. Go ahead and answer the question.

A. Ask the question over, please.

[fol. 1635] Mr. Wright:

Q. I say it is a fact, isn't it, that Mr. Nusbaum instructed or refused to permit you to confer with me or any other counsel for the Government about your testimony in the case?

A. That was last night about 8:30, yes.

Q. Well, you didn't make any effort and Mr. Nusbaum didn't instruct you to communicate with me or any other Government counsel before you took the stand, is that not right?

A. I don't know what he instructed about that. I was told to report here to room 245 and did it.

Q. Now, this tabulation, you say, was prepared by your office manager?

A. Yes, sir.

Q. When?

A. About eight days ago or nine.

Q. Now, prior to that time you- exchange prepared, did it not, pursuant to instructions from the home office, these tabulations that are shown you of the play-off of the MGM contract for the 1935-36 season through 1938-39, inclusive, for Brownsville?

A. Yes sir.

Q. Who prepared those?

A. My office force.

Q. Now, this tabulation for the 1935-36 season, that was previously prepared and submitted to the Government in answer to its interrogatories, shows a total of thirty seven feature pictures played during that season by the Capitol [fol. 1636] Theatre of the Crescent Amusement Company at a total rental of $775.00?

A. Yes sir.

Q. Now, the tabulation you just identified as Defendant's Exhibit No. 58 shows forty six features played off for the same season and the total rental was $1021.95. Now, can you tell us the explanation of that discrepancy?

A. Well, this appears to be the actual play-off (indicating one paper), and this seems to appear to me as the actual amount of the contract at the time it was sold them. Some of the pictures we didn't produce, I suppose, that year. That is the amount of the sale.

Q. This tabulation that was identified as Defendant's Exhibit No. 58 contains the projected figures based on looking at the contracts rather than what was actually paid, is that correct?

A. I believe that that is the actual amount of money or amount of the face value of the contract at the time it was sold, and I think that is the actual play-off. Now, possibly some of the pictures were not produced and released and naturally couldn't be played off.

Q. I am showing you these tabulations here for the 1935-1936 season with your company, as previously produced. It appears, does it not, from that tabulation that nine features that you sold on the 1934-1935 contract weren't actually released during that season but were subsequently [fol. 1637] released during the 1935-1936 season, is that correct?

A. Yes sir.

Q. Mr. Lawing couldn't very well play the pictures on this 1934-1935 contract in his theatre before they had been released, could he?

A. No sir, he could not.

By the Court:

Q. You mean to say that this compilation that you have filed here as Exhibit No. 58 for the years 1935-36, 1936-37, 1937-38, and 1938-39 relative to the Crescent house in Brownsville does not actually represent in dollars and cents the amount that MGM received from the Crescent Amusement Company under its contract for those years but just the face value of the contract?

A. That is my opinion of it. I didn't compile the figures.

Mr. Waller: I understood him to say the pictures may have been counted in the tabulation for one year and the money was actually received in the next year. There is

no duplication. In other words, they didn't take the same money and put it in two years but the contract may have been one season and the money was coming in the next season. In other words, if you add it all together it makes the same result; it is just a question of which year he put it in.

A. You see, he had nine pictures there carried over from [fol. 1638] 1934-1935 to 1935-1936.

The Court: I didn't understand it that way.

By Mr. Wright:

Q. These records that have been introduced as one collective exhibit here are the records which show the——

By the Court: Mr. Wright, if you will excuse me just a minute, please; I want to get this straight.

Q. Do you mean to say then for the years or seasons 1935-1936, 1936-1937, 1937-1938 and 1938-1939 that MGM received from Crescent at Brownsville the total amount of those figures for each year?

A. That was according to my opinion, your Honor.

Q. I am not asking for your opinion.

A. Well, I didn't compile the figures. That is the total amount of the contract at the time we made the contract but sometimes we carry over a picture from one year to the next, which will go in the collections of the particular year that is released in. It all sums up to the same thing, that you have carry-overs.

Q. Well, do you say there are any carry-overs now from those years and the company has actually collected all those amounts?

A. For the last two or three years we haven't had any carry-overs, two or three years; I am not positive whether it is three or not but I know for two years we didn't have [fol. 1639] any carry-overs. We got through releasing pictures on August 31st and that product is complete then. That is the total amount of the contract in dollars and cents at the time we entered into it.

Q. Has that been collected, is what I want to know, that amount?

A. If the pictures were made it has been collected.

Q. I am not asking if they were made; has this amount been collected, is what I want to know.

A. The amount actually collected was over here on this piece of paper. That is sales over there.

[fol. 1640] Mr. Wright: I move to strike Defendants Exhibit No. 58.

The Court: I sustain the motion.

Mr. Waller: I think the witness is wrong about that.

The Court: He may be, I don't know.

Mr. Wright:

Q. Now, Mr. Willingham, these records which were marked as collective Defendants Exhibit, show the play-off feature pictures under the contract, do they not?

A. Yes, sir.

Q. With the dates on which they were played?

A. Yes, sir.

Q. The dates on which they were released?

A. Not released; shows only their play dates.

Q. Shows only the play dates and shows the actual rentals received?

A. Yes, sir.

Q. And shows the pictures that were not played?

A. Yes.

Q. It also shows those that were not made?

A. The ones that were not made were just automatically [fol. 1641] eliminated.

Q. These yellow ones relate to short subjects?

A. Yes, sir.

Q. And the white are the feature play-offs?

A. Yes, sir.

Q. Now, this record here, which has for 1933-1934, in the lower right hand corner; that is the play-off record of the Southland Theater at Brownsville for the pictures released during that season?

A. Yes, sir.

Q. And every picture that was released during that season, according to that record, was played there, was it not?

A. No, sir.

Q. Well, which ones were not played?

A. You know, I don't handle these things very often personally; transfers, one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen; that would be transferred

to another card; have you any other card there for 1933-1934.

Q. There doesn't seem to be another card there, unless you can find it.

(Recess.)

[fol. 1642] Resumption After Recess:

Mr. Wright:

Q. Mr. Willingham, were you able to find the other record?

A. Yes, sir.

Mr. Waller: Now, if your Honor please, in regard to the records I think the witness has shown he doesn't know about them. We will get the man who made them to explain them; he will be here in the morning.

Mr. Wright: Well, let's see what he knows about it.

A. It is the 1933-1934 cards.

Q. The 1933-1934 card shows that he played every record released, is that correct?

A. No, sir.

Q. Those that were released were transferred to the other season?

A. Shows that he played all that were released that year except three.

Q. They were cancelled?

A. They were cancelled.

Q. Where is that shown (showing record to witness).

A. I don't see it.

[fol. 1643] Q. Your answer is you don't know where that is shown?

A. Because I don't understand the card.

Q. Well, I move to strike the cards out then, until they have some one here who does understand them.

Mr. Waller: The truth is, we would rather have them explained by the person who made them.

The Court: If you can have them explained, I will sustain the motion until they are sustained.

Mr. Wright:

Q. Mr. Willingham, when you went through your files to check up this correspondence, were you looking for the

application for the 1935-1936 season that was signed; have you those?

A. I have one here and I think the attorney has the other, if he is able to find it.

Q. This application is dated 7/16/35; is this the one that you held in the drawer there?

A. Yes, sir.

Q. And later didn't you go back in and approve the deal and get a later application; that is, the amendment there, I believe?

A. Yes, sir.

[fol. 1644] Q. Well, what was this other application that you were referring to that you said you thought was turned over to your attorney?

A. Some one said something about two or three different applications being taken, and I only remembered two, and I think our attorney has the other one.

Q. Which is this, the first or the second one?

A. I think it is the second one.

Q. Can you find out for us definitely?

A. Yes, sir, I can.

Q. And if you can find the other one, you will produce that for us?

A. Yes, sir.

Q. I will ask to have this application marked with the next Government L exhibit number, and the letter attached dated December 5, 1935, that was the letter that you wrote to Mr. Lawing on that date rejecting the application?

A. Yes, sir. (Marked Gov. Exhibit L-18.)

Q. Now, Mr. Willingham, I show you a letter dated July 1, 1936, from you to Mr. Kessnich, at Atlanta, and ask you if you wrote that letter at or about that date?

A. I did, yes, sir.

Q. And in that letter you made the following statement, did you not: "I know Mr. Lawing personally and know this [fol. 1645] is the party Mr. Sudekum sat down on top of in Brownsville, Tennessee and finally ran him out of town. Mr. Lawing is a very good theater operator but cannot buck such opposition as Sudekum." Is that right?

A. I said that; I wrote the letter.

And further this deponent saith not.

Mr. Waller: Of course, your Honor understands in cross-examining Mr. Willingham, we are not conceding the com-

petency of any of those letters; we are reserving our objection to all of the letters.

The Court: All right.

[fol. 1646] R. M. Avey, called as a witness in behalf of the plaintiff, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wright, for the plaintiff:

Q. Please state your name and address, please?

A. R. M. Avey, Atlanta, Georgia.

Q. And your occupation?

A. Branch Manager, Loews, Incorporated.

Q. How long have you held that position?

A. About six years.

Q. I will hand you a letter dated April 8, 1935, signed by you and addressed to Mr. T. J. Connors, Home Office, and ask you if you wrote that letter on that date in the course of performing your duties as Branch Manager?

A. Yes, I wrote the letter.

Q. I would like to have that marked with the next Government exhibit Number. (Marked by the clerk Government Exhibit No. 175).

Q. And I will also show you a letter from you to Mr. T. J. Connors, Home Office, dated August 17, 1937, and ask you if you wrote that letter on that date in the course of discharging your duties as Branch Manager?

A. Yes, I wrote the letter.

[fol. 1647] Q. I will also show you a letter from you to Mr. Postman, Home Office, dated February 16, 1940, and ask you if you wrote that letter on that date in the course of performing your duties as Branch Manager?

A. Yes, I wrote the letter.

Q. I will show you a letter dated November 14, 1940, from you to Mr. Kessnich, and ask you if you wrote that letter on that date in the course of performing your duties as Branch Manager?

A. Yes, I wrote it.

Q. The first letter is dated April 8th, from Mr. Avey to Mr. Connors, and is marked Government Exhibit No. 175; it is a three-page letter; I will read only the parts that I

think are significant. The report for Wednesday, April 3rd says:

> "*Wednesday, April 3rd:* Called to see Mr. Sudekum, made every effort to get him to sign contracts and use our trailers. He told me that our business relations were very pleasant that he was satisfied with our service, that Miss Brockett was satisfied with the manner in which we were dating the accounts and that everything was agreeable, but until the second run matter in Nashville was cleared up, he would not use the trailers or sign the contracts, and when I kept pushing [fol. 1648] him to sign the contracts, he said that he used our product last season without signing the contracts and that he was using them so far this year without signing the contracts, that he did not want the trailers, but if other matters effecting the signing of the contracts were straightened out, he would use the trailers but would not pay as much as the prices originally scheduled for trailers over the circuit. He express-- his expectations of making a deal with us for the coming season, requesting that I be sure and notify Mr. Kessnich that he wanted our product for Brownsville, Tenn., next season."

Then the report of Thursday, April 4th:

> "*Thursday, April 4th:* Miss Mabel Harrison of Crossville, Tenn., was out of town. Drove on to Knoxville, Tenn., and met Mr. McGuire, took him with me to visit Mr. Denton, and made a deal with Mr. Denton for house he is opening in Lennoir City, in opposition to Mr. Parrott. We were unable to sell Mr. Parrott, due to him operating in opposition to Mr. Sudekum in two of his towns. Mr. Sudekum and Mr. Denton have been on a deal with Mr. Parrott for Mr. Denton to take Lennoir City and Mr. Sudekum to take Mr. Parrott's [fol. 1649] other towns. Mr. Parrott was in Nashville this week to see Mr. Sudekum and Mr. Sudekum told me that he did not make a deal with him and was not interested in doing so."

Mr. Waller: May it please the Court, in addition to our other objections, that is obviously hearsay.

The Court: Overruled.

[fol. 1650] Mr. Wright: Next letter, marked Government's Exhibit No. 176, is from Mr. Avey to Mr. Connors, dated August 17, 1937. The report for Wednesday, August 11th, contains the following statement: with reference to Mr. Hill of the Hill or Cumberland Circuit:

> "He then informed me that he merely wanted to learn what he could from each company's representative and make his buying plans afterwards, and that Mr. Sudekum, who owns considerable interest in the Hill Circuit, had requested them not to buy at what he called this early date. He also stated that he doubted if they would make a deal until after the Sudekum deal was made."

Mr. Waller: Is that a conver*d*ation or alleged conversation between Mr. Sudekum and Mr. Hill? If so, it would be hearsay.

Mr. Wright: Conversation between Mr. Avey and Mr. Hill, who was then president of one of the defendants in the case.

Sunday August 15th;

> "Met Mr. Baird this morning and he informed me that Mr. Sudekum had acquired an interest in his thea-
> [fol. 1651] tre but that he was still permitted to do his own buying and booking. Worked with him until noon and met with him again this afternoon. He would not agree to a deal that we thought we should have and stated that he did not believe we were offering him a deal in keeping with the Sudekum Circuit deal of last year and that he thought it advisable to contact Mr. Sudekum, or at least postpone buying our product until a later date."

Mr. Waller: We think that is objectionable also, Your Honor.

The Court: Overruled.

Mr. Wright:

> "In connection with this solicitation I found that Mr. Sudekum has made a concentrated effort during the past season to acquire an interest in every remaining independent theatre in the State of Tennessee. Mr. Earl Hendren, of the Parrott and Hendren Circuit,

who is now affiliated with Mr. Sudekum, told me early in the year that that was what Mr. Sudekum wanted to do and that he, Mr. Hendren, was working the Eastern section of Tennessee in acquiring theatres for Mr. Sudekum. While in Sevierville, Mr. and Mrs. Murphy [fol. 1652] told me that Mr. Hendren made an effort to buy an interest, or all, of their theatre by threatening them with competition unless they sold at the price which Mr. Hendren wanted to pay. This is a method they are pursuing and where they have acquired partnership, such as Lewisburg, which we made earlier in the week, the exhibitors are very bitter but are frightened to raising their voices against Mr. Sudekum. With this condition existing throughout the entire state, the placing of our product is very doubtful until Mr. Sudekum gives the word to buy.--

Mr. Waller: In other words, Your Honor, this witness has conversations with somebody who tells him that Mr. Sudekum is making a concentrated effort to acquire the theaters.

The Court: It is not one person, from that letter, apparently, it is several persons. I think that part of the conversation with Mr. Hendren might be competent, but I do not think that part of it that he finds that Mr. Sudekum is trying to buy up all the theatres in the State of Tennessee. [fol. 1653] Mr. Wright: This is a statement of what he was told Mr. Sudekum wanted to do.

Mr. Waller: That was before Mr. Hendren was affiliated with him, and by no rules of agency could one make declarations to bind a principal, by some one who is to become an agent.

Mr. Wright: It is not before that at all, Mr. Hendren became affiliated with Mr. Sudekum in the fall of 1936, this letter refers to early in the year 1937.

Next number is Government's Exhibit number 177, dated February 16, 1940, from Mr. Avey to Mr. Postman, at the Home Office.

"Dear Mr. Postman: I talked to you yesterday by telephone regarding my negotiations with Mr. Tony Sudekum, Mr. Louis Rosenbaum and Mr. Kermit Stengel. Attached is a schedule showing the number of percentage pictures that we have set up for each town."

Then there is a long discussion of terms, and the third paragraph says:

> "There are a few other things they ask for in connection with a five-year deal, contending that they have [fol. 1654] the same with other extended term deals they have. One is, they want the privilege to a repeat run on any picture and cancel a picture from the 'Balance' group. This, of course, I told them we would not under any circumstances agree to and they asked that we please try to get that concession for them. They will not make an issue of that point.

Mr. Waller: That is objected to among other grounds, because it is after the date of the suit, in August, August 11th, 1939.

The Court: I do not see where it is very material anyway.

Mr. Wright: If the Court please, this reports that there was a five year deal pending, and that was why these pictures were not made available to any one else.

The Court: It was an attempt referred to.

Mr. Wright: After all, the Act covers attempts as well as those attempts which actually become completed acts. I think it is very plain evidence, an attempt to tie up the Metro product for a five year period, to secure the same [fol. 1655] kind of rebate, which of course we contend is illegal, that which they knew was illegal at the time they entered into it.

The contention——

The Court: Is it the contention of the Government that a five year franchise is an absolutely illegal in itself?

Mr. Wright: It depends more on the circumstances under which it was made and the purpose for which it was made. The rest of the letter I think is merely a discussion of the terms and negotiations.

The next is a letter from Mr. Avey to Mr. Kessnich, dated November 13, 1940, Government's exhibit number 178.

> "This will confirm my understanding of——

The Court: Mr. Wright, I am just sorry, but I just can't hear you. You will have to speak a little louder.

Mr. Wright: This is to confirm my understanding of Mr. Sudekum's proposal to use our 1939-1940 releases. And there is some discussion of the picture BOOM TOWN.

"They want to make a contract for twenty-six (26) [fol. 1656] pictures, agreeing to play the top four, seven from the first ten, and seven from the second ten in the following towns:

Decatur, Ala., Gadsden, Ala., Harriman, Tenn., Gallatin, Tenn., Franklin, Tenn."

That is all for Mr. Avey.

Mr. Mitchell: Mr. Wright, do I understand this has been offered in evidence?

Mr. Wright: Yes, sir.

Mr. Mitchell: I object to it, may it please the Court, so far as Mr. Rosenbaum is concerned, it is a recitation by Mr. Avey, that he has conferred with Rosenbaum, and had an understanding with Sudekum about a contract, or course a recitation in a letter, is not evidence of the fact.

The Court: Just what is your objection to this as evidence? If he talked to him.

Mr. Mitchell: Sure if he talked to him, if he did, he can say it, but whatever else is not competent evidence, and [fol. 1657] what he talked to him about several years ago, it is objected to under the simplest rules of evidence.

However, I do not think it is so very important I just want to preserve our rights.

The Court: I am inclined to think you are right, the witness was not asked what he did talk to him about, he just wrote this letter, and they made it an exhibit to the testimony, to permit the letter to testify instead of the witness. All right. Go ahead. Sustain the objection.

Mr. Wright: I beg your pardon?

The Court: I say I sustain the objection.

Mr. Wright: If the Court please, may I see the letter a moment?

The Court: Yes, sir.

Mr. Wright: This letter says that he talked by telephone and confirmed by letter, and that Mr. Kermit Stengel was there, a defendant. I understand your Honor is sustaining [fol. 1658] the objection on the ground that that statement permitted the letter to testify.

The Court: That permits the letter to testify instead of the witness, you haven't asked the witness anything about it.

Mr. Wright: I just want to get the ground of sustaining the objection exactly. As I understand Your Honor does

not include the statement, and then there were other negotiations with Mr. Sudekum and Mr. Rosenbaum and Mr. Stengel, for a deal.

The Court: Yes, sir, you can ask the witness about if if you wish.

[fol. 1659] Q. Mr. Avey, at the time you wrote this letter of February 16, 1940, in which you said, "I talked to you yesterday by telephone regarding my negotiations with Mr. Tony Sudekum and Mr. Louis Rosenbaum, and Mr. Stengel".

Had you then been negotiating with those gentlemen with respect to a possible five-year franchise when you had the conversation?

A. Yes, I talked with Mr. Sudekum in Nashville.

Q. Just answer the question.

A. Will you state the question again.

Q. It calls for a yes or no answer.

The Court: He can answer yes or no, then make any explanation he wants to.

A. Yes, I talked to Mr. Sudekum in Nashville and I believe the letter refers to a trip I made to Florence, Alabama where I met Mr. Kermit Stengel and Mr. Louis Rosenbaum and had a further discussion regarding an extended deal, a five-year franchise.

Cross-examination.

By Mr. Mitchell:

Q. Mr. Avey, you were just interrogated by Mr. Wright regarding a letter written or that you wrote on February, 1940, in which the names of Mr. Stengel, Mr. Sudekum and Mr. Rosenbaum were called. You dod not conclude any transaction with Mr. Rosenbaum, did you?

A. No.

[fol. 1660] Q. Did you make a contract with the other parties?

A. You mean, in connection with the negotiations for a five-year deal?

Q. Yes.

A. No.

Q. Mr. Rosenbaum negotiates his own contracts, does he not?

A. Yes.

Mr. Wright: That is a conclusion of the witness. I think he can bring out the facts, just what was done by the various parties, then the Court can decide to what extent Mr. Rosenbaum negotiated his own contracts.

The Court: Ask him if Mr. Rosenbaum negotiated his.

Mr. Mitchell:

Q. Did Mr. Rosenbaum negotiate his own contracts?

A. With our Company, Mr. Rosenbaum negotiates with some sales representative of our Company.

Cross-examination.

By Mr. Waller:

Q. Mr. Avey, how long have you been Branch Manager of Loew's at Atlanta?

A. Since January, 1935.

Q. The Government has introduced in this case a number of letters between the Atlanta Branch of Loew's and Mr. [fol. 1661] Roth at Gallatin. Are you acquainted with Mr. Roth?

A. Yes.

Q. Did you have correspondence with him before you became personally acquainted with him?

A. Yes.

Q. Had Loew's had contractual dealings with Mr. Roth in Gallatin for a number of years before Crescent Amusement Company opened a theatre in Gallatin?

A. Yes.

Q. Do you recall about what time Crescent Amusement Company opened their theatre in Gallatin?

A. I think it was in the late Fall of 1937.

Q. As Branch Manager of the Atlanta Exchange, was it a part of your duties to determine whether to recommend to your superiors whether Loew's, for the ensuing season, should make a contract for its product with Mr. Roth, or with the Crescent Amusement Company?

A. Yes.

Q. Did you make a decision, so far as you were concerned, as to whether you would prefer to make the contract with Crescent Amusement Company, or with Mr. Roth?

A. After conferring with Mr. Kussnich, who was my District Manager, we recommended that we sell our 1938-1939 product to Mr. Sudekum in Gallatin, Tennessee.

Q. Did you or not obtain an application from Crescent [fol. 1662] Amusement Company for that product for Gallatin?

A. Yes.

Q. Did you submit it to New York, to your New York office along with other towns that you were dealing with, or dealing for, or dealing on, rather, with the Crescent Amusement Company?

A. What year's product are you speaking of?

Q. I am speaking of the 1937-1938 product?

A. Yes.

Q. Was the recommendation that you made with reference to Gallatin approved or rejected by the New York office?

A. Rejected.

The Court: What letter is it you want, Mr. Waller?

Mr. Waller? A letter from Mr. Postman to Mr. Kessnich and from Kessnich to Postman, introduced this morning, dated December 21, 1937, and December 22, 1937. I don't believe the letter of December 22, 1937, has been introduced.

The Court: That is the one that has been introduced right there (Indicating).

Mr. Waller:

Q. Now, according to this Government Exhibit No. 174, the letter from Mr. Postman to Mr. Kessnich—By the way, Mr. Kessnich was in the same office as you, there in Atlanta? [fol. 1663] A. Yes.

Q. It is stated that with reference to the proposed contract with Mr. Sudekum, for Gallatin, Tennessee, "I had Crescent's request and we are withholding action on the product pending receipt of further advice from you as to the reason for not continuing with our usual customer in this situation."

Was there a reply to that letter, prepared and sent by Mr. Kessnich, after collaborating with you, on December 22, 1937?

A. Yes, Mr. Kessnich wrote Mr. Postman on December 22, 1937, and furnished me with a copy of his letter.

Mr. Waller: We offer that letter as Defendant's Exhibit No. 59.

Mr. Wright: May I ask if Mr. Kessnich will be here for cross-examination?

Mr. Waller: Mr. Kessnich is ill, I understand, at the hotel. This is a part of the correspondence which has already been introduced, except the Government introduced a part of it, without the remainder which makes a connected story and we are entitled to introduce the other part.

The Court: They introduced it by stipulation. Did you ask them to stipulate on that?

Mr. Waller: I think perhaps I overlooked that, your [fol. 1664] Honor. Maybe I should have done it in advance.

Mr. Wright: We have no objection to his offering the letters, or to this exhibit.

Mr. Waller: I will read this letter to your Honor:

"Dear Mr. Postman:

In reference to the Roxy Theatre, Gallatin, Tennessee—Sudekum account, Mr. Roth operating the old theatre in Gallatin has never been a satisfactory account. Aside from that he only has a little store show, with plate glass windows in the front of it, and for a period of years we have never had anything but trouble in handling the account.

Sudekum has built a much better theatre in the situation and in allocating the prices for Gallatin, we used the rentals set up previously for another town of comparable size in the circuit. You will have to approve the Roxy Theatre, Gallatin contract as it is a part of the whole Sudekum deal and I would thank you to do so immediately. Merry Christmas. Sincerely * * *"

The Court: What is the number of that Exhibit?

Mr. Waller: That is Defendant's Exhibit No. 59.

Mr. Waller:

Q. Now, Mr. Avey, after that letter was written on De- [fol. 1665] cember 22, 1937, do you recall receiving a letter from Mr. Roth, dated December 27, 1937, and which is

filed in this case as Government Exhibit No. 30, reading from Page 540 of the record as follows:

(Counsel here read letter from Page 540 of the present Transcript of testimony, which is not repeated.)

Q. Did you receive that letter?
A. Yes.
Q. Did you send it to New York?
A. I am pretty sure that I did.
[fol. 1666] Q. Now, state then was that Sudekum contract or Sudekum application here rejected at that time? In other words, it had never been approved?
A. The application for contract——

Mr. Wright: Just a minute. If your Honor please, that is a question that has to be determined from an examination of all the correspondence.

The Court: Well, the contract shows when it was approved, doesn't it?

Mr. Waller: It was approved several months after that.

The Court: Well, what does the contract show?

Mr. Waller: The contract doesn't show. The contract is filed as Government's Exhibit No. L-5, March 30, 1938.

The Court: What is the date of that letter?

Mr. Waller: That letter was December 27, 1937.

The Court: All right. I overrule the objection.

By Mr. Waller:

Q. Now, as a result of sending the letter to New York did [fol. 1667] you go to see Mr. Roth in Gallatin? I mean did you have some conversation with New York on the telephone or otherwise?

A. I don't recall whether it was by telephone or by letter but I believe I was instructed to call on Mr. Roth along about that time.

Q. Well, did you go to see Mr. Roth in Gallatin sometime in January, 1938?

A. Yes.

Q. What took place?

A. I tried to sell Mr. Roth some pictures and he didn't buy them. I don't recall just why he didn't buy them.

Q. Do you recall whether anything was said about whether he had his playing time filled up or almost filled up?

A. I don't remember on that call. I believe I made two calls on Mr. Roth in the winter of 1938.

Q. Now, after you made your first call in January did you write him a letter after you returned to Atlanta?

A. I don't remember.

Q. To refresh your memory, I will ask you if you recall having written him on January 18th, 1938 as per Government's Exhibit No. 32, page 545 of the record:

"Dear Mr. Roth:

I wish to thank you for the courtesies extended me during my visit with you on Saturday, January 15th. I was disappointed when you told me that you couldn't use our 1937-1938 product; that you had open time for [fol. 1668] only fifteen pictures.

This will confirm, etc. * * *"

A. Yes sir, I wrote that.

Q. Well, had Mr. Roth told you he had open time for only fifteen pictures?

A. Yes sir.

Q. Do you recall receiving a reply from Mr. Roth dated January 25, 1938, Government's Exhibit—page 551 of the record but I don't see the number——

"Dear Mr. Avey:

I am unable to understand the gesture in your letter dated January 18th received this morning. I wrote you several times in September asking you to advise me by return mail whether or not you intended to sell me your product for the season of 1937-1938. I haven't received reply to it. I wasn't given a chance of refusal of the new product. Your new product was sold and is being shown by the Roxy Theatre in Gallatin and am unable to figure out how you expect them to be shown at both houses as I do not run second run pictures."

A. Now, had you offered Mr. Roth second run pictures or first run?

A. First run.

Q. Was it a fact that some of that season's product had been shown at the Crescent Amusement Company house?

[fol. 1669] A. Yes.

Q. Although the contract of the Crescent Amusement Company had never been approved?

A. The application for contract was rejected by the home office. We accepted some dates when the application for contract was made. They were post dates on just a few pictures, perhaps three or four pictures, and after the application for contract was rejected by the home office we didn't want to pull those pictures out of the Roxy Theatre on short notice so we let them go through and put through a spot-booking memo to cover the shipment of the prints.

Q. Now, did you offer Mr. Roth the remainder of your first run product for 1937-1938 other than what had already been dated by the Crescent Amusement Company?

A. You have reference to the first visit?

Q. Yes.

A. I don't remember, whether I offered him all of the 1937-1938 product except those that we had spot-booked to Mr. Sudekum or not. I do recall that he told me that he could only use a few pictures and I believe the number that he told me was fifteen.

Q. Well, after that did you see Mr. Sudekum, or let me ask you this: Prior to that time had you had any communication with Mr. Sudekum about his application?

A. Yes sir.

[fol. 1670] Q. What was that?

A. That it was rejected.

Q. Right after your visit to Mr. Roth did you again see Mr. Sudekum?

A. After my second visit to Mr. Roth at Gallatin, Tennessee, at which time I offered him a split of the product inasmuch as he could only use fifteen pictures I offered to sell him what he could use, but he had some contracts pending, I believe, with United Artists, and if the United Artists application for contract was accepted he lead me to believe he couldn't use any pictures.

Mr. Wright: If the Court please, let him state what the conversation was; not what he was lead to believe.

Mr. Waller:

Q. State, as well as you recall, what the conversation was about United Artists when you offered him a split deal? On your second visit.

A. He had a contract application pending with United Artists and if the contract was accepted he wouldn't have any playing time for our pictures; if that application for the United Artists contract was rejected he would entertain a proposition from us for some pictures.

Q. Now, was that second visit after there had been some word that he had made complaint to the Department of Justice about Loews and Paramount?

[fol. 1671] A. Yes sir.

Q. Now, did you then sometime later get a letter from him saying that he had made the United Artists contract and wouldn't need any pictures?

A. Yes sir.

Q. By the way, what were the terms that were offered——

Mr. Wright: Just a minute. Have you got that letter?

Mr. Waller: It is in the record. The Government has introduced it.

Mr. Wright: You refer to a letter that is in evidence?

Mr. Waller: A letter that is in evidence. I didn't want to go to the trouble to find it. It is already in.

Q. Did you discuss the terms of this split deal?

A. Oh yes.

Q. Did you make an offer on certain terms to Mr. Roth?

A. Yes sir.

Q. Did he make any counter-proposal?

A. Yes sir.

Q. Now, what did you do about his counter-proposal? In other words, did he specify terms in his counter-proposal?

A. Yes sir.

[fol. 1672] Q. Now, what took place about that?

A. On my return to Atlanta I had contract application prepared for a split of the product at the terms that Mr. Roth suggested and I believe that——

Mr. Wright: If the Court please, he has not answered the question. He is telling what he did in Atlanta afterwards. Let him state, first, what this conversation he had with Mr. Roth was and what the terms Mr. Roth offered were.

Mr. Waller: This is connecting up exactly with Mr. Roth's testimony about that application. I think Mr. Roth testified about it too. I am seeking his version of the same transaction.

Mr. Wright: I don't have any objection to his giving his version of that transaction but he is not attempting to do that. He is telling about what he did after he got back to Atlanta.

The Court: I guess he is leading up to it.

Mr. Waller: I think his answer is responsive to what I asked:

[fol. 1673] Q. Let me ask you again this way, Mr. Avey. Did or — not Mr. Roth tell you what he would do on a split deal, provided the United Artists deal fell through?

A. Yes sir, very definitely.

Q. When you got back to Atlanta did you make up an application in accordance with what Mr. Roth stated he would do if United Artists' application fell through?

A. Yes.

Mr. Wright: We are still objecting. I think he could tell what the deal was. What did Mr. Roth say? That is what we want to know about, not what he did when he got back to Atlanta.

Mr. Waller: All right.

Q. Was the application that you sent to Mr. Roth that the Government has already referred to in Mr. Roth's testimony—I make this statement that way without looking in the record, because I know it is in there—was the application you sent to Mr. Roth made up in accordance with what Mr. Roth stated to you he would accept if he made the deal?

A. Yes.

Mr. Wright: We make the same objection.

Mr. Waller: I submit it is competent, your Honor, without [fol. 1674] going into the terms of each. I don't imagine the witness remembers each one.

Now, here is the application in evidence as Government's Exhibit No. L-2, page 554 of the record. Mr. Roth was asked:

"Q. Now, after he went back to Atlanta did you receive from Mr. Avey application for Metro contract"

and he answered:

"A. Yes sir.

"Q. Is this the application that you received?

"A. Yes sir.

"Mr. Dobey: We offer it in evidence as Exhibit No. L-2.

"The Court: Let it be admitted."

The Court: All right. What does it say?

Mr. Waller: I don't have the exhibit.

The Court: Well, let's get it.

Mr. Wright: We concede that the exhibit he just referred to is in evidence.

[fol. 1675] The Court: Well, you are wanting to know what the proposition was, what he said he could do, and whether or not this gentleman made up an application according to what Mr. Roth told him. Now, that is the only way I can see to do that, is to read what is in the exhibit, and let him see whether that is what Mr. Roth told him he would do.

Mr. Wright: It would be interesting to test his memory in the absence of reading the application, if he was able to recall.

The Court: I don't know whether he can remember all that or not.

Mr. Waller: I think if a man makes up an application in accordance with a conversation he had two or three days before he would certainly know whether it corresponded with the conversation.

The Court: I don't know whether he would or not. He might and he might not. He might forget some of it. I can't remember what was in some of them here two or three days ago myself.

[fol. 1676] Mr. Waller: I don't think it would help him much to show him the application at this time.

Q. I will pass to you a letter dated February 21, 1938 from you to Mr. Roth, in which the following statement is made, this being Government's Exhibit L-2, a letter and a contract:

"Dear Mr. Roth:

"Following up personal call which Mr. McGuire and I made on you at Gallatin on February 9th, I enclose herewith application for Metro-Goldwyn-Mayer pictures for 1937-1938 season in exact accord with the proposal which you made to us at that time."

I will ask if that refreshes your memory as to whether you did make up the application in accord with the proposal that Mr. Roth made? (Handing paper to witness).

A. Yes. I would like to state that this was not made from memory. I am quite sure there was titles of pictures and prices made and some kind of memo so the application could be made up in the office.

* * * * * * *

[fol. 1677] Q. And did you receive from Mr. Roth a letter dated February 28, 1938, Government's Exhibit 34, in which he made this statement: "I have been really busy the past week and have not had much time to consider your offer. However, since my United Artists contracts have been approved it seems my playing time has almost been taken up." Do you recall a letter of that nature?

A. Yes, sir.

Q. Now, after that was the contract with the Crescent Amusement Company made?

A. After that?

Mr. Wright: I think the contract speaks for itself; I don't know anything to be gained by asking him whether it was before or not.

Mr. Waller: Well, I just call the Court's attention to that fact. I withdraw the question.

Q. Mr. Avey, do you remember having some correspondence with Mr. Andy Anderson at Hopkinsville about second run Metro product in the year 1938?

A. Yes.

Q. Do you recall that you sold Mr. Anderson the 1936-1937 product, second run, and that he also later wanted to buy the 1937-1938 product, second run?

[fol. 1678] A. I remember selling him some pictures, but I don't remember what season's product it was.

Q. I hand you a letter dated June 28, 1938, written by you to Mr. Anderson, or a photostat of same, and I will ask you if that refreshes your recollection?

A. Well, it would seem from this letter that I sold him the 1936-1937 product.

Q. Was he also asking for 1937-1938 product?

A. Yes.

Q. Why was it that you didn't sell him the 1937-1938 product?

A. I believe he sold his theater before he finished playing the product, 1936-1937 product, or the product sold him previous to the 1937-1938 season.

Q. Do you recall whether or not the contracts for the 1936-1937 product was to be played off starting June 1, 1938, and that during the month of June he was asking for the next year's product?

A. Well, I would have to refer to the plain terms of the contract.

Q. Well, let me ask you a question: Where you have the product sold that season and only three or four pictures of that season's product have been played, is it customary to make a contract for the next season's product?

[fol. 1679] A. No, for the next season's product we would like to have some idea of how he is fulfilling the contract before we make any other contract with him.

Re-Direct-Examination.

By Mr. Wright, For the Plaintiff:

Q. Now, Mr. Avey, before you had even sent in the application of Mr. Sudekum to play the 1937-1938 product at his new theater at Gallatin, you went right ahead and let them play the 1937-1938 pictures there, isn't that right?

A. We took some dates.

Q. I have a play-off record here for the 1937-1938 Metro product in the Roxy Theater at Gallatin, which shows you let them play two pictures in December, 1937; does that sound right?

A. That sounds about right.

Q. And then he played two more in January, is that right?

A. That sounds about right.

Q. And then he went right ahead after that and played seven more pictures of that season, in February, is that right?

A. That sounds about right.

Q. All before this contract was finally approved in May?

A. Yes.

[fol. 1680] The Court: How many pictures in all?

Mr. Wright: That is 11 pictures.

Q. Now, in this letter that Mr. Waller offered in evidence here from Mr. Kessnich to Mr. Postman, dated December

22, 1937, he says, in the last paragraph: "You will have to approve the Roxy Theatre at Gallatin contract, as it is a part of the whole Sudekum deal, and I would thank you to do so immediately." Now, can you tell us why that statement was made?

A. I can't tell you why Mr. Kessnich made a statement; you would have to ask Mr. Kessnich.

Q. Well, you received a copy of the letter?

A. Yes.

Q. And it was discussed with you at the time it was sent.

A. Perhaps so.

Q. You and Mr. Kessnich together had worked out both the deal for the Roxy Theater and the rest of the Sudekum deal, referred to as the Sudekum deal?

A. Yes.

Q. Now, in this letter that Mr. Waller introduced, dated December 22, 1937, to the home office, I believe you referred to Mr. Roth as an unsatisfactory account, is that right?

[fol. 1681] A. You have that letter?

Q. I believe the letter is from Mr. Kessnich to Mr. Postman; it is the same letter in which the statement that I have just read you, about approving the Gallatin contract. Now, do you recall just when it was that Mr. Roth became an unsatisfactory account?

A. No, I don't recall just exactly the date that he became, that we considered him an unsatisfactory account; I believe it was before I took charge of the Atlanta Branch.

Q. You wouldn't know anything about this statement here, then, and he was an unsatisfactory account?

A. I wouldn't know anything about that statement.

(Noon recess.)

[fol. 1682] Afternoon Session

R. M. Avey, resumed.

Mr. Wright:

Q. I want to show you a copy of a letter dated January 1st, 1938, from you to Mr. Connors, and ask you if that is a copy of a letter you wrote to him on that date?

A. Yes.

Q. And in this letter you state,

"As for Mr. Roth as an account. Mr. Lucy informs me——

By the way, who is Mr. Lucy?

A. Mr. Lucy was our office manager in the Atlanta branch.

"Mr. Lucy informs me that about four or five years ago he was so troublesome by writing trade magazines, condemning the merits of Metro Goldwyn Mayer pictures, that our company thought it advisable not to sell him until such time as he could show a better appreciation of our product.

"I believe your files will disclose the fact that Mr. Roth, through his lack of appreciation of our product and service, would not be classed as a satisfactory account."

A. Is that the opinion the basis for classing Mr. Roth as an unsatisfactory account?

[fol. 1683] A. He was classed as an unsatisfactory account by certain employees of the Atlanta branch, before my connection with the Atlanta branch.

Q. I don't think you have answered my question.

The Court: His answer is he can't answer because he was classed as unsatisfactory before he came with the company at Atlanta.

Mr. Wright: Came with the company at Atlanta. The reason he was so classed was the reason you stated here, was it not, because he criticised Metro-Goldwyn-Mayer pictures?

A. That was what I was told.

Q. And you continued to accept each year a very substantial payment, or very substantial payments from him for your pictures, after he had made those criticisms, is that right?

A. I presume the terms we stated were the best we could get, he having the only theater in the town.

Q. And when the customer that happened to use a Metro picture in a theater registered disapproval, you didn't take him out of the theatre or forbid him to come in the theater or exclude him from the theatre, did you.

Mr. Armistead: We object to that, Your Honor.

[fol. 1684] The Court: Well of course.

A. I was not in the theaters I do not know whether I would bar him, I am not in the running end of it, I don't know whether I would bar him from the theatre or not.

Mr. Wright:

Q. The exhibitors or customers who may criticise Metro pictures, their money is just as good as the money you get from anybody else for your purposes, isn't it?

Mr. Armistead: That is objected to, money is money everywhere.

The Court: I don't know, that is a rather broad statement. Let him answer.

Mr. Wright:

Q. Will you answer the question.

The Court: Of course he accepts anyone's money, and if they accept it it is just as good as anybody else's of course.

Mr. Wright:

Q. Now I want to offer the letter that was excluded there at first to the negotiations had with Mr. Stengel, Mr. Rosenbaum and Mr. Sudekum.

[fol. 1685] The Court: The letter is in evidence, the only objection I sustained to this, was—I didn't exclude the letter from the evidence, but its being written I excluded it as testifying to the fact that he did have a conversation with Mr. Rosenbaum, but when you asked him the question, that made it competent.

Mr. Wright: That is all.

Cross-examination.

By Mr. Waller:

Your Honor, we would like to offer in evidence as defendant's exhibit sixty, the letter of January 1, 1938, written by Mr. Avey to Mr. Connors, about which the witness was examined.

The Court: All right.

Mr. Waller:

Q. Mr. Avey, you were asked by Mr. Wright in regard to pictures at the Crescent theater at Gallatin in January and February, 1938; I believe altogether in December, January

and February, there were about eleven pictures showed, is that correct?

[fol. 1686] A. Sounds about right.

Q. Why was that done?

A. The first dates that were taken, were taken with the first application from Mr. Sudekum. That application was rejected by our home office, but we did not pull the dates because the dates were close and we did not want to deprive them of the pictures, probably they had advertised or something like that.

Q. As to the pictures that were played in February?

A. It is possible that those pictures were dated after Mr. Roth told me he couldn't use over fifteen pictures.

Mr. Wright: If the Court please, we want to object to any statement as to what was best, let him testify to what he knows.

The Court: Yes.

Mr. Waller:

Q. As a matter of fact was it in the middle of January, 1938, that Mr. Roth told you that he could only use about fifteen or twenty pictures?

A. As well as I remember it was about the middle of January.

The Court: Well can you recall of any other instance where your company allowed an exhibitor to go ahead and [fol. 1687] start playing pictures for a particular season before the contract for that season was approved by the home office?

A. Yes, sir.

Mr. Waller: Now in this letter that has been filed as exhibit number sixty for defendants, you say to Mr. Connors:

> "I believe Mr. Kessnich explained to you over the telephone that the Palace Theatre is in a store building with the plate glass still in the front. It does not have the appearance that a theatre should have and in our opinion the town has been entitled to a better theatre for a number of years. As for Mr. Roth as an account, Mr. Lucy informs me that about four or five years ago he was so troublesome by writing trade magazines, condemning the merits of Metro Goldwyn Mayer pistures, that our company thought it advisable not to sell him

until such time as he could show a better appreciation of our product."

A. Are those facts true, and was that your opinion at the time you wrote that letter?

A. Yes, sir.

[fol. 1688] Mr. Waller: Now Your Honor, the Government subpoenaed Mr. Connors of Loews, who is here in the anteroom, and I understand they are not going to put him on, he is here from New York and we would like to put him on as our witness, out of order.

The Court: I would not let you put him on out of order, unless it is agreeable to the Government.

Mr. Wright: I think that would be agreeable, to save Mr. Connors another trip down here.

Q. Did I understand you to tell the Court that it was customary for you to let an account play the pictures before a contract had been made?

A. Not customary, it does happen.

Q. It happens frequently?

A. It has been done, yes.

Q. Can you recall any instance where it was done, where the account would play the pictures?

A. Yes.

Q. And was it a new man, or any account, or an old customer in a situation?

[fols. 1689-1690] A. I can't by name, but I can refer to the records.

Q. Will you refer to your records and see if you can find such a situation for us?

A. Yes.

Further deponent saith not.

[fol. 1691] A. M. Avery, called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you tell your name and address, please?

A. A. M. Avery; residence address, please?

Q. Yes.
A. 642 Roselle, Memphis, Tennessee.
Q. And your occupation?
A. Motion picture distributor.
Q. By whom are you employed?
A. RKO Radio Pictures, Inc.
Q. In what capacity?
A. Branch Manager, at Memphis.
Q. How long have you held that position?
A. Three years.
Q. I hand you a letter from you to Mr. Jules Levy, at the Home Office, dated January 28, 1939, and ask you if you wrote that letter on that date in the course of your duties as Branch Manager?

Mr. Raftery: You offer that as to RKO? Is that offered as to conspiracy amongst ourselves?

Mr. Wright: I offer it against all the exhibitors for whateyer it may be worth.

[fol. 1692] A. That is the letter.

Mr. Waller: Is it offered on two conspiracies, RKO and independent exhibitors?

Mr. Wright: Everything that is in the case.

Q. Mr. Jules Levy, to whom this letter is addressed, what was his position at that time?
A. He was General Sales Manager at that time.
Q. Located in New York City?
A. Yes sir.

Mr. Wright: I will read it, then I will have it marked (Reading):

"DEAR MR. LEVY:

Mr. J. D. Henry, who is building a new theatre called the Roxy in Union City, Tenn. in opposition to the Sudekum Circuit, called on me yesterday for the purpose of purchasing such film as is unsold to Mr. Sudekum.

I made a deal with him only for the unsold portion of our 1937-1938 product, this consists of eighteen features, and inasmuch as it was only the program pictures that were left, he would only pay a program price, which is $10.00. He agreed to buy the remaining nine two-reel subjects at $3.50 and the sixteen

remaining one-reel subjects at $2.00, all for one or [fol. 1693] two days use. He is also agreeable to buying Snow White second run, at $25.00 against 40% of the gross, 50/50 over $150.00. He intends charging on his regular days of the week except Sunday, 10¢ and 15¢ but he will charge 10¢ and 25¢ for Snow White and run it three days to include a Sunday.

I would not sell him any of the 1938-1939 product as Mr. Sudekum's booker advised that they were putting in a second theatre themselves over there, and would no doubt use our entire 1938-1939 product."

(Letter marked Government Exhibit No. 179.)

The Court: What are the last words of that, that you read?

Mr. Wright: "No doubt use our entire 1938-1939 product."

The Court: All right.

Cross-examination.

By Mr. Waller, for Defendants:

Q. At the time you wrote this letter on January 28, 1939, did you already have a contract with the Crescent [fol. 1694] Amusement Company at Union City for the 1938-1939 product?

A. Yes sir, I did.

Q. That contract was made back in December of 1938, was it not?

A. Yes sir.

Q. So you couldn't have sold Mr. Henry any of that product, regardless of whether or not Mr. Sudekum was putting another theatre in the town?

A. No sir, I could not have.

Mr. Wright: If the Court please, the contract is in evidence, it speaks for itself.

The Court: How does the Government insist this evidence is material? It doesn't seem to me he could have sold the product there until after Mr. Sudekum signified whether he was going to exhibit the pictures.

Mr. Wright: Of course, if Mr. Sudekum had only a contract for 21 pictures, those that Mr. Sudekum played under the contract. The rest of the pictures of that season,

Mr. Sudekum was also anxious to pick up and spot book long after this conversation.

The Court: You say he did not have a contract for the entire output?

Mr. Wright: No sir, he had a contract for 21 pictures.

[fol. 1695] The Court: What was the entire output?

Mr. Wright: It is about 50.

The Court: That is what I say; it is your position he did not have a contract for the entire output?

Mr. Wright: That is right.

The Court: All right.

Mr. Waller:

Q. Did you offer those extra pictures to the Crescent Amusement Company, personally, with whom you had a contract?

A. Of the 1938-1939 season?

Q. Yes, I mean those in addition to the 21 pictures?

A. Those pictures, the way that we have always operated on contracts that are selective contracts, we always endeavor to get every account that buys a selective contract to play all the product if it is possible to do so, as a matter of salesmanship.

Q. You mean, play all the pictures, not only those they are permitted to play under the contract, but all the other pictures?

A. We try to get them to play all of our product.

Q. As a matter of fact, Crescent Amusement played all of the 21 contracted for?

[fol. 1696] A. Yes, and I think they played 18, over that, that year.

Q. That was 1939?

A. 1939.

The Court: What does the contract say about their right if they contracted for 21 pictures, can you make them play more?

A. No sir, you can't do that.

The Court: Does the contract give them the right to demand more?

A. No, I don't believe that it does, but it has always been a business practice to allow accounts to overlay their commitments if they so desire.

Mr. Wright: Is that a regular custom in the business?

A. Always has been.

Mr. Waller:

Q. In other words, the custom is to offer those pictures first to the man with whom you have a contract?

A. That is right.

Q. If he doesn't want the other——

A. If he has an account, we always offer them to him first.

Q. Have there been rejected pictures from prior season's product?

A. Yes, there were.

[fol. 1697] Q. Have you sold them to Mr. Henry?

A. We have sold them to Mr. Henry in their entirety.

Q. After he was obligated to buy them, did he play them?

A. He played three out of eighteen.

Q. And failed to play the other fifteen.

A. Yes, the other fifteen was eventually canceled and were never played off.

Redirect examination.

By Mr. Wright:

Q. Then, as to those pictures that have not been played under contract, or the others, you never made an offer of any of those to Mr. Henry?

[fol. 1698] A. No sir, I did not, I didn't know what pictures Mr. Sudekum would use and until he had selected his twenty one we had nothing available for Mr. Henry.

Q. And even after the selections were made, you offered them first to Mr. Sudekum, is that right?

A. I think we would have, as our regular account, yes.

Q. Do you know whether you did or not?

A. Off-hand presumably we did, inasmuch as he played them I would say that we did.

By the Court:

Q. Well, had Mr. Henry gone out of business when the product for that season became available?

A. I think that he went out of business early in the fall, as I recall, and the contract, Mr. Sudekum's contract had not been entirely played at that time, his play-offs.

By Mr. Wright:

Q. Well, do I understand your interpretation of the contract correctly as being that even though Mr. Sudekum bought only twenty one, there would be no pictures available for anyone else, even those he rejected, until the end of the season?

A. No, no, if he played and then gave us definite rejections of pictures in between the releases of what he had used we could then serve them to anyone else if we so desired.

Q. You don't know whether he rejected any or when he made any rejections?

[fol. 1699] A. Without checking the records back again I couldn't tell you definitely but I presume that there were some rejections, but I am sure that Mr. Henry, outside of this one time when he bought pictures, never called on me for any further business.

Q. You didn't offer him rejections?

A. No.

By the Court:

Q. You say he only played three out of eighteen of the previous season?

A. That is right, your Honor.

Further this witness saith not.

[fol. 1700] T. B. Kirk, witness on behalf of the Defendanrs, and called at this time by agreement, he having been first duly sworn, testified as follows:

Direct examination:

By Mr. Waller, for Defendants:

Q. Mr. Kirk, are you connected with Loews, Incorporated?

A. Yes, sir.

Q. At Memphis, Tennessee?

A. That is right.

Q. What is your position?

A. My present position is in the sales department, but that went into effect only day before yesterday. Prior to that time I was office manager.

Q. Prior to that time, before yesterday, you were office manager?

A. Yes.

Q. What was your connection with the accounting department, branch office, I mean?

A. At the time I was office manager?

Q. Yes.

A. Well, just, I had supervision over it, the same as in the other departments.

Q. How long have you been connected with the branch office there in Memphis?

[fol. 1701] A. Since November, 1931.

Q. In what capacity did you start, and what other changes in your duties occurred from that time until day before yesterday?

A. I started in the accounting department as assistant to the cashier; that was in 1931; and then in 1933 I was made cashier; and from there I went to a booking position, which was in 1936; I was in that position approximately thirteen months, and in July, 1937 I went to the position of office manager, which position I held until day before yesterday.

Q. Now, I show you a bunch of cards which have been filed as Collective Exhibit L-17, and I will ask you what they are?

A. Exhibitors record cards, a record to play off the contract.

Q. Now, will you explain how those records are kept, and what they show?

A. These records show the date on which each picture was exhibited and the film rental paid.

Q. That is the actual film rental paid?

A. Yes.

Q. In other words, if the exhibitor has a contract and doesn't live up to his contract, there are no entries made on those records to show that he has fulfilled his con-

[fol. 1702] tract?

A. I didn't catch that question?

Q. I say, in case there is a contract for the playing of the Pictures, and the exhibitor fails to play the pictures according to his contract, does that nevertheless show on those cards?

A. It will show as not having been played on those cards.

Q. Now, did you make the tabulation which was filed as

Defendant's Exhibit No. 58, and then, on motion of the Government, was stricken by the Court, and which I now hand you?

A. Yes, I compiled that, with the help of one of my employes.

Q. Did you compile that from those original records you referred to as exhibitors' what?

A. Exhibitor record cards.

Q. Exhibitor record cards?

A. Yes, sir, I compiled it from these cards.

Q. When did you make that compilation?

A. It was last Saturday a week ago.

Q. At whose direction?

A. At the direction of the Southern District Manager, Mr. C. E. Kessnich.

Q. I will ask you to look at the item in this tabulation [fol. 1703] which is headed, Capitol Theater, Crescent Amusement Company, 1935-1936 Product. Do you see under that the item 46 features, $1021.95?

A. Yes, I see it.

Q. Did you get that information from those exhibitor record cards?

A. I did.

Q. Were those 46 features a part of the 1935-1936 product?

A. They were.

Q. Now, were all of those played by the Crescent Amusement Company prior to September 1, 1936, or were some of them released and played after that date?

A. Some were released and played after that date.

Q. Now, as they were played were they paid for by the Crescent Amusement Company?

A. Yes.

Q. Or were they paid for in advance?

A. It could have been either; I don't remember either way.

Q. The system is, they are either paid for in advance or sent C. O. D., isn't it?

A. Yes, I will say they were played and paid for within one week of the play-date.

[fol. 1704] Q. And the amount of those 46 features was $1021.95?

A. That is correct.

Q. Now, can I have the document that was shown to Mr. Willingham. (Paper produced for Mr. Waller). I want to show you, Mr. Kirk, a tabulation which is headed, Brownsville, Tennessee, Capitol Theater, Crescent Amusement Company, and then with the heading MGM, 1935-1936 features and then a list of feature pictures with numbers by them, and certain information as to play-dates and rentals. Do you see those numbers on there? Some of the pictures starting with the number 6, and some starting with the number 5?

A. Yes, sir.

Q. What does that mean or signify?

A. It means a different year's product.

Q. Now, which year's product is numbered with numbers starting with 6?

A. Numbers starting with 6 would be the 1935-1936 product.

Q. The 1935-1936?

A. Yes, sir.

Q. And those pictures with the number 5, starting with number 5?

A. Previous to the others, 1934-1935 product.

[fol. 1705] Q. The 1934-1935 product?

A. Yes, sir.

Q. Now, the record shows Mr. Lawing had a contract for the 1934-1935 product; and I will ask you if in each case where one of those 1934-1935 pictures appears in that tabulation there is not a notation "1934-1935"?

A. There is not. The only signification would be the release on it.

Q. I am referring to another column there, those red figures under play-dates?

A. Each one with the red figure is a 1934-1935 release.

Q. And in no instance was there any item of money collected under the column "money"?

A. Correct.

Q. Now, does that tabulation include all of the 1935-1936 season's features, or only those that were released on or before July 24, 1935?

A. I believe that only includes the ones that were released prior to July 24, 1935.

Q. Now, I show you a similar tabulation which Mr. Wright has kindly handed me for the 1936-1937 season's features, MGM, which is made up in the same way as the

tabulation I have just showed you. I will ask you if in that tabulation for the 1936-1937 features, you find some pictures [fol. 1706] which have numbers beginning with the number 6?

A. Yes.

Q. Now, how many of those pictures are there listed in that year's tabulation?

A. Nine.

Q. Now, at the foot of the tabulation, or at the bottom of it, do you find the totals for the rentals on the 9 pictures of the 1935-1936 product set out separately from the table of the rentals on the 1936-1937 product?

A. They are set out separately.

Q. And what is the rental on the nine pictures from the 1935-1936 product that are listed on that tabulation?

A. $246.95?

Q. Now, will you add $246.95 to the total shown on the former tabulation of $775.00, and tell me what the result is?

The Court: $1021.95.

A. $1021.95.

Mr. Waller:

Q. Now, is that the exact amount shown on this document, this tabulation, that you made up?

A. It is.

Q. Which is marked Defendants' Exhibit 58?

[fol. 1707] A. Yes, sir.

Q. Now, Mr. Kirk, I will ask you to look on your tabulation, with reference to the 1934-1935 product, under the heading, Southland Theater, C. G. Lawing; what is shown there as to the amount of money—on the number of feature pictures, rather, and the amount of money received on those feature pictures by Loews Incorporated from Mr. Lawing for the 1934-1935 product?

A. It was 41 features for which we received $765.69.

Q. Now, was some of that money received from pictures which were not actually released prior to September 1, 1935, but which were released, played and paid for after that time?

A. That is correct.

Q. In other words, did you make up the figures with reference to the Lawing contract on exactly the same basis.

and in exactly the same way as you made up the figures for the Crescent Amusement Company contract?

A. Well, all these figures were arrived at by the same method.

Q. At that time, I mean back in 1934-1935, 1935-1936, 1936-1937, did Loews Incorporated actually release during the film season the entire product for that season, or were there carry-overs some times?

[fol. 1708] A. There were carry-overs.

Q. How did that happen? What was the reason for that?

A. Well, it could be for several reasons to account for that; in those days when we sold pictures we agreed to deliver a minimum of so many pictures or a maximum of so many pictures, approximately so many pictures, approximately one a week with certain stars; and if the stars did not happen to be available to start production at the time, it was delayed; it could be caused, perhaps, because of the star working on another picture; or it could be caused by a number of things, a number of things could cause it with which I am not familiar.

[fol. 1709] Q. You mean back in those days you might contract to sell two Greta Garbos and a Clark Gable, or something like that, and when the time came you couldn't get Greta or Clark at the right time, there might be some delay in the picture?

A. That is right.

Q. That system has been changed since that time, has it?

A. It has.

Mr. Waller: Now, may it please the Court, we will offer as defendant's exhibit 58 the tabulation.

The Court: Suppose you examine him as to each one of those set out here just on the total?

Mr. Waller:

Q. Did you find, Mr. Kirk, in addition to feature pictures you have included in your tabulations I believe short subjects and news reels?

A. Yes, sir.

Q. Take Mr. Lawing for the 1932-33 product; will you state what Mr. Lawing played and paid for out of the 1932-1933 product?

A. Played thirty-nine features, eighty-one short subjects and seventeen news reels for a total revenue of $966.77.

[fol. 1710] Q. Out of the 1933-1934 product, what did Mr. Lawing play and pay for?

A. He played forty features, ninety-six short subjects, six news reels, for which we received $1124.80.

Q. Out of the 1934-1935 product——

The Court: They got $765.69.

A. You have part of the 1933-1934.

Mr. Waller:

Q. If you have that, that $765.69 was on the features, I am also now including short subjects.

The Court All right.

Mr. Waller:

Q. What did Mr. Lawing play and pay for out of the 1934-1935 product?

A. Forty-one features, thirty-two trailers, sixty short subjects, twenty-two news reels, $1,086.69.

Q. What did the Crescent Amusement Company play and pay for out of the 1935-1936 product?

A. Forty-six features, forty-six trailers, eighty-five short subjects, 104 issues of news, a total of $1596.95.

Q. What did the Crescent Amusement Company play and pay for out of the 1936-1937 product?

[fol. 1711] A. Forty-two features, forty-two trailers, eight-four short subjects, four reissue pictures, four trailers on those reissues, a hundred and four news reels, or a total of $1,604.20.

Q. What did the Crescent Amusement Company play and pay for out of the 1937-1938 product?

A. Forty-three features, forty-three trailers, ninety-eight short subjects, a hundred and four news reels, a total amount of $1645.38.

Q. What did Crescent Amusement Company play and pay for out of the 1938-1939 product?

A. Forty-nine features, forty-nine trailers, eighty-seven short subjects, a hundred and four news reels, or a total of $1730.67.

Mr. Waller: Now, Your Honor, we re-offer the tabulation.

The Court: All right.

Mr. Waller: I have some other questions.

Q. Now with reference to the two tabulations which I showed you, listing the feature pictures, do you know who made those tabulations?

A. I believe they were made in the Memphis office.

[fol. 1712] Q. Do you know who made out these forms with the list of MGM season pictures?

A. I do not, they were sent to the Memphis office by our New York office; where they got them I don't know.

Q. In other words, what was sent to your office was a list of pictures and you were asked to fill in the play dates on those particular pictures and the results received from those pictures?

A. That is right.

Q. You had nothing to do with preparing the list of pictures?

A. No, sir.

Q. And if some 1936-1937 is listed product on the 1937-1938 form you don't know how that occurred?

A. No, sir.

Q. Mr. Kirk, did you make a search of the files at the Memphis office for the purpose of locating any applications for contracts with Mr. C. G. Lawing, made in the year 1935?

A. I did.

Q. At whose request?

A. Mr. J. F. Willingham's request.

Q. When was that search made?

A. I believe that was made more than a week ago, I can't recall the exact date.

[fol. 1713] Mr. Waller: May I have the exhibit L-18, which is that application.

(Passed to counsel by the clerk.)

Q. Did you locate in the files these three duplicates of an application made by Mr. Lawing, or purporting to be made by Mr. Lawing, dated 7/16/1935?

A. Yes, I got that out of the Memphis files.

Q. And also a carbon copy of a letter dated December 5, 1935, which is a part of this exhibit L-18, addressed by Mr. Willingham to Mr. Lawing, and stating that the applications signed for 1935-1936 product had been rejected?

A. Yes, that came out of the Memphis files, also.

Q. When these applications are made in duplicate or counterparts, are they made in different colors?

A. Four of the colors we have; white, pink, buff and green.

Q. There are only three of those counterparts you found?

A. Yes.

Q. Did you look through the files in an effort to see if there were any applications dated on any other date than July 17, 1935?

A. Yes, sir, I did.

Q. I mean July 16, 1935.

A. I did.

[fol. 1714] Q. Did you find any there?

A. No, sir, I didn't.

Q. Did you find any memorandum or locate anything to indicate that there might have been another application either before or after this one?

A. There was a letter in there from either the district office or the home office, of Loew's Incorporated, I mean that stated that it was written by Mr. Willingham, he stated that.

Mr. Wright: May it please the Court, let's have the letter.

Mr. Waller: It is already in, the letter.

Mr. Wright: We call for the letter then.

Mr. Waller: You have a letter in the file as a part of Mr. Willingham's testimony. May I see all those exhibits.

The Court: Who is the letter to?

Mr. Waller: Can you answer that?

A. I do not recall who it was to, Your Honor, it was either to the district office or home office.

* * * * * * *

[fol. 1715] Mr. Waller: I think—I am sure it makes the statement that he had taken an application and he had re-[fol. 1716] jected it and he had gone and gotten a better contract. Mr. Simons recalls that it was exhibit 165, some one says.

The Court: This is a letter from Mr. Willingham to Mr. Kessnich, thinks it would be good business to continue to do business with Mr. Lawing at Brownsville. Can you find 165 for him? Get 165.

Mr. Waller: It may be in the transcript, Your Honor. Mr. Wright says go ahead and ask the question.

Q. Mr. Kirk, do you remember such a letter as has been referred to in the colloquy?

A. Yes, sir.

Q. Did you undertake and attempt to find the application if it was still in the files?

A. I did.

Q. Were you able to do so?

A. No, sir.

Q. Did you find anything in the files, any Memorandum or letter or anything, which would suggest that there might have been an application taken after July 16, 1935?

A. No, sir, I could find nothing of that nature.

[fol. 1717] Q. Did you find any application bearing a date subsequent to July 16, 1935?

A. No, sir.

Mr. Waller: That is all.

[fol. 1718] Redirect examination.

By Mr. Wright:

Q. Do you remember when it was these play-off sheets were made up, that I am now showing you?

A. I can't remember exactly when, but I should say approximately two months ago.

Q. The list of features that is shown here on each of those sheets is the list that appears on the release schedule which the Company issues each year, which shows the features actually released during the season, isn't that correct?

A. Not during the particular contractual season, I wouldn't think.

Q. The list you have seen release schedules, showing the schedules of the pictures as released, and the conditions under which they were released, have you not, and have them year by year?

A. Yes, we get them periodically.

Q. You issue one for each season, don't you?

A. No, not a sheet like this.

Q. You have schedule releases, haven't you?

A. Schedule releases?

Q. And on the schedule releases appears the title of each picture released and the date on which it was released, doesn't it?

A. Yes.

[fol. 1719] Q. That is what you see here, in chronological order, don't you?

A. In one sense of the word, that is correct.

Q. Well, this sheet which is headed, "1938-1939 features", shows all the titles that you actually released during period of time *ocvered* by the 1938-1939 seasons, isn't that right?

A. I don't get exactly what you mean, please sir?

Q. The period from September 1, 1938 to August 31, 1939, constitutes what you call the 1938-1939 motion picture season, is that not correct?

A. That is correct.

Q. And what you see there in front of you is a list of all the feature pictures that were released during that season, is that right, and the release date of each one?

A. In the 1938-1939 season, that is correct.

Q. That is also correct with respect to each of the other sheets, is it not?

A. No sir, it is not.

Q. Now, calling your attention to the sheet here on which the 1936-1937 season features are shown, all of the features titles that are shown there were released on the date which appears under the heading "National Release Date", are they not?

A. I am Assuming they are correct.

[fol. 1720] Q. You notice these dates run from July, 1936 to August 1937?

A. Yes.

Q. That was the period covered by the 1936-1937 season, was it not?

A. No, it was not, because we had some carry-overs.

Q. I understand that you had carry-overs, which are shown there, pictures which you had sold under the 1935-1936 contract, those there shown as 1935-1936 releases, of which there are 9 in number, were all actually released during the 1936-1937 season, isn't that correct?

A. They were released during the same time that 1936-1937 releases were released.

Q. They were released on the dates shown there?

A. Right.

Q. Which was during the 1936-1937 season, isn't that right?

A. They were released at the same time as 1936-1937 releases were released, but they were a part of the 1935-1936 contracts that we had with our customers.

Q. Yes, that were contracted for in 1935-1936 features but were actually released during the subsequent season because they had not been made ready before that?

A. That is right.

Q. So that there is nothing inconsistent with this tabulation that you offer here and the figures that appear upon these sheets that I am showing you now, on which the reve-
[fol. 1721] nue received, from the pictures actually released during the season is shown, appearing at the head of the tabulation?

A. I don't know who made this sheet out, but these figures that I have compiled are the actual figures that we received for each of our year's product, regardless of when it was released.

Q. Yes, I understand that, but these are the actual figures showing what you received during the season, during the releasing season, isn't that correct?

A. No, it is not.

Q. How would you compute the actual total amount of revenue you received from features which were released by you during the particular chronological season, during a particular period of time?

A. During this season, 1936-1937 season, we released 1936-1937 productions covered by the 1936-1937 contracts, and during the same time, there were certain pictures that we had made during the 1935-1936 that were released along with, in chronological order, with the 1936-1937 releases.

Q. This total which you see at the bottom of the sheet, in the total of the 1936-1937 season is the total amount received for all of the pictures released during that season, including those that have been sold under 1935-1936 contracts?

A. Including carry-overs from 1935-1936, that is correct.

Mr. Waller: I think Counsel and the witness are using
[fol. 1722] the word "season" in two different senses; one speaking about a certain number of months, chronologically, and the other is talking about a film season.

The Court: Well, I think I understand the situation.

Mr. Wright:

Q. Now, I again ask you, there isn't anything in this tabulation which you are offering here, which in any way contradicts any of the figures that are shown on this tabulation you previously prepared on the basis of the films actually released during those seasons?

The Court: The only difference is, one set of figures was compiled on the pictures of a certain season, and the other is compiled on the pictures actually exhibited during the same season.

Mr. Wright: Actually released.

Mr. Waller: In other words, your Honor can take these two tabulations and look at that and the one Mr. Wright had, and there is no inconsistencey, but if you had just one of them, there is an inconsistency.

Mr. Wright:

Q. Now, I show you these sheets that purport to be an- [fol. 1723] swers furnished by your Company to interrogatories propounded by the Government. Those were prepared in your office insofar as Memphis territory is concerned?

A. These sheets were not prepared in the Memphis office.

Q. Those were prepared by the Home Office?

A. I don't know, sir. This is the first time I ever saw them.

Q. Wasn't the data that is shown there taken from the Memphis Exchange?

A. This? (Indicating).

Q. No, shown on here, the answer to the Interrogatory 10 purports to show the recap of the season's contracts, season by season, showing the number of features that were covered by the contract, the number actually exhibited, and the total film rental for the features covered by the contract?

A. Yes.

Mr. Waller: As I understand it, those interrogatories and answers, if your Honor please, are not a part of the record in this case, they are discovery interrogatories.

The Court: I don't know, they may want to introduce them.

Mr. Wright: We intend to introduce every one of them.

Mr. Waller: We intend to object to them.

[fol. 1724] The Court: All right, I will pass on them when they are introduced.

Mr. Wright:

Q. The figures shown in the answer to interrogatory 10, the amount received for each contract, should be the same with respect to feature pictures, as those on the tabulation that you have just identified, isn't that correct?

A. Should be the same, if everybody has done the work correctly.

Q. I notice on there, for 1934-1935 season offered by the Government, that the Memphis territory shows Brownsville, Tennessee, it shows only the Capitol Theatre and doesn't give any theatre, any pictures played or any contract for the season. On the basis of your recent search here, I take it that is incorrect?

A. We did have pictures played in Brownsville during the 1934-1935 season.

Q. And did have a contract with Mr. Lawing, that apparently they failed to catch or note in New York?

A. Correct.

Q. And the information that you have furnished in the tabulation that you have is what appeared in the 1934-1935 season, is that right?

A. That is right.

Q. With respect to feature pictures?

A. Yes.

Q. Can you also supply us with figures for 1932-1933, [fol. 1725] 1933-1934 1934-1935 seasons, which will be comparable to those I am showing you here for the ensuing seasons that were furnished by the New York Office, that is, the actual play-off during each of those three preceding seasons, you can make that up, can you not, from the records that you have there in your lap?

A. It can be made up.

Q. Can you do that for us, so that we will have complete and comparable records?

Mr. Waller: What is the question?

Mr. Wright: I am asking if he can supply us with a tabulation of the actual play-offs of the 1932-1933, 1933-1934, 1934-1935 seasons, so that we will have a record that is comparable to what we have for the ensuing season?

The Court: On the same basis as those other compilations.

Mr. Wright: That he has in his hand here.

Mr. Waller: We think those tabulations and compilations are wholly irrelevant, they don't mean anything, they are very confusing and we move that they should be stricken from the record if there are any that are already in. In other words, just as was shown yesterday when Mr. Wright handed in one, and without the two there was an inconsistency.

[fol. 1726] The Court: The witness wouldn't know, anyhow. It didn't come under the supervision of that witness. It is a proposition of six of one and a half dozen of the other. You have put in the record your compilation according to your way of looking at it, and I will permit him to put in his compilation according to his way of looking at it.

Mr. Wright:

Q. In order to make that complete, you have the same sort of records, have you not, for the 1939-1940 season, the last complete season?

A. We have in the Memphis Office, not made up in this form of record, but I can put them in this form.

Q. Can you do that for us for the 1939-1940 season, as well as sales contract recapitulation that you have already made and extend your tabulation one more year, that has already been offered in evidence here as Defendant's Exhibit?

A. Also for the years that we do not have here?

Q. Yes. That will give us a complete picture of what happened in Brownsville from the 1932-1933 season through the 1939-1940 season, both reference to the actual play-off during each year, but the amount of revenue received on each season's product.

Q. What about the carry-over? Do you want them on the [fol. 1727] release order?

Q. I assume that carry-overs will appear just as they do on these sheets. If the picture was released in the ensuing season, it will so appear, as it does there?

Mr. Wright: If the Court please, I might as well say now, that we intend to offer in the case, and that was the purpose for which this material was obtained of course, a complete record of two things: First, the information furnished in

interrogatories 10 and 12 which shows each contract that each Company made with the Crescent circuit and with its opposition during the five seasons, 1934-1935 to 1938-1939, inclusive, showing the date of the contract, the number of pictures licensed, the number played and the total amount paid for features under the contract. And in addition, we also propose to offer the answers to interrogatories 15 and 16, which show for the same seasons the titles of each each feature released during the chronological seasons, its national release date, the date it was played in the theatres which contracted for the pictures and the film rental paid therefor.

[fol. 1728] That information, of course, we feel is essential to avoid misleading comparisons such as were attempted here. I think that what happened on this situation shows the necessity of having a complete record, which shows exactly what did happen. Now, we, of course, have been somewhat handicapped by inaccuracies such as this which have turned up after the presentation of witnesses by us involving situations but in any event we will offer what the tabulation, as finally corrected shows, and exactly what did happen in each one of these situations.

Mr. Waller: I am still objecting to it not only on the ground of irrelevancy but also on the ground that it would be incumbent upon the Government to bring the people who made the tabulations, except in one instance and that is where the affairs of the Crescent Amusement Company and the defendant exhibitors are involved, and we have agreed with the Government that as to the dealings which the Crescent Amusement Company or these defendant exhibitors had with the distributors that we would accept the distributors' figures, subject to correction, of course, so far as competency is concerned—I mean so far as identifying [fol. 1729] the figure is concerned, but we still reserve the right to object to them on the ground they are irrelevant and immaterial; but so far as any dealings that any independent exhibitor may have had with any distributor, we insist that the only competent way of proving that evidence would be by bringing the man who made the figures and let us cross-examine him.

Mr. Frolich: We are going to make our objection to any interrogatories or answers to interrogatories made by the five distributors who were let out of the case on the ground

that interrogatories could only be asked for or against parties to an action, and they are no longer parties to this action.

Mr. Wright: This procedure, if the Court please, was adopted pursuant to discussions of all parties as a matter of convenience to all parties to avoid subpoenaing and production of a large mass of documents and a large number of witnesses. Now, this is the first time that it has been suggested to us that the defendant exhibitors were not willing to accept the information supplied by the distributors at its face value. Certainly I am sure they wouldn't have gone to the work of assembling it if they had assumed, after [fol. 1730] having assembled this and furnished copies to the defendant exhibitors and submitted the information to us that they would then have to come down here and bring each of the records of which tabulations were made.

Mr. Raftery: There was no agreement with the distributor defendants. Mr. Frolich's objection is still good.

Mr. Wright: As to Mr. Frolich's objection, obviously those interrogatories furnished by each company will be offered only against them and the defendant exhibitor and not against any other distributor.

Mr. Frolich: No, that wouldn't satisfy. I still urge my objection because these distributors are no longer parties and even though the interrogatories and answers are offered as against them and not against us, they still encumber the record and they do not belong here, in my opinon, because they are not parties to the action.

The Court: Well, I assume that counsel, by subpoenaing the witnesses will be able to prove what are in the interrogatories. Of course, if the purpose of making the objection is to enable you to cross-examine the witnesses, why, that is a different proposition.

[fol. 1731] Mr. Waller: In other words, your Honor, here is our position about it. Let me state first, however, there has been no agreement, express, implied or otherwise, so far as we are concerned, that the Government could use any interrogatories or answers to interrogatories as evidence except as I have heretofore stated. Now, if they want to introduce tabulations like this, we want to know the purpose for which they are introduced; otherwise, they may have a mass of records in here and we don't know the purpose of them, and then when we come to the argument of the case

Government's counsel will try to draw certain inferences and conclusions and we wouldn't know where we are.

Mr. Wright: I will tell you the purpose right now. In the first place, it is to protect ourselves against the sort of thing that is done here by selecting one situation and make up a particular tabulation from that and then make argument from that. Now, we expect to show from all the information as to the dealings between Crescent and these companies and their dealings with independents that the Crescent company was able to buy its pictures at much lower prices in comparable situations, and that this tabulation, [fol. 1732] which has been introduced here, its value would be completely destroyed as to the defendant by a complete analysis of what Crescent and Lawing did in comparable situations.

Mr. Waller: That is exactly what we thought, your Honor, and there is no such thing as comparable situations and they certainly can't be proved by statistics.

The Court: I think, Mr. Wright, that these parties who answered interrogatories, not being parties to the suit, that objection to the admission would be good.

Mr. Wright: I can only say, of the Court please, that we regard that as an essential part of our case and if they are not willing to accept, as we were, simply the figures that they submitted as taken from their records, we shall have to subpoena them with regard to the records and put them on and develop it that way.

Mr. Waller: Of course, your Honor, if they do that we are going to ask the witnesses—we don't want the Court or counsel for the Government to be mislead as to our position, that is, what one man paid for pictures and what another man paid for pictures; we want to go into a number of human elements. We may want to find out what kind of man [fol. 1733] this was.

Mr. Wright: I take it that the man who keeps the books won't know anything about what kind of fellow the man who bought the pictures was. If that is what you have in mind, I don't think there is any objection to stipulating what they say the books show is correct.

Mr. Dobey: As I understand it, Mr. Waller, you say our agreement with respect to answers filed by the distributors was an agreement to accept those answers as correct, sub-

ject to any corrections you wished to make, is limited to dealings with the Crescent Amusement Company?

Mr. Waller: It is limited to such information as the Government got from the distributors under an understanding that if they got the information from the distributors that we wouldn't supply it, and, of course, we could only supply information as to our own dealings with these distributors and we could in no way supply information to the Government as to dealings with independent exhibitors.

Mr. Wright: You don't deny that you were furnished copies of the material?

Mr. Waller. We have stacks of it in our office that we have [fols. 1734-1735] never looked at because we don't know what it is about.

Mr. Dobey: May it please the Court, I now definitely withdraw my suggestion that the trial of this case would last about ten days or two weeks and I suggest it might last two months.

The Court: Well, I took that suggestion at the time it was made in due course.

Mr. Waller: Your Honor, this exhibit that I was asking for has been located. It is Government's Exhibit No. 166 and it is a letter of July 30, 1935 addressed to Mr. Connors by Mr. Willingham, in which Mr. Willingham makes this statement: "Mr. Mock secured a deal in this situation several weks ago, which the writer rejected, went back into the town and improved the deal," • • •.

Q. Is that the letter, Mr. Kirk, you had reference to?

A. It is.

[fol. 1736] Volume XIII

Thursday, July 24, 1941

Court convened at 9:30 a. m., when the following proceedings were had:

H. G. Ballance, called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. 197 Walton Street, Atlanta, Georgia.

Q. And your occupation?

A. I am southern district manager for Twentieth Century Fox Film Corporation.

Q. Your headquarters are where?

A. I am headquartering in Atlanta.

Q. How long have you held that position?

A. I beg your pardon.

Q. How long have you held that position?

A. Since December, 1932.

Q. I will hand you a letter dated March 24th, 1934 from you to Mr. T. W. Young at the Fox Company in Memphis and ask you if you wrote that letter on that date in the course of performing your duties as southern district manager?

A. Yes sir, I wrote that letter.

[fol. 1737] Q. The gentleman to whom that was addressed was then the manager of the Memphis Fox Exchange?

A. Yes sir.

The Court: Do you want to mark that?

Mr. Wright: That should have the next Government number.

The Clerk: That will be Government's Exhibit No. 204.

Mr. Wright:

Q. I will hand you a letter dated March 13, 1936 from you to Mr. W. J. Kupper, Twentieth Century Fox Film Corporation, New York City, and ask you if you wrote that letter on that date in the course of your duties as southern district manager?

A. It looks very much like—yes, I wrote that.

Q. What was Mr. Kupper's business at that time?

A. Mr. Kupper was what we call the western division sales manager for Twentieth Century Fox headquartering in New York City.

Mr. Wright: I will ask to have that marked the next Government's exhibit number and I will offer both of these.

(Paper marked Exhibit No. 205).

The Court: Do you wish to read the exhibit at this time?

[fol. 1738] Mr. Mitchell: You say they are offered?

Mr. Wright: Yes, I am offering them and I will read them.

Mr. Mitchell: I would like to see them.

Mr. Wright: Pardon me. I thought you had seen them.

Mr. Mitchell: No, I haven't. Does this touch Muscle Shoals?

Mr. Wright: I don't think so. It will show on its face.

Mr. Mitchell: If there are any that touch Muscle Shoals I want to see them.

Mr. Wright: The letter dated March 24, 1934 from Mr. Balance to T. W. Young, Branch Manager, at Memphis, reads as follows:

"Dear Mr. Young:

"I received your letter of March 21st and I don't believe I would sell the organization trouble by making a deal with Mr. Haynes for the towns of Dyersburg [fol. 1739] and Union City.

"We are getting support from Sudekum in all of his towns, and while the deal that we received from him was not altogether to our liking, it is one of the things we have to put up with when an exhibitor like Sudekum buys product on a wholesale basis. I can well understand that it doesn't set so well to have to play a picture like George White's Scandals at $35.00, but Sudekum's business amounts to six or seven hundred dollars a week to the Atlanta Exchange, and I do not want to jeopardize it by making any kind of a deal in these towns. * * *"

There is another paragraph I didn't read.

Now, this exhibit has been marked Government's Exhibit No. 205, dated March 13, 1936, and is from Mr. Ballance to Mr. Kupper at New York.

Mr. Waller: Now, if your Honor please, that letter was dated March 24, 1934. The complaint alleged that this conspiracy started in August, 1934 and among other objections to these letters—they are the same objections which we have been making all along to the other letters of this type, and we object to this one on the ground that it is before the date of the alleged conspiracy.

The Court: All right. Read the letter and let's see what it is.

[fol. 1740] Mr. Waller: That is the one just read that I am referring to.

The Court: You mean the one he just read?

Mr. Waller: Yes sir, March 24th, 1934.

The Court: I overrule the objection.

Mr. Wright: The one I am now putting in evidence or about to read is dated March 13, 1936.

"Dear Mr. Kupper:

"As you know we have had a great deal of difficulty with the Sudekum Circuit and the procedure in the past has been such that we almost had to take anything that Sudekum wanted to give us. I have been on the verge of splitting with him a time or two, but could not see that I was gaining anything, so always late in the season would take rather unsatisfactory deals.

"However, this year, after repeated efforts to get together with him on any kind of a deal that would show an improvement over anything we received in the past, I closed up and called it a day and attempted to salvage what money I could from a few opposition points, thinking that maybe with Fox out some opposition would open up. He has opposition in the towns of Gadsden and Maryville in the Atlanta territory and in [fol. 1741] the Memphis territory, he has opposition in Paris, Tennessee. In the Indiana territory, they sell a little bit of a town outside of Madisonville, called Earlington——"

Q. Now, Mr. Ballance, there is a pencil notation on here, pointed to by an arrow, which rings the word "Earlington" and says "clause gives exhib. priv. to cancel if we sell Madisonville". Is that in your handwriting or was that put on by someone else?

A. No, that is not my writing.

Q. Do you know whose it is?

A. I don't know. I imagine it would be in the contract department of the home office. I don't really know but it is not mine, I know definitely.

Q. It wasn't put on at the time you wrote it but it was put on in the home office?

A. I don't know; I just couldn't say because it wouldn't be my writing.

(Reading continued):

"——which George Landis advised me he received a very satisfactory contract from the K-3 product. In Decatur he has opposition in a town called Hartselle, which we have sold, but this is all we could salvage:

I imagine the whole thing amounted to about seven or eight thousand dollars."

[fol. 1742] Q. That refers, does it not, to the 1935-1936 product?

A. Well, I would have to figure it out which group that we sold on, whether the fiscal year as we call is, K-3, K-4, K-5—that is the year's product. I would imagine—well, we are now selling the K— we just finished selling the K-8 so that is five years ago. It would be K-3——

Q. 1935-1936?

A. Yes, that would be.

(Continuing reading):

"Since I have sold away from Tony, he has evidenced some desire to get together with us in the future and while it is too late to sell him in some of his spots this year, we have worked out a deal that I think is excellent. I am sending you a recap of the money that we have received, which includes all of the towns in his circuit, for which he buys direct, (he still owns half interest in the Hill Circuit, but this is a separate Corporation). This shows the gross total of $24,745.50.

"Briefly, the deal is this:—he is to give us $20,000.00 for half of the K-3 product, but deducting from this, the money that he would normally allocate against the towns where we have already sold. In other words, we only sell him half of the K-3 product, but in view of the fact that we receive more from these towns than we have received from Tony, the deal will probably run up to considerably more than $20,000.00 for the K-3 [fol. 1743] product.

"The deal for these towns is to be in accordance with the proposed franchise that I am attaching. This is an accumulative 5% increase on K-4, K-5 and K-6 and will have either a weekly, monthly or quarterly payment plan, so that we received $769.00 a week for the next three years. As a matter of fact, this is a greater increase for him to pay, but he does not like the fact that I am selling what little opposition he has.

"Sudekum plays no pictures on percentage. We have never been able to get a percentage and neither does Paramount nor Metro and it is just one thing that he will not go for. As a matter of fact, he has no op-

position and is not the best operator in the world and with the big lift that we are receiving from anything we have secured in the past, I think this is an excellent deal and takes care of one of the most troublesome spots that I have almost ever experienced.

"Looking at the past records of what we have received for Fox, I believe you will agree with me that this increase from $24,745.50 to $40,000.00 with a gradual increase each year is pretty good.

"The deal has been agreed upon in principle, but he wants to allocate the money a little differently than he has in the past, but the total will start at $40,000.00 [fol. 1744] and end at $44,000.00

"I would appreciate your giving me your thoughts in the matter, or anything else you might want to add to this, but I would like to get it operating as quickly as possible. These are all very small towns, no opposition and some of them are pretty bad looking propositions insofar as gross returns are concerned, although a few of them are pretty good. I do not think I could ever do any better and I am quite sure that I could not go up there 'cold' and sell him next year's product at $40,000.00.

"I will be in Dallas for several days next week and would like to hear from you as soon as possible.

"Kindest regards.

Yours very truly, H. G. Ballance."

[fol. 1745] Cross-examination.

By Mr. Waller, for Defendants Crescent Amusement Co. etc.:

Q. Mr. Balance, in selling of pictures to a circuit, is it and have you found it an advantage to the distributor in making a deal to sell the entire circuit together from one exchange, especially where the particular exhibitor has some towns in which he has opposition and wants pictures badly in those towns?

A. Will you repeat the question, please?

Q. I have here a letter which was furnished us by the Government, purporting to be a photostat of a letter they took from your file, dated July 6, 1934, which you wrote to a Mr. Sussman in New York, regarding three towns in Kentucky—Bowling Green, Hopkinsville and Madisonville,

and you say this "He wants to buy immediately for Bowling Green, Hopkinsville and Madisonville and leave the rest of the circuit out until December; that will leave the product immediately in these situations—as these three opposition towns are the only places where we can get a little leverage." Does that refresh your memory about that situation?

A. My memory is that he needed product in those three towns a little more than he needed it in the others, and I wanted to leave what leverage I could from a sales [fol. 1746] angle, to try to get the other towns in line.

Q. In other words, you found it an advantage in a case like that to make a circuit deal, I mean, an advantage to the distributor?

A. Most assuredly.

Q. You get a better price for your product by making a circuit deal?

A. That was the ultimate goal.

Q. You were asked by the Government about a letter that you wrote to Mr. Kupper on March 13, 1936, in which you made the statement that since you had sold away from Tony he evidenced some desire to get together in the future, and that you had made a deal with him for the next year. Now, do you mean by that that when you were not able to make a deal with Mr. Sudekum that you regarded as satisfactory that you proceeded to sell away from him, and by that you forced him to make a deal next year on terms satisfactory to you?

A. Where it was possible to sell—I think it was in the K-3's—we started to sell around him.

Q. I have here another letter, which is a photostat——

A. Pardon me. I have been in an airplane three or four days and on the train—I came from California—and my ears are ringing and it is difficult for me to hear anything. [fol. 1747] Q. Mr. Balance, I have here a photostat of another letter, which the Government apparently took from the files of your corporation, dated a short while before the letter which the Government introduced; this letter which I have in my hand is dated February 14, 1936; the letter the Government introduced is dated in March, 1936—Now, in your letter of February 14, 1936, to Mr. Kupper, you make this statement, among others "Frankly, it doesn't make much difference to me whether they take K-4 or K-5

deals or not." And then again: "I don't think we will lose a quarter by not selling the Sudekum circuit and ultimately we will probably be ahead, because up in Tennessee business is pretty good at present, and there is talk of opposition in most of Sudekum's towns if we can give them product." Was it your policy to refuse to make a circuit deal, as referred to in your letter, which was unsatisfactory?

A. It was not so much our policy as it was our desire to make satisfactory deals.

Q. And through that policy you were able to make a satisfactory deal as stated in your letter in March?

A. Yes.

Q. Mr. Ballance, have you in the past made deals on behalf of Fox Film Corporation with the Crescent Amuse-
[fol. 1748] ment Company and with other defendant distributor corporations?

A. The last deal I did not make; I was in the hospital; that was the last franchise, and it was negotiated principally with Mr. Wilson, our local Branch Manager; and previous to that time I had negotiated all deals with Mr. Sudekum.

[fol. 1749] Q. Now did you also engage in or negotiate deals with the Muscle Shoals theaters?

A. Separate deals, yes, sir.

Q. And with the Haynes Circuit? Known as Strand Enterprises?

A. The Haynes circuit, with headquarters in Memphis, and Mr. Young our manager over there made deals with the Haynes Circuit, with the exception I think it was a group picture we called K-7, a group picture, we couldn't get together with Mr. Haynes so we didn't sell him at all.

Q. What about the Cumberland Amusement Company, sometimes referred to as the Hill Circuit, did you make deals with them?

A. I didn't make deals with the Cumberland Circuit, we had a partial deal one year while we were with the Sudekum Circuit and Rosenbaum Circuit—I do not know the corporate names of the circuits, we were out of the Hill Circuit for part of a year, but we were still dealing with the Sudekum and Rosenbaum, circuits.

Q. Did you make these deals as part of one deal, or were they negotiated separately?

Mr. Wright: I object to that, that is a pure conclusion, let him say what the negotiations were, and then we can decide.

[fol. 1750] The Court: Let him state the facts and tell about the deal let him state the facts about making the deal.

Mr. Waller:

Q. State how that was done?

A. The Hill circuit was always made separately.

Mr. Wright: Same objection, state what he did.

The Court: Separately from what?

A. I mean separately from the Sudekum circuit. The Rosenbaum circuit was always made separately.

Mr. Waller:

Q. You mean the deal with the Rosenbaum circuit?

A. The deal with the Rosenbaum circuit, yes, sir, other than one time, the last deal, I do not know how that last deal was made, but the Haynes circuit was always made separately, and I always for years with the Rosenbaum circuit always had separate negotiations with him, even in the years I was with Paramount, fifteen years ago, they were always made separately.

The Court: What do you mean by separately?

A. Without any reference to any deal we would make [fol. 1751] with Sudekum. Mr. Haynes operated a circuit and Mr. Ruffin a circuit; those are all in our distribution system, they operate under different heads, we held our managers responsible for those deals on those circuits, and sometimes they cleared through my office.

Mr. Waller:

Q. Has your corporation from time to times made deals for certain seasons' product with one or more of those circuits, and not with others?

A. Parts of a circuit, yes, lots of times, we had charge of the Haynes circuit part of the time, year before last, and we could not make a satisfactory deal, but we made a deal with him.

Q. Have you sometimes had a deal with some of them?

A. I think that has happened with the different units of the Crescent Amusement Company, other than the Rosen-

baum circuit, even at times when I couldn't use their other pictures, we generally always sold the Sudekum circuit, but the Rosenbaum was operated separately. I was with Paramount sixteen years, when Paramount was having some discussion with Sudekum or Rosenbaum circuit was always playing pictures to the best of my recollection, I am speaking for no other company.

The Court: When you made a deal with the Hill Circuit, agreeing upon the terms, conditions and privileges condi-
[fol. 1752] tions and so on, under the contract, did you take into consideration that that was a part of the Crescent circuit, or affiliated with the Crescent circuit?

A. Never during the time I was with them, I think we had some difficulty with Hill circuit, and we asked Mr. Sudekum to help us, and he said, let them fight their own battles, whatever they were.

Mr. Waller:

Q. With refer ce to the importance of the Sudekum circuit and the Haynes Circuit and the Rosenbaum circuit, and all these other so-called affiliated circuits to the Fox Film Corporation, I mean those with which Mr. Sudekum is directly or indirectly connected, about what per cent of the revenue of the Atlanta exchange of the Fox Film Corporation do they account for?

A. A very small portion.

Mr. Wright: I think this is wholly immaterial, Your Honor. I do not see how this is material to the issues in this case, what percentage of revenue the Fox exchange comes from Mr. Sudekum's contracts; the question we are interested in here is how much of the revenue the exchange gets from the towns in which Mr. Sudekum operates.

[fol. 1753] Mr. Waller: Your Honor, on that point, as I understand the Government does claim these defendant exhibitors exercised coertion and compulsion on the distributors to force them to discriminate against individual theaters and to force them to do things and suppress the competition of these individual theatres, I think it is relevant to show whether or not these defendants are in position to do that from the standpoint of the importance of their business.

The Court: The thing that they wanted was the business in that particular district within the Crescent circuit, where it operates.

Mr. Waller: Any individual theatre, one like Mr. Mitchell up here at Russellville; he is the only theatre operater in Russellville, he can compel these distributors to do what he wants them to do in Russellville. It is only a matter of degree, there is no other theatre in Russellville. It is many individual situations, and we can't see that it makes any difference, doesn't make any difference as we see it.

[fol. 1754] Mr. Raftery: Your Honor please, we do not think it is that at all that is an issue in the lawsuit on the Government's part, they have shown a few isolated theatres in the Sudekum chains, as the one of the shotgun type that our friend testified about yesterday, the revenue you get out of any situation depends entirely on the volume of trade, the contract you have made, we can't see that any comparative figures in any town, town against town, because the pictures never played in that particular house. It is not an issue in this suit by any means.

The Court: I do not think it is determinative at all how much of that business of the Atlanta exchange is Fox, or what proportion is Crescent business, I do not t-ink it is material in any way.

Mr. Dobey: On behalf of Mr. Buchanan, I want to bring out that his house did not start out as a shot-gun house. It became that way when Crescent competition started.

The Court: Well reserve the argument to the end of the case.

[fol. 1755] Redirect examination.

By Mr. Wright:

Q. Now, Mr. Ballance, I believe you stated you did not negotiate yourself, the Cumberland Circuit deals at all? Is that right?

A. Yes.

Q. Then you don't know to what extent the affiliation with the Cumberland Circuit with Mr. Sudekum entered into these deals, do you?

The Court: When I asked that question about Mr. Hill, I didn't mean to single out the Hill Circuit, I meant that to apply to any exhibitor.

Mr. Wright: I anted to clear that up.

A. I wouldn't know. All the negotiations negotiated from my office, I mean, as a matter of fact, that if we were not sold in the Cumberland Circuit, I would look at it and tell Mr. Wilson, our salesman, to negotiate the deal, and I know it was negotiated up in that town, what was the name of it?

Q. You are not in position, yourself, to state the extent the Crescent affiliation entered into those negotiations that Mr. Wilson had with the Cumberland?

A. Well, I think I would be, because I am there a good deal of the time. I don't know what transpired when he was talking to the different accounts, but I know when one ac- [fol. 1756] count would be sold and one would be unsold we would immediately make every effort to sell the unsold one, when we were in any territory, or that territory wherever Mr. Hill lived.

Q. With reference to your efforts to sell Mr. Hill, would you ever have to discuss the matter with Mr. Sudekum?

A. Well, I don't know—I didn't quite get that.

The Court: In the course of your efforts to sell Mr. Hill, would you ever discuss the matter with Mr. Sudekum?

A. One time, when we hadn't sold Mr. Hill, I asked Mr. Sudekum if he could intercede and help us, and he said "No, you people argue out with Mr. Hill," because we had different kinds of deals with Mr. Hill than we had with Mr. Sudekum.

Q. That is the only time you ever discussed the Hill deals with Mr. Sudekum?

A. Yes.

Q. How about Mr. Stengel, did you ever talk to him about that?

A. I have never had very many associations with Mr. Stengel, personally.

Q. Do you recall any discussion with Mr. Stengel as to the Cumberland?

A. I think one discussion we had with Mr. Hill, was several years ago—I didn't have any discussion with Mr. Stengel.

Q. In other words, if the deals went along smoothly, you [fol. 1757] didn't discuss*ed* it with Mr. Sudekum, but if there was a hitch, then you discussed it with him?

A. We have generally had a franchise with Sudekum Circuit running over a period of years, and I am under the impression that the Hill circuit has had a franchise now, but it didn't for some time.

Q. You negotiated a franchise with the Hill Circuit for the current product that is now in effect, about the same time you negotiated a franchise with Crescent, Rockwood, Muscle Shoals and the rest of them, isn't that right?

A. I don't think the Hill Circuit was negotiated at that time.

Q. You didn't take that in then?

A. No, not the Hill circuit.

Q. In connection with those negotiations for the Rosenbaum Circuit, a letter that was read in evidence there referred to a $40,000.00 deal. That was a deal that included Crescent towns and the Rosenbaum and Muscle Shoals towns, was it not?

A. Yes.

Q. When you submitted the deal, you asked to have it made up in two franchises, did you not?

A. I am under the impression that we did, yes, except I think it was several franchises.

Q. I call your attention to a letter here from you to Mr. Cooper dated March 30, 1936, and ask you if you wrote that letter? I believe Mr. Wilson wrote that letter, and a copy went to you?

[fol. 1758] A. This is Mr. Wilson's letter, yes sir.

Q. You received a copy of it?

A. Yes. There is a breakdown of the total, I mean, there is a total, it is broken down. Yes, this is Mr. Wilson's letter.

Q. The $40,000.00 was broken down between Rosenbaum and Muscle Shoals towns?

A. The different situations, yes.

Q. And the Crescent towns?

A. Yes. That is the way we make our daily sheets when they are broken down.

Q. I call your attention to another letter from Mr. Wilson to Mr. Cooper dated July 25, 1939, of which a copy was apparently made for you, and ask you if that refreshes your recollection about the dealings with the Cumberland Company?

A. Yes, I remember a letter, that copy, I remember seeing a copy of that letter.

Q. I want to call your attention to a statement in here with reference to the Hill Circuit: "All buying is done by Cowan Oldham subject, of course, to Sudekum's approval."

"They could not negotiate a deal for service until we had closed the deal for the Sudekum circuit and we want to tie this circuit up on a three year deal because in the past it has been the habit when Mr. Hill was doing the buying, to [fol. 1759] leave a company out for a year or two."

That would indicate, would it not, that at least at the date that letter was written, July 25, 1939, and subsequently, the buying of Hill's Circuit was subject to Mr. Sudekum's approval?

A. Not necessarily. I don't think Mr. Wilson intended that letter to be read that way; that is, that he wanted to have the Sudekum circuit.

Q. I am sorry, I interrupted you. Would you repeat the answer?

Mr. Waller: The reason I interrupted, I think Mr. Wright said July 25, 1935, instead of 1939.

Mr. Wright: I said 1939.

Q. Well, anyway, since the date of this letter, which appears to be July 25, 1939, do you have any different impression than Mr. Wilson expressed here as to who had the final say on the Cumberland deal?

A. In my experience, I have never known any deal that was ever made with Hill to be upset by Mr. Sudekum; that has been my experience, and I think that the thought in Mr. Wilson's letter was, as long as we were having Mr. Sudekum's circuit under franchise, he wanted to get the Hill Circuit at the same time and have them all run concurrently and have them expire at the same time.

[fol. 1760] Q. You knew that during the entire time you were negotiating, or that Mr. Wilson was negotiating with Cumberland that Mr. Sudekum was President of that Company, you were aware of that?

A. Yes. I don't know whether he was President, I don't really know.

Q. There was no doubt in your mind but what Mr. Sudekum had power if he wanted to exercise it over the Cumberland Circuit?

A. It is a mystery to me now how some of those circuits operate. They seem to run along without any supervision

or anything else, by Mr. Sudekum of anyone else. Because, many times we have been out of those circuits. I remember I came back from a trip and was looking over the unsold possibilities and the Hill Circuit was not sold and——

Q. I know you have been in and out of them quite frequently, but so far as you were concerned, you never had any doubt, in so far as Mr. Sudekum's power to approve or disapprove was concerned, you never had any doubt in your mind at all, at any time they made a deal with the Cumberland Amusement Company, is that correct?

Mr. Waller: We object to that as argument.

A. I wouldn't know that at all, because I have never seen that power exercised.

(Further this deponent saith not.)

[fol. 1761] PAUL S. WILSON, called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address?
A. Paul S. Wilson, 20th Century Fox, Atlanta, Georgia.
Q. In what capacity are you employed by Fox?
A. As Branch Manager.
Q. How long have you held that position?
A. Since 1934.
Q. When in 1934?
A. March 30, 1934.
Q. I will hand you a letter dated August 6, 1934, from you to Mr. T. W. Young, Fox Film Corporation, Memphis, Tennessee, and ask you if you wrote that letter in the date in the performance of your duties as Branch Manager?
A. Yes, sir.
[fol. 1762] Q. Mr. Young was then branch manager at Memphis?
A. That is right.
Q. I hand you a letter dated October 10, 1934 from you to Mr. Young and ask you if you wrote that letter on that date in the course of performing your duties as branch manager?

A. That is right.

Q. And I will show you — letter dated April 30, 1936 from you to Mr. Jack Bloom of Twentieth Century Fox Film Corporation, New York and ask you if you wrote that letter on that date in the course of performing your duties as branch manager?

A. Yes sir.

Q. Who was Jack Bloom at that time?

A. He was our contract clerk in New York, head of our contract department.

Mr. Wright: The first letter, dated August 6, 1934, marked Government's Exhibit No. 206, from Mr. Wilson to Mr. Young, read as follows:

"Dear Tom:

"This will acknowledge your letter of August 4, regarding the possibility of making a deal with Sudekum for the K-2 product. It so happens that I talked with Tony Saturday afternoon over long distance, hoping to make an appointment with him for this week, but he advised me he was going out of town and would [fol. 1763] prefer to make it a little later on. I told him I would keep in touch with him and will try to get up there next week if possible.

"I do not see any reason why we should not be able to get together with him because he is very happy over the Fox product and would therefore appreciate your not doing anything with Haynes until we definitely have a 'yes' or 'no' from Tony."

The remaining two or three paragraphs I don't think I will read.

Mr. Waller: If your Honor please, in addition to our general objection, we further object to that letter because it was written before the alleged conspiracy.

The Court: About five days before?

Mr. Waller: Five days before.

The Court: Overruled.

Mr. Dobey: Your Honor, there is a Supreme Court ruling which supports your Honor's ruling on this point.

Mr. Wright: The next Government's Exhibit is No. 207, from Mr. Wilson to Mr. Young, dated October 10, 1934.

[fol. 1764] "Dear Tom:

"This will acknowledge your letter of October 8, and while I dislike very much having to ask you to bear with me on this Sudekum Circuit, when I was up there the last time there was some talk of Warners taking over the circuit and Tony, of course, would not negotiate for product until that matter was definitely settled. He said it should be definitely on or off this week and I am going to Nashville again next week.

"Naturally, I know it is not your desire to do anything in Union City with Mr. Haynes that would jeopardize six or seven hundred dollars per week for the company, so just bear with me as I am sure we will have a deal from the Crescent Amusement Company. He has not bought any new product whatsoever so you can just advise Mr. Haynes that we have a deal in the making, which we expect to close next week. I will keep you advised.

"Best wishes.

Yours very truly."

Mr. Waller: If your Honor please, I would like to call your Honor's attention to this in connection with the letters of that type. Obviously they are not relevant or material on any alleged conspiracy between Fox and the defendant exhibitors. Obviously they are being offered for the purpose of proving a conspiracy among the defend-[fol. 1765] ant exhibitors. They are undertaking to prove a conspiracy among the defendant exhibitors to which Fox was not even supposed to be a party, but letters written by representative of Fox——

Mr. Raftery: If he had sold out to Warners the consent decree would have taken care of this situation.

The Court: How is that?

Mr. Raftery: If he had sold out to Warners the consent decree would have taken care of this situation. I can't see any other materiality of that letter.

The Court: Well, I don't think the consent decree affects this lawsuit one way or the other. I have gone into that. As I see it, the only thing the consent decree did was just to suspend the prosecution of that suit in New York for a period of years.

Mr. Wright: The next letter is dated April 30th, 1936 and is Government's Exhibit No. 208. It is a letter from Mr. Balance to Mr. Jack Bloom in New York.

"DEAR JACK:

This will acknowledge your letter of April 23rd and [fol. 1766] I will ask that you please pardon my delay in answering. I have been out of the city and of course your letter was held for my return.

"I can easily imagine the difficulties you must have had in analyzing the *Sudekum* deal because I thought I would go crazy in trying to figure it out, because in starting with a lump sum of money and breaking it down into each allocation for each town probably left me a little dizzy. After that the negotiations on K-3 product were such that I twisted them around so that we received more money than we really should have.

"First of all, the total amount of revenue represented on the Sudekum K-3 deal covers a minimum commitment. It is my personal belief that we will receive more revenue from them than what the contracts represent because I feel that they will play more pictures in some of the situations than called for on the contract, however, in some of the smaller towns where they have only one theatre they may not play as many, which will necessitate certain adjustments in lieu of their playing over their commitment in other situations. Nevertheless, in the end I feel our net amount of revenue will be more than $11,256.00."

The rest of this simply recites the details of the negotiations. I propose to offer it simply to show the way the [fol. 1767] deal was made with a lump sum for all of these companies and then broken down by individual situations.

Mr. Waller: Now, is that on the Fox conspiracy or on the blanket conspiracy? That is, the one against the defendant exhibitors?

Mr. Wright: It is offered against all the defendant exhibitors.

Mr. Waller: But not against Fox?

Mr. Wright: Fox doesn't happen to be a defendant.

Mr. Waller: I mean on the Fox conspiracy.

Mr. Wright: Yes, all the defendant exhibitors in their conspiracy with Fox.

Mr. Waller: It is absolutely irrelevant on its face in regard to any conspiracy between Fox and the defendant exhibitors.

Mr. Wright: Well, I will read the next significant paragraph:

> "To start with the K-4 deal represented for the Crescent Amusement Co., the Rockwood Amusement [fol. 1768] Co. and the Muscle Shoals Theatres totaled $40,000.00. From that $40,000.00 I deducted $5,000.00 for the Muscle Shoals Theatres, $4,608.00 what we sold the K-3 product for in Gadsden to the opposition, $2,605.00 what we sold the K-3 product for to the opposition in Maryville, $1,984.00 what we sold the product for in Paris, $2,442.00 what we sold the product for in Madisonville, which is the K-4 allocation on this account, $2,432.00 what we sold the product for in Decatur, which totals $18,971.00. Deducting this from the $40,000.00 leaves $21,029.00, half of which is $10,514.50. I secured $11,256.00."

Mr. Mitchell: I didn't understand the correspondence related to Muscle Shoals Theatres but the name is called here and I object so far as Muscle Shoals is concerned; I object to the introduction of this letter.

The Court: That is just a statement of what happened.

Mr. Wright: That is the way the bill was figured, which included Muscle Shoals.

Mr. Mitchell: It is being introduced against Muscle Shoals, according to that information, and we object to [fol. 1769] the evidence as not competent against Muscle Shoals.

Mr. Waller: It shows how Fox allocated the money. I don't see how that is competent against anybody. It might be binding against Fox if they were in the case but they are not.

The Court: Well, they were named as co-conspirators.

Mr. Waller: But he is introducing this on the blanket conspiracy.

The Court: I don't understand it that way. I understood he was introducing it as evidence against the exhibitor defendants and the co-conspirator distributors.

Mr. Waller: Well, that would be Fox in this case.

The Court: It would be one of them.

Mr. Waller: Now, that is not possibly relevant on any issue of a conspiracy between Fox and the defendant exhibitors, how Fox allocated the money. I think what he is trying to show is that the defendant exhibitors made a deal together. In other words, he is trying to show that the [fol. 1770] defendant exhibitors conspired among themselves and made a joint deal.

The Court: He is trying, as I understand it, to show that the defendant exhibitors not only conspired among themselves but conspired with each individual distributor.

Mr. Waller: Well now, my point is, he can't prove under any circumstances, under any theory he can't prove that the defendant exhibitors conspired among themselves by introducing a letter written by a representative of Fox to another representative of Fox.

The Court: It was all part of the same conspiracy.

Mr. Waller: No. That is a separate conspiracy. The Government says there are nine conspiracies. They have got to prove them separately. They can't mix them up.

The Court: Well, it is a separate conspiracy insofar as the exhibitors are concerned.

Mr. Waller: Well, I know but a separate conspiracy in which the defendant exhibitors are concerned is one among themselves and no distributor is a conspirator in that conspiracy. That is the Government's own statement.

[fol. 1771] The Court: Well, there seems to be more in this case than just a conspiracy.

Mr. Wright: There certainly is, your Honor.

Mr. Mitchell: May it please the Court, may I state my attitude, the nature of my objection or the real import of my objection? It is like this. If I understand it, and I haven't completely read the letter—Paul Wilson, the witness now on the stand wrote this letter in 1936 relating to a transaction by which Fox had contracted with a number of exhibitors. A recitation by Mr. Wilson of the details of that transaction or a portion of that transaction might be relevant evidence but a letter that he wrote at that time could not any *any* way that I can see. If the original letter were here and this were not a photostat I don't see how a man employed by Fox could write a letter which would be evidence against Muscle Shoals Theatres. The witness is on the stand and he can tell the facts.

[fol. 1772] The Court: Well, the letter reflects upon the general situation. It might probably be a development of the combination.

Mr. Wright: If the Court please, certainly this letter, this memorandum of the transaction, made at the time, is better evidence than any oral statements elicited four years later as to what happened.

The Court: I am inclined to agree with you. I overrule the objection. Go ahead.

Mr. Wright: Then the statement is made with reference to the Decatur deal (reading):

> "The Decatur deal was more or less a gesture on my part to Sudekum as he called me on the 'phone while I was negotiating this deal with Mr. Rosenbaum of the Muscle Shoals Theatres and asked if I could do anything for him in Decatur. I thought it was to the best interest of the company to do so. To further substantiate Mr. Ballance's original statement, I would like to point out to you just what has happened since [fol. 1773] this franchise was negotiated. First, he has taken over the opposition house in Gadsden, Ala., the landlord having forced the opposition to vacate the property, so Gadsden is now without opposition. He has bought out the opposition in Paris, Tenn. and is negotiating to take over Maryville, so in reality it leaves as of today opposition in Maryville, this nearby town of Hartselle against Decatur and a little town outside of Madisonville, Ky. named Earlington:"

I don't think the last paragraph is material.

The Court: Well, I am admitting that, not for the purpose of establishing the facts that are stated in that last paragraph that you read but for the purpose of showing the attitude of the writer of that letter at that time and as bearing upon his mental conception of the situation.

Mr. Wright: That is correct, your Honor, and so far as those facts are concerned, we will of course establish those by independent evidence. It merely shows what the effect of those facts was upon the negotiations.

[fol. 1774] The Court: What is the number of that Exhibit?

The Clerk: No. 208.

The Court: The Clerk says he understood you to state that that was a copy of a letter to Mr. Ballance. It is a copy of a letter in response to Mr. Bloom?

Mr. Wright: Yes, sir; all of these letters that we offer by this witness, as we understand, were written by him. Then I would like to offer at this time the three year franchise that is referred to in the correspondence which covers the Crescent Amusement Company and Rockwood Amusement Company, which is dated April 2, 1936, a three-year frachise for 1936-1937, 1937-1938 and 1938-1939 seasons. I believe the Muscle Shoals franchise covering the same seasons, dated April 3, 1936, has already been offered in evidence. I will ask to have this one marked with the next F exhibit.

The Clerk: It will be F-10.

[fol. 1775] Mr. Wright: I suggest, then, your Honor, that the cross-examination proceed while we get the franchises together.

The Court: All right; you may proceed.

Cross-examination.

By Mr. Mitchell, for Muscle Shoals, etc.:

Q. Mr. Wilson, the letter that has just been discussed here by Mr. Wright, dated April 30, 1936, written by you to Mr. Jack Bloom, refers to deals of Crescent Amusement Company and Rockwood and Muscle Shoals, with a total of forty thousand dollars; the Muscle Shoals contract was negotiated, the negotiations were completed on it before you had any negotiations with the Crescent Amusement Company or Rockwood, is that true?

Q. Which franchise was that, Mr. Mitchell?

Q. April, 1936.

Mr. Wright: Excuse me just a moment: I will have the other one here in just a moment.

Mr. Mitchell:

Q. The franchise is dated April 3, 1936.

Mr. Wright: I will ask to have that marked Exhibit F-11.

[fol. 1776] (So marked by the Clerk.)

Mr. Mitchell:

Q. I am asking you whether, as a matter of personal recollection, it is not plain in your mind that your nego-

tiations with Rosenbaum for the Muscle Shoals franchise did not take place first, and whether those negotiations, as a matter of negotiations—I don't mean the signing of the contract—were not completed before you took up negotiations?

A. No, sir, they were not.

Q. Not completed?

A. No, sir.

Q. But did you not have your first negotiations with the Muscle Shoals Theaters?

A. No, sir; you see, the year before this franchise was made we did not sell the Sudekum circuit, and sold the opposition houses in the towns where there was opposition, and it had gotten to a point where it did not look like we would ever make a deal with the Sudekum circuit; but Mr. Rosenbaum came into Atlanta to arrange a deal for his town, and we persuaded him to act to see if he couldn't bring the Sudekum circuit and negotiate a deal with us for the entire situation.

Q. You asked him to help you to get Sudekum lined up?

[fol. 1777] A. Yes, sir.

Q. In the previous year, previous to this franchise, it is true, is it not, that Muscle Shoals Theaters had bought your product?

A. Yes, sir.

Q. But the Crescent hadn't bought your product?

A. That is right.

Q. And Rockwood hadn't bought your product?

A. That is right.

Q. As a matter of fact, is it not true, Mr. Wilson, that Rosenbaum continuously negotiated his own contracts with your concern?

A. You mean in the years back?

Q. Yes, and the years since; Sudekum hadn't negotiated his contracts, has he?

A. No, sir.

Q. And Rosenbaum has carried on negotiations with your company continually?

A. Yes, sir.

Q. And you have negotiated on the local proposition of sales to theaters——

Mr. Wright: I object to that.

[fol. 1778] The Court: Sustained.

Mr. Mitchell: I am cross-examining his witness.

Mr. Wright: Not on that subject.

The Court: You can make him your witness, if you want to, but you can't lead him unless you do.

Mr. Mitchell: All right; that is all I want to ask him.

Cross-examination.

By Mr. Waller, for Crescent, etc.:

Q. Mr. Wilson, you became branch manager in Atlanta in what year?

A. 1934.

Q. So when you wrote those letters in 1934 that the Government has read you were pretty green in that particular position?

A. In so far as the Atlanta territory as it existed at that time, yes, sir.

Q. When you wrote this letter of April 30, 1936 to Mr. Bloom, you had been there about two years?

A. That is right.

Q. I notice in that letter that you refer to Hartselle, [fol. 1779] Alabama and to Decatur, Alabama. How far apart are those towns?

A. Approximately eight miles, as I recall it.

Q. And what is their comparative size?

A. Hartselle is about one-tenth the size of Decatur.

Q. Now, you also refer to Earlington, Kentucky, and Madisonville, Kentucky; do you know how far apart those are?

A. No, sir, I do not; those are handled out of our Indianapolis Exchange.

Q. You don't know the size of the towns?

A. No, sir.

Q. Well, what you referred to in this letter was simply that you had an account in those two small towns, Earlington and Hartselle, and didn't have accounts in the larger towns, and that you later made sales to the people who had theaters in the larger towns?

Mr. Wright: I will object to that, your Honor; it is pure argument.

Mr. Waller: The letter has been introduced, your Honor.

The Court: Overruled.

[fol. 1780] Mr. Wright: It is plain in the letter, what he is referring to.

Mr. Waller:

Q. Is that correct? In other words, you didn't take the product away from the theater owners of these two small towns, did you?

A. No, sir.

Q. You just sold the product to the larger towns?

A. Yes, that is right; and, as I remember, we also sold the smaller towns right along.

Q. But the small towns played behind the larger towns, after you sold the larger towns?

A. That is right.

Q. Well, there is nothing unusual in that, is there?

A. No, sir.

Q. Did your company sell Parrott & Hendren in Greeneville, Tennessee, and were they a customer of the Fox Corporation at the time the Crescent Amusement Company started a theater in the town?

A. Yes, sir.

Q. What did the Fox Film Corporation do about that situation?

A. We continued to sell Parrott & Hendren as long as they operated a theater there.

[fol. 1781] Q. At the same time you were selling other Sudekum towns?

A. Yes, sir.

Q. Were you selling to Mr. Roth in Gallatin, Tennessee, after the Crescent Amusement Company started a theater in that town?

A. That is right, and we are still selling them.

Q. Although you are selling Mr. Roth, are you selling other towns that Mr. Sudekum is interested in?

A. Yes, sir.

Q. Did Mr. Sudekum ask you for a second run at Gallatin?

A. As I remember it, shortly after he opened the house he did and I refused.

Q. You refused to sell Mr. Sudekum even a second run in Gallatin?

A. Yes, sir.

Q. Although you were selling him in other towns?

A. First run in other towns, yes, sir.

Q. Now, as to Hopkinsville, Kentucky; do you remember when Andy Anderson opened a theater up there?

A. No, sir; that is out of my district.

Q. Out of your district. You are not familiar with Brownsville, Tennessee, either, I guess?

A. No, sir.

Q. Is Rogersville, Tennessee, in your district?

[fol. 1782] A. Yes, sir.

Q. Now, do you know Mr. Miller that used to have a theater up there?

A. Yes, sir.

Q. Was he a regular Fox customer or not?

A. Now, at what time?

Q. Well, back there; well, you first started, we will say, 1934; was he a Fox customer at that time?

A. No, sir, and for three or four years after that he was not a Fox customer.

[fol. 1783] Q. Well, you did make a deal, didn't you?

A. You mean before the other house was built?

Q. Well how was it, what are the facts?

A. I do not recall exactly the year, but we did not sell one year to Mr. Miller before the opposition opened in the town, and the following year we sold to the opposition.

Q. Who was the opposition?

A. The theater it was Cumberland Amusement Company.

Q. That is what is known as the Hill Circuit?

A. Yes, sir.

Q. When did you sell to Mr. Miller, or did you sell to Mr. Miller one year when the Cumberland Amusement Company had the theatre?

A. Yes, sir, I sold Cumberland Amusement Company as I recall it, only one year and then sold Mr. Miller from then on until he sold his house.

Q. So it was only one year you failed to sell Mr. Miller?

A. That is true.

Q. Now during the first year that you did sell Mr. Miller, was he a satisfied customer or what were your dealings?

A. He was rather hard to get along with.

Q. Did he complain about the pictures, and the bookings?

A. He complained about the pictures, he complained [fol. 1784] about the bookings, and everything.

The Court: Where was that?

A. Rogersville, Tennessee.

The Court: He was a mountaineer.

Mr. Waller:

Q. For the last two years before he sold out he was playing Fox product?

A. Yes, sir.

Q. Is Mt. Pleasant, Tennessee, in your territory?

A. Yes, sir.

Q. Do you remember an occasion when Mr. Page came down to Atlanta to see you about selling him?

A. Yes, sir.

Q. Had you been selling Mr. Page at Mt. Pleasant?

A. No, sir.

Q. Did he come down there and want to buy some pictures?

A. He did, yes, sir.

Q. How long had it been since he had bought any pictures from you?

A. As I recall it was from 1933, we had a little difficulty back in 1933, we had a Will Rogers picture booked on some holiday, he had sent a check and there was some question [fol. 1785] about the check and it was returned to him, in payment for the film and he said he would send another check in a short time, and asked for shipping, and that came in, I didn't want to send it, and he didn't send the check in as agreed, and we shipped that film C. O. D., and he did not take that film out of the express office.

Q. At the time he came down to Atlanta, that was several years after that?

A. I think it was a year or two before he came to Atlanta.

Q. You mean before this check transaction?

A. Yes.

Q. You do not know about it of your own personal knowledge?

A. No, sir.

Q. You were there as branch manager in Atlanta, when the question came up about getting Fox Product?

A. I was Branch Manager.

Q. Had you made a contract or deal with somebody else?

A. I had entered into a negotiation with Rockwood. I was advised that they had an option on two pieces of property and had just about closed one of those options, was just about to close one of those options on the property to build a theatre, and I made a deal with them for our product in Mt. Pleasant.

Q. At that time you did not and had not been selling Mr. Page for sometime?

[fol. 1786] A. No, sir, not since 1933.

Q. When he came down and wanted the product, what did you say?

A. I told him I couldn't make any deal, that Sudekum or Rockwood, or some one *one* were building a theatre in the town.

Q. Did you go into the situation, tell what the result was?

A. When I made the deal with Rockwood, there was a clause inserted in that contract as I recall it to the effect that if that theatre was not in operation by a given date, the contract would be cancelled.

Q. Well, I want to know did you sell the contract to Page that he wanted?

A. After that, yes, sir.

Q. Is Gadsden, Alabama, in your territory?

A. Yes, sir.

Q. Are you familair with that new picture theatre that was built over in Gadsden?

A. East Gadsden, yes, sir.

Q. What they call the Ritz theater in Alabama City?

A. Yes, sir.

Q. And there are some downtown theatres?

A. Yes, sir.

Q. Did you think about the Dixie Theatre, did you have that theatre, operated by the Crescent Amusement Company?

[fol. 1787] A. Right, I have been for many years.

Q. For many years?

A. Right.

Q. Why is it you didn't play the Alabama City theatre and the Dixie theatre day and date, why didn't you make pictures available at both theatres?

A. Crescent Amusement Company is our regular established account in that area, we have always sold Gadsden that way, always sold Alabama City, excepting one year when it was closed.

Q. Is Gadsden big enough to zone?

A. I would say no, sir, because the downtown area is more or less spread out. I never heard of zoning going into effect in towns that small.

Q. What would be the effect of attempting to play or sell pictures in the two theatres at the same time, would that be a good policy?

A. I do not know, it is a guess anyway you answer it.

Q. The Crescent had been your old, established account?

A. Yes, sir.

Q. Oldest theatres there?

A. Yes, sir.

Q. And about the Dixie?

A. Yes, sir, and besides the Dixie was the last theatre to come into the town.

[folo. 1788] Re-direct examination.

By Mr. Wright:

Q. Can you explain to the Court, Mr. Wilson, what zoning is, Gadsden being the type of town it is, what do you understanding by zoning?

A. Zoning is normally applied to larger towns, where the area is drawn around with different circles and those different circles are called Zones.

Q. That is for the purpose of a first run, or change zone?

A. That is true. The first run and the second run in that zone.

Q. And Gadsden was not big enough for doing that?

A. I wouldn't say it would be, I do not think any town of the size that is has been zoned.

A. Didn't you undertake to sell and sell for a number of years the Ritz theater in Alabama City, first run in Alabama City?

A. That is true.

Q. And in doing that you set up the Alabama City section of Gadsden as first run zone, did you not?

A. Not necessarily, as I recall it. It was only recently that Alabama City became a part of Gadsden. It was previously a separate municipality.

Q. You do not know when it did come in, do you?

A. No, sir, I don't.

[fol. 1789] Q. But in any event, you sold it the same way in or out of the city limits of Gadsden?

A. That is true.

Q. So that you want to correct your previous testimony that you did not think the city of Gadsden is big enough to zone?

A. No, sir, I still believe that.

Q. But you think you have made a mistake in selling the Ritz at Alabama City first run Alabama City, since Alabama City was incorporated into Gadsden, is that correct?

A. No, sir, because Alabama City and the Ritz theatre were always identified in all our negotiations in years gone by as a separate municipality.

Q. Yes, I understand that, but we are talking now about the municipality of Gadsden; your testimony is then that the city of Gadsden with Alabama City included, is big enough to zone?

A. No, sir.

Q. But without Alabama City it is big enough?

A. No, sir, with Alabama City and with East Gadsden and Attalla, wouldn't be big enough to zone. Your zoning usually belongs to your key towns, and give them second, third or fourth or fifth area.

Q. There is no reason in the size of the city of Gadsden which would prevent you from zoning east Gadsden, in pre-
[fol. 1790] cisely the same way you have done Alabama City, for the purpose of fixing runs?

A. I did not quite follow the question.

Q. You are familiar with the size and population of the entire city of Gadsden and its various sections, such as East Gadsden and Alabama City?

A. Yes, sir.

Q. There isn't anything in the size, geographically or population, or set up, of those areas which would prevent you from making the same kind of a zoning arrangement with respect to East Gadsden that you have made with respect to Alabama City, is that right?

Mr. Raftery: Your Honor please, we are just encumbering the record. On the Government's case the witness fully testified that they are not interested in playing pictures day on day with Alabama City, he said he wanted to play after, or before.

. . . . . .

[fol. 1791] The Court: Objection to all this testimony about zoning Gadsden is sustained.

Mr. Wright: That is including the testimony brought on by Mr. Waller's examination on direct.

[fol. 1792] The Court: Yes, sir.

Mr. Wright:

Q. When was this conversation you say you had with Mr. Page from Mt. Pleasant?

A. It was in 1938 I believe.

Q. When in 1938.

A. Now I will have to refer to the records to give you that.

Q. You do not know what part of the year it was?

A. No, sir.

Q. When was it you made this deal with the Rockwood Company to let them have your product in Mt. Pleasant?

A. It was some time prior to the time I talked with Mr. Page, but just what the date is I don't know.

Q. It was for a theatre that Rockwood was thinking about erecting?

A. Yes, sir.

Q. When they did not build the theatre of course you couldn't make the deal, that is right?

A. Correct.

Q. And when you found that out, you offered the pictures to Mr. Page.

A. Mr. Page wanted them.

Q. I say, but you did not offer them to him until after [fol. 1793] the Rockwood decided not to build the theatre?

A. I offered them to him for four years previous to that.

Q. I am talking about with reference to the time he wanted them?

A. That is right.

Q. Have you got a copy of the agreement you made with the Rockwood Company?

A. I believe it is in the file now I do not know I am sure it was in the files I sent to the home office, I do not know.

Q. Will you see if you can get it for us?

A. I will be very glad to.

Q. Do you recall, I believe you testified you had sold Mr. Miller in Rogersville and when Cumberland came in and opened up an opposition house, you sold the Cumberland the next season?

A. That is right.

Q. And then you sold the account to Mr. Miller?

A. That is right.

Q. And the reason you sold back was because you were unable to make a deal with Cumberland Amusement Company.

[fol. 1794] A. That is right.

Q. You did not offer the pictures to Mr. Miller until after you found you had not been able to sell them to Cumberland?

A. That is Cumberland for the whole circuit, that is right.

[fol. 1795] Q. I believe you said you sold, you served Roth with pictures at Gallatin, even after Sudekum came into Gallatin, is that right?

A. Yes.

Q. The reason you kept on serving him was because he had a deal in existence at that time, isn't that right?

A. No sir, we continued to sell Mr. Roth every year.

Q. I know, but the time Sudekum came into Gallatin, you then had a contract with Mr. Roth under which he was entitled to your pictures, first run, at Gallatin; that is a fact?

A. I imagine so, because we have sold him every year.

Q. He had a three-year deal that expired with the 1938-1939 season?

Mr. Raftery: We object to that unless Mr. Wright calls it a franchise, not a deal.

Mr. Wright: I will be glad to call it a franchise.

A. We did have a franchise; now, exactly when it expired, I don't recall.

The Court: Did you re-sell him after the franchise expired?

A. Yes sir.

Mr. Wright:

Q. That was for the 1939-1940 season?

A. Yes. Also for the 1940-1941 season.

[fol 1796] Q. At the time the franchise expired was about the time this suit was filed?

A. I don't remember. I know one time I made a deal, with Mr. Sudekum, it was brought to his attention by Mr. Stengel that Gallatin was not included in that deal and Mr. Sudekum's remarks were "That is all right, Paul has a regular account there and that has been their established policy."

Q. When was it Mr. Sudekum asked you for a second run at Gallatin?

A. As I recall it, it was about two or three months after he opened the theatre at Gallatin.

Q. Do you know how big Gallatin is?

A. As I recall it, it is around 3200.

Q. Do you sell second runs anywhere in towns of that size?

A. Not to my knowledge.

Q. Parrott & Hendren, at Greenville, Tennessee, that was one of the places that you sold independents while you were or just before you made the three-year franchise with Mr. Sudekum, isn't it?

A. I don't recall the date, but we sold them every year that they were there.

Q. Well, they weren't there for the season that you made, the first season of the three-year franchise, that is right, isn't it?

[fol. 1797] A. Without checking the dates of the two contracts, I couldn't say.

Q. You made the franchise in April, 1936?

A. When did Parrott & Hendren sell out?

Q. June, 1936, I believe.

A. Well, we had a deal—

Q. That deal you had was for the 1935-1936 season, which was made prior to the deal that you made for the franchise with Mr. Sudekum; that is right?

A. That is right.

The Court: We will have a short recess.

(Recess).

Mr. Wright: I am through with the witness.

Cross-examination.

By Mr. Waller:

Q. Mr. Wilson, you were asked about the size of Gallatin, you were merely giving your best guess of the size, I take it?

A. That is right.

Q. It might be considerably larger than the figures you mentioned?

A. That is right, or it might be smaller.

(Further this deponent saith not.)

[fol. 1798] the Twentieth Century Fox Film Corporation.

Mr. Waller: Your Honor can see by looking at them, one was not sent and the other one was copied from the first one with the exception that was stricken out that part that was stricken out, had to do with a little theatre.

Mr. Wright: Whatever they show, they show.

The Court: Well, Mr. Henry has already testified about them.

Mr. Waller: I would like to recall Mr. Wilson for one question on cross-examination.

PAUL S. WILSON, recalled for further cross-examination, testified as follows.

By Mr. Waller:

Q. Mr. Wilson, I hand you a photostat of a letter dated October 18, 1937, or rather a photostat that appears to be an original copy of such a letter, addressed to Mr. J. L. Davis, Clinton, Tennessee; this being one of the photostats made by the Government from the Fox files, I will show you that and ask you if you recall that, and if you wrote any such letter? (Passed to the witness.)

A. Yes, sir.

[fol. 1799] Mr. Waller: We offer that as defendant's exhibit, whatever it is.

The Clerk: Defendants exhibit No. 70.

Mr. Waller: This letter reads as follows:

"October 18, 1937. Mr. J. L. Davis, Clinton, Tenn. Dear Mr. Davis: This will acknowledge your post card of October 16 advising that the Rogersville Theatre is operated by Mr. Cowan Oldham and yourself and that you are interested in our product for Rogersville, Tenn.

"I regret exceedingly that it was not possible for Mr. Laseter to work out a satisfactory deal with Mr. Hill and Mr. Oldham while he was in Tennessee last week, and the only deal that we are interested in making, insofar as Rogersville is concerned, is one in conjunction with the other towns operated by the Cumberland Amusement Company, or Mr. Oldham and Mr. Hill."

Yours very truly.

Q. Mr. Wilson, is it a fact that you refused to sell product for the Cumberland Amusement Company theatre in Rogersville, Tennessee, because you had not been able to make [fol. 1800] a deal with them for their theatres in their other towns?

A. That is right.

The Court: That was one of the levers was it?

A. Yes, sir.

Mr. Waller:

Q. So you sold that product to Mr. Miller instead of the Cumberland Amusement Company?

A. Yes, sir.

Q. Did you have any figures, do you have any figures as to the comparative revenue Fox Film Corporation received from Mr. Miller in 1934-35 season and from the Cumberland Amusement Company in 1935-36 season?

Mr. Wright: If the Court please, before we go any further with this kind of examination, we have the same situation up we had with respect to Brownsville. We have asked for and received what is presumably a correct figure for the contracts made with Cumberland and with Mr. Miller for the Rogersville, Tennessee, situation, covering the whole five year period 1934-5, 1939-40 contract, and offered this in evidence. We have also applied for certain information as to the other theatres and those at Rogersville, covering the same period, and we intend to offer those.

[fol. 1801] Mr. Waller: I will withdraw the question, Your Honor please.

The Court: All right.

Further deponent saith not.

Mr. Wright: I think that finishes up with the exception of the current Fox franchises. Will you get those. We have already offered in evidence these.

The Court: Franchises for 1938-39 season?

Mr. Wright: Yes, and in addition to those we offer the existing franchises that were made with Crescent and Lyric which covers the 1939-40 and 1940-42 seasons, and we would like to offer the companion franchises made with Fox and the Rockwood Amusement Company, Cherokee Amusement Company, Dixon theatre, Russell Amusement Company, Hartsell Theaters corporation, Lord Theaters, Inc., New-

port Amusement Company, Inc., Kentucky Amusement Company, which is dated August 22, 1940, and contains so-called deal sheets, which are attached, which was signed by the parties and dated June 27, 1939, and I ask that be [fol. 1802] given the next exhibit number.

The Clerk: No. F. 12.

Mr. Waller: We would like to know the purpose for which it is offered, and perhaps make an objection if it is a limited offer, or if it is a general offer, we would like to know what is the purpose and intent for which it is offered.

Mr. Wright: It is a general offer.

Mr. Waller: We object.

The Court: It is against Fox distributors.

Mr. Raftery: I thought he might be creeping up on us.

Mr. Waller: I think we are entitled to know in a situation of this kind, the purpose for which the document is offered, we might want to introduce some evidence in regard to it if we knew the purpose of it.

The Court: He said he is making a general offer, as part [fol. 1803] of the conspiracy and combine.

Mr. Waller: We object to it as irrelevant.

The Court: Overruled.

* * * * * * *

[fol. 1804] agent of Cherokee Amusements, Inc., he represents and manages the Cherokee interests, and perhaps he is also interested if the very fact he testified as president of the Newport Amusements, rather than holding title in the Cherokee.

The Court: You can ask him on that matter, first.

J. W. Baird, being first duly sworn, testified as follows.

Direct examination.

By Mr. Wright:

Q. Will you state your address?

A. I am a little hard of hearing.

Q. Would you state your address, please, Mr. Baird?

A. Newport, Tennessee.

Q. And your occupation?

A. Manager of the Newport, I manage the Winston Park theatre at Newport.

Q. And you are president of the Newport Amusements, Inc., a corporation?

A. That is right.

Q. And you own half of the stock of the corporation?

A. That is right.

[fol. 1805] Q. And the remainder, or the other half of the stock is owned by Cherokee Amusements, Inc.?

A. Yes, sir.

Mr. Wright: If the Court please, I think that brings out the ownership there.

The Court: Are you employed in any manner by the Cherokee Amusements Company?

A. I didn't understand.

The Court: Are you employed in any way by the Cherokee Amusements Company?

A. No, sir.

The Court: Are you an officer of that corporation?

A. No, sir.

The Court: Any connection with them at all in an official capacity?

A. No, sir, not with Cherokee.

Mr. Wright: We think that brings him within the rule.

[fol. 1806] The Court: I don't think it does.

Mr. Wright: Certainly he is president and the general manager of the Newport Amusements, and is the agent for the stockholders of the company.

The Court: He is not an agent for the stockholders he is an agent for the company.

Mr. Wright: Where the only stockholder outside of himself is Cherokee Amusement Company.

The Court: I can't help it, it is still a corporation just as much a legal entity as an individual.

Mr. Wright: I won't press the point further except to say that it is perfectly obvious that his position in the lawsuit it seems to me is precisely as an adverse party, and is wholly as adverse as it would be if he were employed directly by Cherokee, instead of acting as manager of properties in which Cherokee only had the half interest.

The Court. That is a different proposition, I don't know.

[fol. 1807] whether he is an unwilling or hostile witness or not.

Mr. Waller. Your Honor please, no relief can be had against him in this case.

The Court. I am just ruling that he is not an adverse party under Rule 43 (b), for an agent or manager or officer or director of an adverse party.

[fol. 1808] Q. Mr. Baird, the Newport Amusement Company was incorporated on April 8, 1937, was it not? I hand you a certified copy of the charter. Now, the charter shows, Mr. Baird, that at the time that corporation was incorporated only one thousand dollars worth of stock was issued, although $10,000.00 was authorized; that one thousand was issued to you?.

A. How much was issued?

Q. I say, the original one thousand dollars worth of stock that was issued, was issued to you, was it?

A. The original stock was; it was incorporated at $10,000.00.

Q. Yes, but according to the charter that you have in front of you there, the entire $10,000.00 was not issued at the beginning, only $1,000.00 worth of stock was issued?

Mr. Waller: Under the corporation laws of Tennessee, it is required that there be one thousand dollars of stock; the capital, the actual capital can, of course, be much greater than that.

Mr. Wright: Q. What I am trying to get at is, to whom was this stock issued, who paid for it?

A. It was issued at the same time.

Q. The entire $10,000.00 of stock was issued?

A. Yes.

Q. To whom was that issued?

[fol. 1809] A. I can't hear you?

Q. To whom was that $10,000.00 worth of stock issued?

A. There was $4500.00 of it issued to myself. $500.00 to my wife, and $3500.00 to the Cherokee Amusement Company.

Q. How about the remaining $500.00?

A. $500.00 to Mr. Stengel, Mr. Parrott, and Mr. Hendren.

Q. $500.00 each to Stengel, Parrott, and Hendren?

A. Yes sir.

Q. What was the consideration that was given for the other stock that was issued to the various parties?

A. You mean, what did they pay me for the stock?

The Court: What did they pay for it to the corporation?

A. They paid $5,000.00 for half of it.

Mr. Wright: Q. What did they, Hendren, Parrott and Stengel and Cherokee Amusement Company, all together pay? Did they pay $5,000.00 for their $5,000.00 worth of stock?

A. Yes sir.

Q. How was that paid?

A. By check, for $5,000.00.

Q. Isn't it a fact that before any stock was issued to them, that you had transferred to the Corporation the equipment in your Winston Theatre at Newport, in return for the $10,000.00 worth of capital stock that was authorized and issued?

[fol. 1810] A. That is right.

Q. And then after the $10,000.00 in stock was issued to you in return for the equipment and the theatre, you sold one-half of the stock to the Messrs. Parrott, Hendren, and Stengel and Cherokee Amusement Company?

A. I sold them a half interest for $5,000.00. That was for the equipment in the Winston Theatre at Newport.

Q. Well, it was for——

The Court: Did that $5,000.00 go to you or to the corporation?

A. It went to me.

The Court: That is what you are trying to develop isn't it, Mr. Wright?

Mr. Wright: I don't think it went quite that way. As I understand the transaction, Mr. Baird transferred his equipment in the theatre to the corporation and received $10,000.00 of stock, then he transferred one-half of the stock to Parrott, Hendren, Stengel and the Cherokee Amusement Company, in return for $5,000.00.

The Court: Which went to him, under your theory?

Mr. Wright: Yes.

The Court: That is what he said.

Mr. Wright: Perhaps I misunderstood him.

[fol. 1811] Q. What led up to the formation of the corporation, how did you happen to form this corporation and issue this stock to these people?

A. Well, Mr. Parrott asked me if I would like to sell a half interest in the theatre. I had bought a theatre off of Mr. Parrott before that in Newport, and later I bought this theatre off Mr. Parrott and Mr. Ausmus, back in July, or

along about the first, I believe it was, of July, 1938. No, wait a minute, that isn't right. In 1929, I bought this off of Mr. Parrott; later he came and he asked me if I would sell him a half interest in the Company. I told him I didn't know, hardly, I would think about it and let him know.

Q. Now, this Winston Theatre, then, you had been operating there in Newport since 1929, is that right?

A. I started at Newport along in 1928.

Q. The Winston Theatre, when was that built?

A. I started off on November 20, 1935.

Q. That was when you opened the new theatre, then?

A. Yes sir.

Q. Had there been any competing theatre operated in Newport?

A. Yes sir.

Q. During that time?

A. Yes sir, back in—I opened up the Gay Theatre on [fol. 1812] June 16, 1928, and the following December 21st, Ed Booth opened a house on Church Street, called the Ritz Theatre and he operated there until he went broke.

Q. When was that?

A. What?

Q. When was that?

A. That was June or July, 1929.

Q. Then there were not any opposition theatres operated there from 1929 up until 1937, is that right, for the period from 1929 to the time that you organized this corporation, there had been no opposition in the town?

A. No, there wasn't any opposition in the town.

Q. Now, before the corporation was organized, you had been advised, had you not, that someone had bought a lot or two lots that were to be used for theatre purposes in the town?

A. Yes, there had been a lot bought.

Q. Do you know who had bought that lot?

A. Well, it was my understanding that it was the Crescent Amusement Company.

Q. Now, with whom did you make the arrangements for the incorporation of this Company and the transfer of the stock?

A. Mr. Parrott and Mr. Hendren.

Q. Did you discuss it with Mr. Stengel, too?

A. No sir, I did not. I had met him, but that was all.

[fol. 1813] Q. Mr. Parrott and Mr. Hendren were both, then officials of the Cherokee Amusement Company, Inc.?

A. Yes.

Q. And on the incorporation of the Newport Amusements, Inc., Parrott and Hendren and Stengel all became officials of the Newport Amusement, Inc. did they, and continue to act as officials?

A. I didn't understand you?

Q. Those gentlemen are still acting as officials of the Newport Amusements?

A. That is right.

Q. And they each receive a salary from Newport Amusements?

A. Yes sir.

[fol. 1814] Q. What services does Mr. Stengel render for the salaries that he receives?

A. Well, advice and—we advise together as to how to advertise pictures.

Q. He also does film buying for Newport, does he not?

A. He does some of it, yes sir.

Q. Newport doesn't pay the film companies direct for its films, does it?

A. I didn't understand.

Q. The payments that are made by the Newport Amusement Company for films are not made direct to the film companies, are they?

A. Yes sir, they are.

Q. Don't you make payments to the Crescent Amusement Company?

A. I make about ninety five to ninety nine per cent direct.

Q. On some deals, however, you do not?

A. Once in a while maybe on something like a boxing picture or something like that I maybe pay it to the Crescent.

The Court:

Q. What kind of picture?

A. A boxing picture like a Joe Louis fighting picture, something like that.

[fol. 1815] Cross-examination.

By Mr. Waller:

Q. Mr. Baird, what is the population of Newport?

A. The present population?

Q. Yes.

A. About thirty five hundred.

Q. Now, you own the Winston Theatre and lease it to the corporation, do you not?

A. How do you mean?

Q. You own the property?

A. Yes sir, I own the property.

Q. Now, does Mr. Stengel do the bookkeeping for the Newport Amusement Company?

A. I can't hear you.

Q. Does Mr. Stengel do the bookkeeping for the corporation?

A. He has it done, I suppose; I don't know.

Q. Don't they keep the books over here at Nashville?

A. Some of them they keep here.

Q. You say he does the film buying?

A. Part of it.

Q. Well, he gets your approval on all deals, does he?

A. Yes sir.

Q. You were asked whether or not the Newport Amusement Company paid the Crescent Amusement Company rather than making payments direct to film companies. Is it true that with United Artists that is done?

[fol. 1816] A. What is that?

Q. On United Artists pictures do you pay direct to United Artists or do you pay it to Crescent Amusement Company?

A. To Crescent.

Q. That is the only company that is done that way, isn't it?

A. I believe it is unless there is one picture they probably buy, RKO, one, and as I said awhile ago, a fighting picture, back, it has been two or three years ago.

Q. You were asked about this man that competed with you in 1929 and went broke. What was his name?

A. Ed Booth.

Q. Do you know anything about the circumstances under which he went broke? What caused it?

A. What circumstance do you have reference to?

Q. I mean what was it that caused him to go broke?

A. Well, it would be hard for me to say what was the cause of his going broke.

Q. Well, you didn't have anything to do with it, did you?

A. Well, I was his opposition in Newport; I don't know.

Re-direct examination.

By Mr. Wright:

Q. Just one more question. What was the amount of your investment in the Winston Theatre there?

A. Well, I don't know the exact amount. It was somewhere around $10,000.00.

[fol. 1817] Q. That is the equipment you are talking about?

A. That is right, just the equipment alone.

Q. How about the theatre building itself?

A. Well, I haven't—let's see. It would run around $25,000.00, somewhere in that neighborhood.

Further this witness saith not.

Mr. Wright: I want to offer this copy of the charter of the Newport Amusement Company as Government's Exhibit No. 230.

(Charter filed as such exhibit.)

[fol. 1818] W. F. Ruffin, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address?

A. W. F. Ruffin, Covington, Tennessee.

Q. And your occupation?

A. Theatre operator.

Q. You are employed by a corporation?

A. Yes sir.

Q. What is the name of it?

A. The Ruffin Amusement Company and the Chickasaw Amusement Company.

Q. Two companies?

A. Yes sir.

Q. What is your interest in the Ruffin Amusement Company?

A. My wife and myself own half the stock.

Q. Who owns the other half?

A. Mr. Stengel and Mr. Sudekum.

Q. What is your interest in the Chickasaw Amusement Company?

A. My wife and myself own one half and Mr. Stengel owns the other half.

Q. You are the president of the Ruffin Amusement Company?

A. Yes.

Q. What office do you hold in the Chickasaw Amusement Company?

[fol. 1819] A. President.

Mr. Wright: May it please the Court, I think this witness is also adverse within the language of Rule 43 (b) and I would like permission to examine him——

The Court: I think he is probably an unwilling or hostile witness and may be interrogated by legal questions but the rule doesn't say an "adverse witness". It says "adverse party" and he is not a party to the suit and his company is not a party to the suit. You may question or interrogate him as an unwilling or hostile witness by leading questions but you can't contradict or impeach him as an adverse party.

[fol. 1820] Mr. Wright:

Q. When did you first enter the theatre business, Mr. Ruffin?

A. I opened my first house in May, in Covington, Tennessee.

Q. Where, Covington, Tennessee?

A. Covington, Tennessee.

Q. And what theatres were you operating just before the Ruffin Amusement Company was organized?

A. I was operating Covington, Newbern and Martin.

Q. All in Tennessee.

A. All in Tennessee.

Q. You had one theatre in each town?

A. Yes, sir.

Q. I will show you a certified copy of the charter of the Ruffin Amusement Company, Inc., from which it appears that it was incorporated January 11, 1937?

A. That is right, yes, sir.

Q. What circumstances led up to the incorporation of the Ruffin Amusement Company?

A. As an individual I installed and operated and owned the Ruffin Amusement Company.

Q. You had been using that as a trade-name in the operation of your theatres?

A. That is right, and it was an individual business, and [fol. 1821] on January 11th, as you state here, as the Ruffin Amusement Company, we incorporated.

Q. And you issued in par value $40,000.00 capital stock?

A. That is right.

Q. Half of that was issued to you and your wife?

A. 199 shares were issued to me, one share to my wife; one share to Mr. Sudekum and 199 shares to Mr. Stengel.

Q. Each share of the par value of one hundred dollars?

A. Yes, sir.

Q. When was it the Chickasaw Amusements, Inc., was incorporated, do you recall?

A. I believe in 1935. I didn't incorporate it myself.

Q. When was it you acquired your interest in it?

A. In May, 1937.

Q. And what was the consideration given by you for your half interest in Chickasaw?

A. Eleven thousand dollars.

Q. That was for how much stock?

A. That was for five shares.

Q. For five shares?

A. Five shares.

Q. And the total capital of the corporation was ten shares?

A. Was ten thousand dollars.

[fol. 1822] Q. Ten shares of one hundred dollars, par value, each?

A. That is right.

Q. And you paid eleven thousand dollars for the five shares you received?

A. Five thousand dollars.

Q. Where was Chickasaw Amusements, Inc., operating theatres then?

A. In Milan and Humboldt, Tennessee.

Q. Milan and Humboldt, Covington, Newbern and Martin are all fairly close together, are they not?

A. Well, Milan and Humboldt are 12 miles apart; although Milan is 70 miles from Covington, Humboldt is 58

and Newbern is 59 miles from Covington, and Martin is 75 miles from Covington.

Q. Where are Newbern and Covington with reference to Humboldt?

A. Newbern, I would say is about 45 miles from Milan, and Martin is about 31 miles from Milan.

Q. How about Humboldt?

A. Humboldt is 12 miles from Milan; that would be 43 miles from Martin.

Q. Now, Mr. Stengel is also an official of Ruffin Amusements?

A. Yes, sir.

[fol. 1823] Q. And has been since its incorporation?

A. That is right; he is Vice-President of the Ruffin Amusement Company.

Q. He receives a salary for those services?

A. Yes, sir.

Q. And what services does he render?

A. In an advisory capacity, in visiting the towns, and at present doing the buying of films.

Q. Well, hasn't he been buying the bulk of the films since he became an official of the company?

A. Starting with the Fall of 1937.

Q. Beginning with the Fall of 1937?

A. Fall of 1937.

Q. And in making payment for your films, you sometimes make it direct to, or make checks payable to the Crescent Amusement Company, instead of direct to the film company.

A. That is only on one contract.

Q. That is the United Artists contract?

A. That is right.

Q. Now, I will hand you a series of typewritten tabulations that you produced in response to the subpoena that was issued, and ask you what those are?

A. These are copies taken from the cut-offs in the film exchanges and from our files, showing what we paid for [fol. 1824] film rental to each company covered in the years that the subpoena asks for.

Q. If you will refer to them, they are the terms of the contracts?

A. The terms of the contracts, and in clauses that were in the contracts?

Q. Yes, sir, and they don't show the actual amount of rental paid under the contract, do they?

A. No; just so many pictures at a stipulated price.

Mr. Wright: I will just ask to have those marked successively as exhibits.

The Court: Do you want the charter admitted, too?

Mr. Wright: Yes.

(Exhibit marked Government Exhibit No. 231.)

Q. Those exhibits that you are just referring to, those tabulations covered each of the towns where you have operated theatres both before and after they were taken over?

A. No, it only covers the towns which the subpoena asks for.

Q. Those towns are Covington, Newbern, Martin, Greenfield?

[fol. 1825] A. And Greenfield.

Q. And Hickman, Kentucky?

A. And Hickman, Kentucky.

Mr. Waller: Your Honor, as the Ruffin Amusement Company is not a defendant in this case, we object to this testimony, and we would like to inquire the purpose of it.

Mr. Wright: The purpose of the testimony is to show that there was a very substantial improvement in the terms on which these theaters were able to buy their films after they became affiliated with Mr. Stengel and Mr. Sudekum.

The Court: Did you understand that, Mr. Waller?

Mr. Waller: Yes, sir; we object on the ground that although the tabulation might show difference in terms, there might be different reasons for it.

The Court: I overrule the objection at this time, you can cross-examine him on that.

Mr. Raftery: For the United Artists, we object, because [fol. 1826] the contracts put in evidence show that the United Artists did not sell any pictures on any specific terms to this particular exhibitor; we sold him pictures where we got our money in advance, on a flat deal, so much for a particular picture for either of the three situations; and any break-down that this man may make between himself and Crescent is not binding on us.

The Court: Well, I think you are right in that.

Mr. Wright:

Q. These tabulations you have just been referring to are for the Major companies?

A. The eight companies.

Q. The eight major companies?

A. Yes, sir, the eight major companies.

The Court: Are there eight major companies?

Mr. Raftery: I don't think they have, even in that, because Mr. Connors put in one company in a super-major state.

Mr. Frolich: I object to this document the witness has produced: it is not competent evidence; the Columbia contracts are the best evidence. Any amendments would have [fol. 1827] to be shown by the contract and not by any statements made by this witness.

The Court: Now, what does the tabulation attempt to show?—Let me see it. (Examining paper.) Well, of course, if your contract that was signed should show contradictory terms or prices, why, I take it the contracts are the best evidence.

Mr. Wright: There is no question about that, your Honor, if they are offering to contradict those tabulations, they should offer the contracts.

Mr. Frolich: I haven't the contracts with me but I could get them in a half hour.

The Court: Well, you can get them this afternoon, better have the witness here this afternoon.

Mr. Frolich: Yes, sir, all right.

[fol. 1828] The Court: If there is any discrepancy, you can't tell it until you have your exchange contract.

A. You see in 1930-36, we had a fire, and we followed the subpoena as close as we could, it was necessary to take a lot of these records from the film exchange from their old records and that is the reason it is tabulated as it is.

Mr. Wright:

Q. I show you this contract that seems to be dated September 9, 1938, and ask you if that was signed by you and Mr. John D. Henry on or about the date it bears there?

A. Yes, sir.

Mr. Wright: I will ask to have that marked as Government's next exhibit, and offer it in evidence.

This contains an agreement made with Mr. Henry referred to on the stand, Mr. Henry referred to it on the stand but was unable to produce.

Q. I hand you a letter, copy of what purports to be a copy of a letter from you to Mr. Stengel, dated December 15, 1938, and ask you if that is a copy of the letter you wrote on that date?

A. Yes, sir.

Q. I also hand you a letter, copy of a letter from you [fols. 1829-1833] to Mr. Stengel, dated December 18th and ask you if that is a copy of a letter you wrote on that date?

A. Yes, sir.

Q. And another copy of a letter from you to Mr. Stengel dated December 19, 1938, did you write that letter on the date it bears?

A. Yes, sir.

Q. And I show you copy of a letter from Mr. Stengel to you dated December 21, 1938, and ask you if that is the reply you received from Mr. Stengel?

A. Yes, sir.

Q. I will ask to have those four letters marked with Government's next exhibit numbers and offer them in evidence.

Q. I show you a letter, what purports to be a copy of a letter from you to Mr. Stengel, dated January 7, 1939, and ask you if that is a copy of a letter you wrote on that date to Mr. Stengel?

A. Yes, sir.

Q. And I show you copy of a letter from Mr. Stengel to you dated May 9, 1939, and ask you if you received that letter from him on or about that date?

A. Yes, sir.

Q. I will ask to have those two marked as the next Government's exhibit numbers, and offer them in evidence.

. . . . . .

[fols. 1834-1840] Q. As I understand, Mr. Ruffin, these tabulations are limited to the pictures that were actually bought for the town and the seasons they were bought, during the period from 1934-5 to 1939-40, inclusive, is that correct?

A. Yes, sir. And I might state this; we did not open the theatre in Greenfield until 1937.

Q. Obviously in some of these situations with respect to some of the pictures no comparison will be possible?

A. That is right.

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[fol. 1841] (Recess.)

Mr. Wright:

Q. When did you acquire the Palace Theatre at Newbern, Mr. Ruffin?

A. Started operating the theatre on July 4, 1927.

Q. And you have operated it continuously?

A. Ever since.

Q. Ever since?

A. Yes.

Q. That was one of the theatres that went into the Ruffin Amusement Company when it was organized?

A. Yes sir.

Q. When did you acquire the Ruffin or Palace Theatre at Covington, Tennessee?

A. The Palace Theatre was the theatre which we took over in June, 1927, and was destroyed by fire on January 29, 1936, and the Palace Theatre was rebuilt and named the Ruffin Theatre.

Q. That was just—There was only one theatre operated at that time?

[fol. 1842] A. We operated in a temporary location while we were reconstructing the Ruffin.

Q. You continued to operate that theatre down to the present day.

A. Yes.

Q. That was the——

A. That was called the Palace.

Q. When did you acquire the Capitol Theatre at Martin?

A. In September of 1931, September, 1931.

Q. You have continued to operate that down to the present time?

A. Yes sir.

Q. And the Capitol at Martin, the Ruffin at Covington and Palace at Newbern were, then, the three theatres which formed the capital of the Ruffin Amusement Company at the time it was organized?

A. That is right, yes sir.

Q. And during the time those theatres have been operated, they have been the only theatres operated in the town, is that correct?

A. That is right.

Q. Both before and after the organization of the Ruffin Amusement Company?

A. Yes.

Q. Now, I hand you this tabulation that you made with [fol. 1843] respect to the Palace Theatre at Newbern, which has been marked Government Exhibit No. 236; and ask you if the 1936-1937 contract, as summarized there, for that theatre, was negotiated prior to the time the Ruffin Amusements, Inc. took over the theatre?

A. Which company do you have reference to?

Q. This is RKO?

A. As well as I remember, the 1936-1937 contracts were made before the incorporation of the Ruffin Amusements, Inc.

Q. The 1937-1938 contract, which appears first, was made after you incorporated?

A. That is right.

Q. Will you please just read the feature terms—You can leave out the rest—for the two contracts?

A. This is RKO. Which year do you want? All of them?

Q. Just 1936-1937, and then 1937-1938.

A. 1936-1937 features at 35 per cent; 7 at $30.00; 30 at $11.50. 48 pictures offered, 40 contracted for.

Q. All I want to get is a comparison of the features and terms?

A. 1937-1938. Instead of, and I might state here, that those three features and 7 features against percentage and no guarantee. In 1937-1938, it was a flat rental deal: 3 at $22.50; 5 at $15.00; 11 at ——; and 6 at $12.50.

The Court: As I understand before you incorporated [fol. 1844] you played your films at a fixed rental against a percentage, and after you incorporated you didn't have any percentage contract?

A. We still played some pictures on percentage but we preferred to play them flat.

Mr. Wright: I didn't get the last of your answer?

The Court: He said he still played some pictures on percentage but preferred to play them on a flat basis.

A. On a flat rental.

Mr. Wright:

Q. Now, will you turn to the next sheet there. Which company is that?

A. Universal.

Q. Was that the Universal 1936-1937 contract, do you recall whether that was made before or after the incorporation?

A. It was made before.

Q. You think it was made before?

A. Yes sir.

Q. Will you compare 1936-1937 and 1937-1938, Universal?

A. Six pictures at $15.00. 6 at $13.50; 18 at $11.50 and 6 at $10.00.

Q. Will you read 1937-1938?

A. There were 4 at $15.00; 8 at $12.50; and 10 at $10.00.

[fol. 1845] Q. Will you turn to the next Company?

A. Columbia.

Mr. Frolich: That has been stricken out.

Mr. Wright:

Q. Will you read the 1936-1937 contract and make the same comparison between 1936-1937 and 1937-1938 deals?

Mr. Frolich: Just a moment. I understood your Honor ruled that out.

The Court: I understood there was no 1936-1937 Columbia.

Mr. Wright: That was in other towns and in order to clear that up, I eliminated these towns that were acquired subsequently.

The Court: Do you have a 1936-1937 contract with Columbia on some towns?

A. Yes sir.

Mr. Frolich: Which town are you reading from?

A. Newbern.

Mr. Frolich: I didn't know.

A. Six pictures at $25.00; 6 at $20.00; 5 at $15.00 and the balance at $12.50. 1937-1938: 4 at $15.00; 6 at $12.50; Balance at $10.00.

The Court: How is this going to be helpful to the Court? I don't know how to analyze this proof. There are so [fol. 1846] many distinctions entering into those prices and different numbers of pictures and different prices. How

can you fix anything definite about it, is what concerns me?

Mr. Wright: For one thing, you can see, without any question, the elimination of percentage deals. Now, in addition to that, in the Columbia, you line up with about the same number of pictures, the total, but you get a different allocation; that is, the 1937-1938 shows a lower top, and a rental lower number of pictures allocated to the top rental bracket.

The Court: It looks to me like we are going to have an accounting if we keep on with that kind of proof. I just can't—Suppose you read those figures over again?

A. Six at $25.00——

The Court: What year is that?

A. 1936-1937. 6 at $25.00; 6 at $20.00; 5 at $15.00; that is 1936-1937.

The Court: Now read 1937-1938.

A. Four at $15.00; 6 at $12.50; the balance at $10.00.

The Court: How much is the balance?

Mr. Frolich: Is the number of pictures for the balance indicated?

[fol. 1847] Mr. Frolich: The first is 6-6-4?

A. The first is 6-4-6.

Mr. Frolich: Whose pictures? But there is no difference, the balance may be 40 or 50 pictures, you can't compare them.

Mr. Raftery: The great mass of evidence is that those exhibitors sign a contract, then don't play them off at the price sold. I am talking about the independents; there may have been adjustments, there may have been eliminations, the pictures may not have been made. They talk about the percentage feature: We haven't got the play-off on the percentage.

Mr. Wright: I think we have in the answers, they should be in the answers to the Columbia interrogatories.

[fol. 1848] Mr. Raftery: Well, then, read your interrogatories if they give the actual facts and not have the Court guessing at it. You remember Mr. Willingham stated this, the contract value—and Mr. Wright admitted it meant nothing, and I agree with him in the position here that contract value doesn't mean anything.

By the Court:

Q. Well, in 1937-1937 pictures you say you had six at $25.00?

A. Yes sir.

Q. And then another six at $25.00?

A. No, another six at $20.00 and five at $15.00 and the balance at $12.50.

Mr. Raftery: It might have been that year because they had some great pictures, Mr. Frolich to the contrary, but nevertheless there is only one figure that will mean anything—they paid seventy per cent for Gone with The Wind that grossed——

Mr. Wright: That hasn't anything to do with it.

Mr. Raftery: That is the only figure that he has that means anything because everybody knows about Gone With the Wind, because it is a great picture and did great business but when you come along with a lot of figures here and [fol. 1849] offer the contract value and stipulate the playoff and everything else, it is just getting us nowhere fast.

The Court: At the same time there did seem to be a considerable difference in the contract price for pictures in 1936-1937 and 1937-1938. Now, I don't know just what accounts for that difference. The defendants may say it is a difference in the quality of the pictures, etc. and I understand it is the Government's theory it is a difference in cost on account of becoming affiliated with the Crescent and they can get lower prices.

Mr. Raftery: You can make up schedules in this case to prove anything but if you stick to the facts the facts will come out very clean.

Mr. Wright: But what we are trying to prove in this case is something that everybody in the film business and all counsel in this courtroom know, that when you get in on circuit buying you are able to get very substantial benefits from that method of doing business in the form of lower film rentals. Now, if they are willing to stipulate that fact we can dispense with all of this detailed proof.

[fol. 1850] Mr. Raftery: We certainly are not. We will stipulate that Mr. Sudekum, once he makes a contract, he will abide by it and that is as far as we will go.

Mr. Frolich: Because in making these contracts with the independents is never like this. Our hopes were completely frustrated and they played half the pictures or one third of

the pictures and walked off with the contracts and cancelled them and when Mr. Sudekum signed—and this will come out in letters that are going to be read—when he signed a contract it was lived up to, as one of the Government's witnesses said, one hundred cents on the dollar. That may account for the prices we gave him. There may be a lot of factors here that way.

The Court: Well, it may be but that is a question that will have to be developed.

Mr. Raftery: We don't think it is that. We think we have the right to sell anybody at any price we see fit. It is a matter of bargaining. We haven't a commodity that you can place a value on. We say we can go into a town or sell or not sell as we see fit. We say we can go in and sell exclusively. You heard Mr. Connors on the stand the other [fol. 1851] day say he shows his pictures first run in Nashville and he doesn't sell a single second run to Mr. Sudekum in the town. If you want to see Metro pictures in Nashville you have to go to Loews or you don't see them. Now, that is his election, the way he wants to sell. We still say each distributor could separately handle it and it is not a question of a circuit. We say that we have a right to sell for less or for more or for nothing. If we want our pictures shown for nothing we have the right to do so but that is not the issue here. Mr. Wright is trying to show comparative figures that don't mean anything as far as this litigation is concerned. We have the right to sell cheaper to Mr. Ruffin if we want to sell cheaper. The evidence indicates, however, from the witness, that the distributor tries to get all he can get and the exhibitor tries to buy them for as little as he sees fit. As Mr. Morgan put it, Mr. Sudekum is a cold-blooded buyer and buys as cheap as he knows how. Now, comparative figures are not going to help the inquiry in any respect. When you come down to it, it is the play-off. They have got the answers and if the answers are competent, and I doubt that they are as to what Mr. Sudekum paid for films or any exhibitor paid for films in this inquiry——

[fol. 1852] Mr. Waller: If your Honor please, in addition to what Mr. Raftery has stated, of course, if an exhibitor pays a certain price for films one season, especially if he has them on percentage or on a guarantee against percentage, I should say, and it develops that the prices were out of line with what he realized on the pictures, of course,

when the salesman comes around next year he will say "Look here, what you did to me last year; you have got to give me a reduction this time". It is a trading proposition. The pictures one year may be good and the next year they may be louzy and they always trade each year on that basis. You may make a poor trade one year and a good trade the next year. Those things happen all the time in the business world.

Now, Mr. Ruffin has been asked to give comparisons and he hasn't yet given Loews and I happen to have the figures here, which are exactly opposite. He paid more when Mr. Stengel made the deal than when Mr. Ruffin made the deal.

Mr. Frolich: I think because Loews might have had a better product for that year.

Mr. Waller: And on Fox still I think in 1937-1938 there was a slight difference. In other words, paid a little less, a little less variation, and in the 1938-1939 Fox got a whole [fol. 1853] lot better deal out of Stengel than they had ever gotten out of Ruffin. Now, they are different.

Mr. Wright: Mr. Waller evidently wants to argue the figures but he doesn't want to have them go in the evidence.

Mr. Waller: I want to say, they are not relevant; you can't make a comparison that means anything, just as Mr. Raftery said.

Now, furthermore, this Columbia deal was in the settlement of a lawsuit, entered into in the settlement of a lawsuit.

The Court: What lawsuit? The Columbia deal?

Mr. Waller: The one that has been read to your Hohor, those comparisons. There are all kinds of extraneous elements that enter into those things and it is just impossible to take figures of one year and another year and show that it proves anything.

Another thing, it frequently depends on the time of the year when you make a deal. For example, suppose an exhibitor had played up most of his playing time and a film [fol. 1854] salesman comes along and the exhibitor says: "I only have room for twenty pictures" and this film salesman knows that two or three competitors will be in there working on the man next year and will do a lot better trading than if he knows the exhibitor doesn't have all of his playing time filled up. In other words, the trading position of the two parties in the different seasons has a lot of bearing upon it.

The Court: Well, I think that it is an important part of the Government's case if they can show that the Sudekum circuit was able to secure rebates or lower prices from the distributors than their competitors were able to secure and that theatres which became affiliated with the Sudekum circuit were able to secure concessions and lower prices on their films than they were able to secure before they became affiliated. Whether or not these exhibits show it, is a different proposition.

Mr. Waller: Your Honor, I suggest this, after this examination on this particular exhibit, that I be permitted to cross examine the witness and then let your Honor——

Mr. Raftery: I don't want to withdraw the objection but I would like to point out to your Honor. Once you sell a picture to an exhibitor you have removed any comparison [fol. 1855] in the town because each picture is a separate proposition and each year's product is a separate proposition and the next year's product is entirely different pictures from the ones of this year. And that is known to everyone at this table. Where a particular company—we will take Metro, and they say they make the finest pictures——

The Court: Yes, and I sustained your objection to that.

Mr. Raftery: Where they had fourteen of the year's big fine pictures, and we must admit that they have the finest stars and the finest people in the business, and then they will come along and have—as Judge Cordoza, in the case of Broadway Photoplay vs. World Films for the exhibition of certain pictures in a specific theatre on upper Broadway in New York, said—as the Court put it, the contract was no sooner made by the distributor than it was broken. It didn't furnish that group of pictures for exhibition in that theatre. They came in and sued for damages and they sought to show over comparative periods the revenue of the theatre with pictures which they said were of equal merit and Judge Cordoza said, "No, you can't do it. There is no way for [fol. 1856] anyone to speculate as to what a particular group of pictures would do." You are dealing with human taste and fancy; you are dealing with a product that there is no way of estimating the value of or what it means or what it is worth, and they allowed a six cents recovery in a case against Mr. Wright that Mr. Driscoll tried, and he got a six cents verdict on a similar state of facts. You have no way of dealing with comparisons of a picture. When you

sell a particular picture that particular deal on that picture may be good and it may not.

[fol. 1857] The Court: Well that is true.

Mr. Raftery: That is the thing we are dealing with here; we are not dealing with parchment paper or anything that the Government is fooling around with in their various anti-trust cases. We are dealing with a different problem. I say any one of the Government counsel can get up a schedule or set of figures to prove any contention they want to make.

The Court: You believe in the theory that you can prove anything by an account?

Mr. Raftery: Yes, sir, pretty nearly; but you can't prove what a picture might have done in these little towns.

The Court: He is not attempting to prove what they might have done in Tennessee.

Mr. Raftery: Well, to prove their sales value.

Mr. Wright: If the Court please, the proposition is so obvious that 100 theaters buying together can get better [fol. 1858] terms for any particular theater in the group than that theater can ever get for itself, I agree it does seem like an awful waste of time and effort to offer detailed evidence to prove a fact that everybody in the industry knows.

Now, if the gentlemen take the position that the fact is an intangible one and is not susceptible of accurate proof and merely a part of the circumstances of the situation, we will probably want to make an argument on that basis.

Mr. Raftery: I have said this to you, Mr. Wright, and I have said it to you and your associates, too, that in building a theater in every situation, you could set up that idea of competition that he talks about, where you have a competitive market, where you can come in and sell your product either to this man or that man; you might be able to create a competitive situation. They have not shown in any one of the situations that they have a situation like that, with the exception of Andy Anderson of Hopkinsville, who remodeled an old theater. Now, as said in one of those exhibits yesterday; analyze the situation and if you can get the United Artists as much money out of the terms by sell- [fol. 1859] ing Sudekum's opposition, go to it; but if you can't, level off and see if we can get the best deal out of Sudekum that is possible.

The Court: That is what the Government is complaining about.

Mr. Raftery: I will answer that; What of it? I will answer it that way.

Mr. Frolich: I take it the contracts would be the best evidence; I don't have the contracts, but I have some records, and they are authentic; I will stand by my records. Now in 1936-1937 in Newbern we had made a contract with the Ruffin Amusement Company for 52 pictures, of which they played off 42. In 1938 we didn't make a contract. They spot booked pictures. And they spot booked pictures the following season. And the last contract I haven't got. Mr. Wright thinks it very funny. I can't see the humor of it. They ought to prove it with proper evidence. The figures are available.

Mr. Wright: If the Court please, the only thing that seemed humorous about it to me was counsel getting up and [fol. 1860] in the form of argument offering his testimony as against a witness on the stand under oath.

Mr. Frolich: I have contracts at my hotel; I can produce them this afternoon.

The Court: All right; I will defer my ruling on the matter until you can bring the contract this afternoon. I think the contract is the best evidence. Now, he says his contracts for 1937-1938 don't show what the witness' compilation shows.

Mr. Waller: If your Honor please, I am not undertaking to testify but if I can make a statement that would be regarded as enlightening, I would be glad to do so; in regard to that Columbia deal, what I was informed was that a man who had a theater at Alamo, sold out without complying with his contract, and the Ruffin Amusement Company bought his theater and he and the Ruffin Amusement Company made a deal with Columbia on a spot booking arrangement, whereby, in order to satisfy the obligations of the man at Alamo, they would play certain rentals. It was totally different from an ordinary contract.

[fol. 1861] The Court: Of course, you would be permitted to show that in explanation of these figures.

Mr. Waller: I am not speaking about this particular compilation, but just to show your Honor that in any comparison that might be brought up, there would be so many extraneous matters that it would be impossible to go into all those matters in the trial of this lawsuit.

The Court: Well, I don't know; we have gone into everything else.

Mr. Wright:

Q. Mr. Ruffin, would you turn to the next company and make a similar comparison between the 1936-1937 features?

A. Just one second: I just noticed, while you all were arguing here, that there is no set price for any year that we buy a film. Now, 1939-1940 Columbia's deal was increased, and in 1940-1941, Columbia's deal was increased, you see.

Q. Increased in——

A. In dollars and cents.

Q. Well, normally your film rentals increased every year in accordance with the increase in your business, isn't that true?

[fol. 1862] A. No, in other words, the policy in selling pictures, as Mr. Raftery there mentioned, is that the distributor tries to get all he can for them from the exhibitor, and the exhibitor tries to get them as cheap as he can.

Q. You had a much larger gross at your theater in 1939-1940 than in 1936-1937?

A. No; frankly, we were not grossing as much money.

Q. What is the next year?

A. 1936-1937, 32 at $12.50, score $3.00; 14 at 15 dollars; score $3.00; 12 at $13.00, score $3.00; 10 at $10.50, score $3.00. In 1937-1938, 4 features at $7.00; and the contract was bought flat rental instead of percentage; and 8 at $35.00, which was $10.00 increase over the 12 for $25.00. 8 at $12.50; 12 at $15.00; the balance at $13.00.

Q. Now, will you turn to the next company?

The Court: What year was that?

A. That was for 1937-8.

Mr. Wright: 1937-1938.

Q. The next is United Artists; will you read that?

A. 11 at $20.00; 4 at $17.50; 4 at $15.00; 4 at $12.50 and 2 at $10.00.

Q. What season are you giving?

[fol. 1863] A. 1936-1937? For 1938-1939, 12 at $15.00——

Mr. Raftery: What about 1937-1938?

A. I didn't make a deal; I couldn't get together with the St. Louis office.

Mr. Raftery: Now, 1938-1939, we are going to object to that; it is an allocation made by this witness in which we had no part.

The Court: All right; I will see what the allocation is.

Mr. Wright:

Q. Now, for 1938-1939?

A. Now, 1938-1939, 12 at $15.00.

Q. What is the next company you have there?

The Court: Is that all of that?

A. 1939-1940 and of course 1940-1941.

The Court: I mean you just played 12 pictures in 1938-1939?

A. That is right.

The Court: All right; go ahead.

A. Now, the next deal is Fox.

[fols. 1864-1866] Mr. Wright:

Q. That, I believe, with Fox you had a franchise that didn't expire until the 1938-1939 season?

A. The franchise was for three years.

Q. That was made before the Amusement Company took over, is that correct?

A. Yes, sir.

Q. What is the comparison between the last deal with Fox made by you and the first deal made by the Ruffin Amusement Company, Inc.; what would be a comparison between the 1938-1939 and 1939-1940 seasons?

A. It would be a comparison on this franchise against the present franchise we are operating under.

[fol. 1867] Q. What is the next company?

A. Fox.

Q. And did you explain your franchise you had made prior to the time?

A. Yes, so that that franchise the only one we could compare would be that you would have to have one picture gross because in my three year franchise we played sixteen pictures or fourteen and so on, they were on percentage.

[fol. 1868] Q. Just give that approximately your franchise with the contracts, what franchise they made then with Fox?

Mr. Waller: Are you taking his franchise as dated here?

Mr. Wright:

Q. What year?

A. Which year you want?

Q. The last year of your franchise and the first year of your connection.

A. The last year of my franchise was 1938, 9; six features at thirty-five per cent, $17.50 with a score of two and a half. Eight at thirty per cent against $17.50, a score of two and a half, ten at thirteen seventy-eight, score two and a half, balance at eleven *o* two, with a score of two and a half.

. . . . . .

[fol. 1869] Q. Go ahead.

A. In 1939-40 we *we* got the franchise for feature pictures and it was a flat rental, we thought at the time we were making a better deal.

Mr. Wright: Just a minute, I am objecting to what you thought. Just answer the question and read the comparative figures you have got there.

A. Ten at forty dollars.

Q. Will you read the figures and if there is a change?

A. Ten at twenty dollars, ten at fifteen dollars, balance at ten.

Q. Turn to the next company, this is the first year of the franchise.

A. This is the first year of the franchise and of course each year was stepped up a little.

Q. Of course under the basis of the franchise, which is in evidence; will you turn to the next company?

A. Warner Brothers, 1936-7. One feature at fifty per cent and the score was two a-d a half, and trailer was two dollars, one feature at thirty-five, trailer was two dollars and one feature at thirty-five trailer twelve dollars and score two and a half; three features at thirty per cent, trailer two, score two and a half. Twenty-two features at [fol. 1870] ten, trailer a dollar and a half, score two and a half, that was the Warner Brothers. From the first, one feature thirty-five per cent, trailer two dollars and I do not know the score, I imagine it was down. Four features at thirty per cent, trailer two dollars, twenty-two at ten dollars, trailer a dollar and a half. All of those are International Pictures.

Q. They were distributed by Warners?

A. Yes, sir, in 1937 and 8 we could not get together with Warner Brothers and did not buy their pictures in 1937-1938.

Q. What was the 1938-39 deal?

A. You mean—twenty-six feature pictures at eight twelve and score two fifty and tr-ilers one dollar.

Q. Is that the last comp-ny you have?

A. That is 1938-9 of course I have 1939-40 and 1940-41.

Q. That is all I care for, are there any other companies there?

A. Paramount.

Q. Will you read that one?

A. 1936-7 was five at ten fifty, six at thirteen, and two at nineteen dollars. 1937-8 fourteen features at forty per cent with a score of three dollars, eight features at sixteen, score three dollars, twenty-eight features at ten dollars and score three dollars.

[fol. 1871] Q. That the last one there?

A. Yes, sir.

Q. Now with respect to all these towns where you operated after you became affiliated with Mr. Stengel and Mr. Sudekum, you were able to get rid of the percentage deals for the ensuing season with Warner, RKO and Metro?

A. And Fox.

Q. And Fox, after your franchise?

A. That is right, but it cost us money by doing it, because we had more flat rental.

Mr. Wright: I move to strike that out.

The Court: I want to get the facts in this case, I do not care whose witness he is.

Mr. Wright: All I want to prove by him were these particular tabulations.

The Court: Go ahead and say all you have to say?

A. No, sir.

Mr. Wright: We do not object to any explanation he may make in response to the Court's inquiry.

[fol. 1872] The Court: I am asking him to explain it.

A. I can take Fox here and explain it to you this way. In 1938-9 we had Fox thirty-five per cent for six pictures and eight at thirty per cent. In 1939-40 we paid forty dollars for ten pictures. If we had to play those pictures on percentage, we would not have paid them forty dollars for the ten pictures, but we paid them ten other features at twenty, while if we had had the other deal it would have been thirty per cent, we would not have paid them that much money.

The Court: You didn't figure then that it was to your interest? To buy pictures on a flat basis against percentage?

A. There is more to it than just the flat basis. In other words, the major companies take up your Saturdays and Sundays and holidays, and your best days for playing, when they have one they do not care for.

The Court: A great deal depends on each particular contract you can make?

A. Yes, sir.

[fol. 1873] The Court: Considering the playing dates, etc.?

A. Yes, sir.

Mr. Wright:

Q. In the course of your negotiation with the film companies you have always tried to avoid percentage deals?

A. That is right.

Q. And play flat rentals wherever you have been able to do, have you not?

A. That is right.

Q. How much did Mr. Stengel receive for the services he rendered to the Ruffin Amusement Company after it was organized?

A. Mr. Stengel is paid a salary of fifty dollars a week.

Q. You are sure it is not more, or has not been more than that?

A. That is what he is drawing at the present time?

A. He did draw more before?

A. I couldn't say without my records.

Q. Might have been substantially more in 1937 and 1938 and 1939?

A. No, I don't think it could be, but it could be in 1937, I did not remember—he didn't draw a salary then.

Q. Your records as to what salary he drew would appear on the tax returns you filed?

[fol. 1874] A. That is right, in other words, I would have to have the records to tell you when his salary started.

Q. And if the tax returns show a higher payment, that would be the correct payment?

A. Yes, sir.

Mr. Armistead: I would like to ask, do you have the records?

Mr. Wright: We have those of the Ruffin Amusement Company.

Mr. Waller: The Ruffin Amusement Company is not a party to this case, and I think the Government ought to explain to us.

Mr. Wright: Very simple, I will be very glad to explain it to you, when the Attorney General writes a request.

The Court: On some interrogatories here they wanted to know the amounts that were paid in taxes, etc. for these different companies and I declined to grant this request for interrogatories on the amounts that were paid, on the ground that with the information that was available to the [fol. 1875] Attorney General, at his request, and I didn't see any reason that they should be made public at this time.

Go ahead.

[fol. 1876] Mr. Wright: I would like to offer these letters that have been previously identified; The first letter is dated December 15, 1938.

The Court: What Exhibit is that?

Mr. Wright: No. 239. It is from Mr. Ruffin to Mr. Stengel: (Reading)

"DEAR MR. STENGEL:

While in Memphis this week I find that there is more talk of competition in this section than ever before. There is still some talk of Joe Wiley possibly opening up next year against us at Hickman. Also it seems to be a certain fact that Mr. Henry has a lease on a building at Union City and has gone as far as making the down payment on his chairs, but before going any further he is waiting to see what product will be available for him for a three year deal.

Jimmy Pritchett of Universal stated to me that he was to meet his District Salesmanager at Nashville and see you and Mr. Sudekum Tuesday December 13th. I understand from a reliable source that unless they close a deal with you that he is instructed by his New York office to take a three year porposition from Mr. Henry. At this time I would suggest that in case you did make a deal with Universal, and if the contracts [fol. 1877] have not been signed that our clearance be brought out in the contracts as this past year our competitive points practically played every picture of any importance ahead of us notwithstanding our short commitment.

On most of my trips to Hickman I see Mr. Henry, but since letting Joe go I have not taken the time to go to his office to spend any time with him. I am sure that Mr. Henry's capital is limited, but he states on film row that Union City is not the only town in which he expects to go in competition to Mr. Sudekum. The thought occurs to me if Mr. Henry really is determined to get back into the show business would it be advisable to let him have Hickman back. It may be that he would not even want this town back.

For your information I am also advised by a boy from Covington who goes with a girl in Union City that they expect to have two new shows there soon, but she did not know who was going to open them. It could be possibly that one of these theatres is the one which Mr. Henry is contemplating an opening, and that Mr. Sudekum naturally would open the second house [fol. 1878] himself in case Mr. Henry would come in.

I am also advised by our manager at Milan that this week a stranger was in Milan with California license on his car looking over the situation and stating to some business men and also Jimmy Shoaf he was there for the purpose to consider another theatre.

During our Convention I talked with Mr. McCord, who is associated with Mr. Lightman, and he states that so far only one of their small town- was getting competition, but they expected to fight this competition at the start by putting up the same class house (shot-gun) as near the competitor's location as possible and operate same at ten cents, which operation would be separate and distinct from their other house in the town.

I wish to remain

Sincerely yours • • •"

The Court: I will admit the evidence, not for the purpose of proving the facts stated in the exhibit but bearing on the relationship and activities of Mr. Stengel.

Mr. Wright: The next is Exhibit No. 240, a letter dated December 17, 1938, from Mr. Ruffin to Mr. Stengel, which is [fol. 1879] as follows: (Reading)

"DEAR MR. STENGEL:

With reference to our phone conversation of this morning in regard to Mr. J. Dee Henry of Hickman, Kentucky, beg to advise that rather than put anything into writing I called him after talking to you and talked to him along the same lines as my conversation with you and Mr. Sudekum. He stated that he and Joe were going to Memphis Monday and made an appointment to see me here at the office early Monday morning.

I wish to remain

Yours very truly • • •"

The next letter is dated December 18, 1938, marked Government Exhibit No. 241, and is as follows: (Reading)

"DEAR MR. STENGEL:

As I advised you as to the appointment I had with Mr. Henry and Joe Wiley of Hickman, Kentucky, beg to advise that they were here this morning promptly at eight-thirty.

My conversation with them was along the lines as discussed over the phone with you and Mr. Sudekum Saturday. I find that they are very anxious to get [fol. 1880] back into the show business and really sorry that they sold Hickman. They have combed this territory very thoroughly and have not found anything that would justify them going into, except competitive points and they do not seem to be so keen for that now. Since being blocked at Union City with the second house their thoughts have turned to Mayfield, Kentucky, but I explained to both of them that we were not interested in such a setup, but that at any time they had anything worth while, I would be glad to discuss it with them and if advisable possibly we would be willing to go into partnership.

After the holidays business I am sure that we will have a considerable slump in business, and at this time I have in mind doing some more scouting myself, expecially centering on Dresden, that is, if you think advisable.

I wish to remain

Sincerely ours * * *"

The next is a letter from Mr. Stengel to Mr. Ruffin, in reply, dated December 21, 1938, marked Government Exhibit No. 242, and is as follows: (Reading)

[fol. 1881] "Dear Mr. Ruffin:

I have your letter with regard to your discussion with Mr. Henry and Mr. Wiley. I do hope that they will find some place where they can locate away from our particular territory.

I think you are absolutely right in following up the Dresden situation sometime after the first of the year.

I am very happy to know that your Christmas Party and Dinner was so successful. Kindest regards, * * *"

Next, a letter of May 9, 1939 from Mr. Stengel to Mr. Ruffin, which has been identified as Government Exhibit No. 244, from Mr. Ruffin as to the Paramount franchise, and reads as follows: (Reading)

"Dear Mr. Ruffin:

As you know, under the terms of our franchise, we have the privilege of playing any feature photoplay as

a repeat run in any of the theatres. This repeat run is to be paid for at the same price as HOPALONG Westerns and is to represent additional business over and above our regular commitment.

We have today signed a rider to the effect that we [fol. 1882] agree to notify Paramount within thirty days after the conclusion of the initial exhibition of each feature photoplay in any theatre as to whether or not this picture is to be used second run in that particular theatre or town.

If you elect to repeat a run of any picture, it is necessary that the picture be dated within ninety days of the first run exhibition. It is, of course, also necessary that you notify Paramount in writing within thirty days after the first run exhibition of your intent to use the picture.

Trusting this explanation is clear to you, we are.

* * *"

Then there is a letter from Mr. Ruffin to Mr. Stengel, dated January 7, 1939, Government Exhibit No. 2437 reading as follows: (Reading)

"Dear Mr. Stengel:

I am just in receipt of a letter from our manager at Martin stating that the Star Mail Route Man from Hickman, Kentucky told him last night that Mr. Henry had closed a contract and lease for the J. Gibbs building at Union City, Tennessee to open a theatre at an early date.

[fol. 1883] He further states that the building is located directly across the street from the Capitol, and is now being used as a wrestling arena.

The above is all the information which I have been able to secure. I thought advisable to pass same on to you and Mr. Sudekum.

I wish to remain

Sincerely yours."

There are two more letters that I thought I had identified, but I haven't.

Q. I will show you a copy of a letter dated August 12, 1939, from you to Mr. Stengel, and ask you if that is a copy of a letter you wrote to Mr. Stengel on that date?

A. That is right.

Q. I show you a letter dated August 14, 1939, from him to you and ask you if that is a reply you received from Mr. Stengel?

A. That is right.

Mr. Wright: I will ask to have these marked as the Government's next exhibits.

The Clerk: Exhibits Nos. 245 and 246.

Mr. Wright: The letter of August 12th, from Mr. Ruffin to Mr. Stengel will be Government Exhibit No. 245, and [fol. 1884] reads as follows: (Reading)

"Dear Mr. Stengel:

Since opening our second house at Hickman which has been a problem as to what really would be the best thing for us to do to hold up our grosses. In operating the little house full time for the first two weeks, we did not break even, and since then have only been operating on Friday and Saturday with one change of program. For the past two weeks our grosses have dropped under thirty dollars ($30.00) the average change of program is costing us: feature $10.00; two reels of shorts, $4.00; Serial, $4.00 plus average of $6.00 per week salary, pluss express, advertising, lights and water, insurance, taxes, and other operating expenses. Our admission prices for the small house are: adults 16¢; children, 10¢.

Since the opening of the little theatre our policy at the Ritz Theatre has been six days a week, admission prices main floor, adults 27¢ and children 10¢; Balcony, being divided for Colored and White, admission prices, adults, 16¢ and children, 10¢.

On Saturday we are continuing to run double features with a serial, reserving the entire balcony for our [fol. 1885] Colored trade, as it seems this is the only day of the week we can get any Colored business, using the Main floor for Whites only; admission prices, adults 27¢ and children 10¢.

Conditions have not been any too good at Hickman, softball cutting in heavily as they are using case giveaways.

As we have kept the little house open this long, would you think it advisable to operate same through the fall

months and thereafter only as it would justify. It would not be to our advantage to convert this building into a store building as the rent in Hickman is entirely too cheap. As we will need equipment for our new theatre at Benton, do you think it would be advisable and safe to consider dismantling this theatre so as to use some of this equipment at Benton, or forget our investment at Hickman and keep same intact for assurance against competition? I would welcome any and all suggestions that you may have to offer.

Thanking you, I wish to remain,

Yours very truly * * *"

The reply from Mr. Stengel is dated August 14, 1939, [fol. 1886] Government Exhibit No. 246, and reads as follows: (Reading)

"Dear Mr. Ruffin:

I have your letter with regard to the poor business in the second house at Hickman, Kentucky.

In view of these bad business conditions, I believe it would be a good idea to close the house until some later date. I would not remove the equipment as, when conditions improve, you might want to re-open it.

Yours very truly * * *"

[fol. 1887] Mr. Wright: That is all.

Cross-examination.

By Mr. Waller, for Defendant Crescent:

Q. Mr. Ruffin, I hand you a letter dated January 14, 1939, addressed to you, and signed J. Dee Henry. I will ask you if you received that letter from Mr. Henry?

A. Yes sir, I did.

Q. Shortly after the date it bears there?

A. Yes sir; in other words, the next day.

Q. That was about four months after the Ruffin Amusements had bought Mr. Henry's theatre at Hickman, Kentucky, with the agreement that he would not compete?

A. That is right.

Q. At the time you bought that theatre, did Mr. Henry make any statement as to his future prospects and state

whether or not he intended to go back into the picture business?

A. When I bought Mr. Henry out, he stated that it was taking too much time from his insurance business and that he wanted to get out of the theatre business and he invited me over to sell to me.

Mr. Waller: I offer this letter as Defendant's General Exhibit No. 72.

Q. Mr. Ruffin, what was Mr. Henry's nephew's name?

A. Joe Wiley.

[fol. 1888] Q. That is the same Joe Wiley that is referred to in this letter?

A. Yes sir.

Q. At the time you bought the Hickman, Kentucky Theatre, did you give Joe Wiley a job?

A. Yes sir.

Q. What experience did you have with him, how long was he with you?

A. I gave him a job as Manager and retained him until sometime in October. I started operating the latter part of September and it was almost impossible to get Joe Wiley to run the Theatre according to the way I wanted it and it was necessary to relieve him because he wanted to run it like Mr. Henry wanted it run.

Mr. Waller: I will read this letter, your Honor; it is dated January 14, 1939, and is as follows:

(Reading):

"Dear Mr. Ruffin:

"Referring to our conversation the other night in which I told you that Joe Wiley was considering installing a show in Hickman, he already has the booth equipment, it is his intention to start this work in the next week or ten days.

"I am interested in both of you making money, he does not have one cent to lose, or the folks backing him [fol. 1889] does not have any that they want to lose, he figures that he can run pictures at a price and with the Saturday business make a go of it, that is his problem and not mine.

"I wish that you two would get together and see if there is not something that you can work out satis-

factory to both of you, one show will pay in Hickman but not two, somebody or both are going to lose some money, if there is anyway that I can be of any help, call upon me.

"Yours very truly. * * *"

Q. Now, as the result of receiving that letter, did you confer with Mr. Henry or Mr. Wiley?

A. I made a special trip to Hickman to confer with Mr. Henry.

Q. What did you find out there?

A. We talked at length, one whole afternoon.

Q. You and Mr. Henry.

A. Mr. Henry and myself. At that time he had bought a building, although it was in Joe Wiley's name.

Mr. Wright: Just a minute. I object to the testimony as to what Mr. Henry had done, he can give the conversation that occurred, but what he had done is incompetent. [fol. 1890] The Court: How do you know he had bought the building?

A. It was commonly known on the street there. I didn't, of course, go to the Court House.

The Court: Objection sustained.

Mr. Waller:

Q. Just state what conversation you had with Mr. Henry?

A. I went to Hickman and still followed up the letter and explained to him how unfair it was to treat me that way when I paid him the price he asked; in other words, when we traded I gave him just what he asked. He went on to say that Joe had to make a living and he figured that was the best way he could make it, was to put up a house in Hickman. We discussed at length that Hickman wouldn't stand two theatres. Then the conversation drifted to Union City, and he stated that "If you can get me $6,000.00 profit over and above all I have invested at Union City, and if Sudekum will take my other nephew and give him a life time job as manager of one of his theatres in Union City, and you take Joe Wiley and make him Manager at Hickman, Kentucky for a life time job, I will see that the theatre here in Hickman isn't completed and is converted back to a store building.

Q. Did you accept the pay-off proposition or not?

A. No, I couldn't accept it.

[fol. 1891] Q. What did you do?

A. As I saw that there was no way to protect myself and protect the investment I had in Hickman, Kentucky, and if it was necessary for the second house in Hickman, if it was necessary for me to protect what I had paid Mr. Henry ~~for the~~ Ritz Theatre——

Mr. Wright: I don't think that is responsive to the question. The question is, what did he do, not argue about it.

Mr. Waller:

Q. What did you do and why?

A. In other words, I opened the second house in Hickman, myself.

Q. Now, Mr. Ruffin, there was a letter that was introduced by the Government in regard to your grosses. I believe you wrote a letter to Mr. Stengel?

A. Yes sir.

The Court: Well, we will adjourn now.

(Recess to 1:30 P. M.)

[fol. 1892] Afternoon Session

W. F. Ruffin resumed the stand for further cross-examination.

By Mr. Waller:

Q. Mr. Ruffin, in your letter of August 12th, 1939 to Mr. Stengel in regard to your second house at Hickman, Kentucky you state that "Conditions have not been too good at Hickman. Soft ball cutting in heavily. They are using cash give-aways." Did you in the theatre business suffer from soft ball competition as well as other moving picture competition?

A. Yes, that is right.

Q. Down in West Tennessee soft ball got to be quite a fad, more than in other places, didn't it?

A. That is right.

Q. You asked Mr. Stengel or mentioned to Mr. Stengel—"It has been a problem to know what to do to hold up our grosses." I will ask you whether or not in a town where

you have no competition, it is necessary to experiment with admission prices to see what admission prices bring the greatest grosses?

A. Yes. I might add this: It is easier to lower prices than it is to raise them. If you once get them lowered it is hard to raise them back.

Q. Of course, the higher the admission price the smaller the volume and it is a question of getting the proper admission price to get the greatest gross?

[fol. 1893] A. And in the towns that we operate in, they are all small towns so we don't have the advantage of volume on cheap admissions.

Q. You were asked about the advantage of flat rentals as distinguished from percentage. I will ask you whether or not the advantage of flat rentals is in regard to the latitude that you have in dating your pictures and playing off the pictures when you want to?

A. That is true, after all, in small towns if it wasn't for the Saturday business a lot of those towns wouldn't be operating, and naturally we have only got a few days outside of Saturdays during the rest of the time that we can gross any good money, that is, like on Christmas, New Year's and Thanksgiving, and the major companies have gotten very contrary about their percentage pictures. They want them either on Saturday and Sunday or Sunday and Monday, so if you come to buy a big picture, if the picture is for two days, they want you to play it Saturday and Sunday and Monday.

Q. You said something on our direct examination about these flat rentals in 1937-1938 contract with Loews and Fox; that if you had had a percentage contract you would have paid less money, is that correct?

A. That is correct.

Q. You said you had those figured?

A. Yes sir.

Q. Can you give us those figures?

A. Yes sir.

[fols. 1894-1895] Mr. Wright: Before the figures are offered, do I understand that he is now offering some figures which will contradict the figures that were submitted by the distributors for the actual play-offs under the contract? We intend to offer those answers to interrogatories 15 and 16, which show, purport to show——

The Court: No. He is just offering them for comparison, as I understand.

Mr. Wright: But what I wanted to get clear was whether this data that he is talking about now has already been presumably submitted by each distributor in answer to interrogatories 15 and 16 on these play-off sheets, some of which your Honor has seen—I presume these are the best evidence of the actual rentals paid and I wanted to know at this time whether there was going to be an attempt to show that the distributors had made some errors in compiling these sheets. If not, I think these sheets tell the story, rather than what he has here.

Mr. Waller: I don't see why they would be any better than these.

. . . . . .

[fol. 1896] The Court: All right. Go ahead.

[fol. 1897] A. In 1937-1938 at Newbern with Loews we had four features at $70.00. These four features cost $280.00 and we grossed $683.73, which showed that we played those pictures 41%; whereas the year before we had the pictures on 40%, and the second group were sold to us six at $25.00, where the second group in 1937-1938 were sold to us at $35.00. So it would have been much better in 1937-1938 by quite a few hundred dollars if we had played the pictures on percentage.

By Mr. Waller:

Q. By that you mean on the same schedule?

A. On the same schedule, because they not only charged us four percentage pictures at $70.00 but increased each of the other allocations. You see, we have the right to play the pictures when we wanted to.

Q. That was Loews?

A. That is Loews.

Q. Did you make the same statement for——

A. On the 1938-1939 product of Loews we paid Loews on the four top pictures 63½%.

Q. You mean that is what you actually paid them?

A. Paying them $70.00 a picture amounted to 63½%.

Q. And the percentage on your previous contract was 40%?

A. Yes. Now, on the 1940-1941—we now have gone back to the four top pictures at 40%. On Strike Up The Band at Newbern they only got $32.16 instead of $70.00, and on Philadelphia Story they got $30.80 instead of $70.00.

[fol. 1898] Q. Now then, what about Fox? Did you also give flat rental on Fox's?

A. Yes, percentage pictures of Fox at Newburn in 1937-1938 cost us $26.03 and in 1938-1939 they cost us $38.16, that is, the average, whereas in 1939-40 we paid them for the top pictures $40.00.

Q. Now, 1939-1940 was the new franchise that was negotiated after the Ruffin Amusement Company was formed?

A. That is right.

By the Court:

Q. What did it cost you in 1938-1939?

A. 1938-1939 cost us $38.16.

Q. Was that on a percentage basis?

A. Yes sir, and the second group, by getting that privilege, was raised from $13.78 to $20.00.

By Mr. Waller:

Q. You mean under the franchise?

A. Yes sir, the second group was, instead of being $13.78, was $20.00.

Mr. Waller: Q. Now, Mr. Ruffin, in your experience would you say that the time of the year in which you make a deal with the film companies has anything to do with the terms you are able to get?

A. The later that you buy pictures naturally the cheaper you can buy them because pictures are just like any other [fol. 1899] merchandise. The later that you run a picture the less you can gross on it.

Q. Now, what is your policy now, your practice in playing pictures with reference to whether they are played as early in the season as when you operated individually?

A. I am playing pictures from sixty to ninety days later than I did when I was in the business as an independent.

Q. In general would you say in your experience, other things being equal, that the man that plays the pictures the earliest has to pay the biggest price for them?

A. To get that privilege you have to pay. In other words, you have to buy the product early to have it approved in

time to start dating on release date and usually those products have been sold in the past before any reviews or any pictures have been released.

Q. Now, these release seasons start after or about September 1st, don't they?

A. Except Fox heretofore has always started theirs in August.

Q. So in order to get going at the beginning of the release season you have got to make the deals before that time and get them approved?

A. That is right.

Q. Now, West Tennessee is an agricultural section, isn't it?

A. Strictly. We depend on the rural sections.

Q. Is cotton a pretty important crop?

[fol. 1900] A. At Covington, Newburn and Halls cotton is the principal crop. At Martin, and Greenfield they don't raise as much cotton but it is more or less strawberries and sweet potatoes, and the, of course—but that is in the Chickasaw and it doesn't come in. Humboldt and Milan, of course, are in the trucking section.

Q. Now, does the condition of the cotton crop in West Tennessee in a particular year have any effect of the money that is in the pockets of the people that want to go to picture shows?

A. It has all to do with it. I was born and reared at Covington and it depends on the cotton crop.

Q. Now, if you have a season when there has been a poor cotton crop and you are going to buy pictures for the coming season, do you take that into consideration in the offers that you make to the film companies and in your negotiations with the film companies?

A. We have to do that because in the days before air-conditioning the theatres in small towns used to close up in the summer and you depend strictly on your fall business. In other words, if you don't get your business in the fall you will show a loss for the year.

Q. Now, even with air-conditioning if you come into a season and you are going to try to buy pictures for the coming year and there has been a bad crop, what effect does [fol. 1901] that have on the way that you trade for your pictures?

A. We take that into consideration and if we can't buy our pictures accordingly, why, we just don't rush into any contracts because they have to be bought right.

[fol. 1902] Q. And would you or not say that prices for pictures fluctuate, to some extent at least, with conditions?

A. There is no set value as to the price of any picture; it is based on possibilities as to what the town will gross, or what the surrounding territory or what the town depends on for revenue.

Q. Now, does that vary from year to year and from season to season?

A. Very much.

Q. I will ask you if in the summer of 1937, you had any boll weavil or army worm trouble down in West Tennessee?

A. The best I remember, we had the army worm which shortened our cotton crop considerably; usually the cotton is out of the field by Christmas; and mostly that year the cotton was out by the latter part of November.

Q. Now, Mr. Ruffin, if you make a deal for pictures with one of these film companies and you find from your actual experience in showing those pictures that you paid more than is reasonable in your opinion, and when you go onto the next season does your past experience have anything to do with your negotiations for the coming season?

A. When I did all my buying myself, I never would enter into a deal until I had figured up as to what I had grossed on that company's product the preceding year, as no film [fol. 1903] salesman will call on you unless he has got the cut-off on your town as to how you paid in the past. We have always bought pictures on the confidence we had in the particular company.

Q. Is the price you pay for pictures one season generally set up and used as a precedent in your negotiations for the next season's product?

A. Every year the salesmen come around for an increase; and we say, why, we will go in and give them an increase for a few years; then it just comes to a point that we just give, and give, and that is the reason, a lot of times, that we are not able to trade with the major companies, and we are forced to leave them out, because we are not able to pay for the product what they ask.

Q. If you leave the major companies out for a time, then have you in your experience found it possible to make much better deals from your standpoint than your previous deal?

A. Usually they sell them on that precedent that you paid in the past, but if you are not too anxious to buy and know what you can pay for pictures, you usually can make a better deal, because, after all, these film companies don't get any revenue out of pictures if you don't play them.

Q. And if they are left out one year, usually they are anxious the next year?

[fol. 1904] A. By leaving them out a year we can usually pick up what we lost in the previous year to apply on that product, you see.

Q. In other words, you are able to get two seasons' product instead of one?

A. Instead of one.

Q. Now, before your corporation was formed, were you able at the end of a film season sometimes to trade off some of the poorer pictures you hadn't wanted to play?

A. That was our ace in the hole; we would usually work our contract up until the trade-off; and it was very seldom that we ever bought a new contract if we had some pictures that were not good, "clucks," as we call them, why, we were able to cancel the unplayed portion before we bought a new contract; we have had some companies that would do that. Of course, a few years ago, they cut us out with "the reduction department is closed" or "the cancellation department is closed"

Q. I mean, in your experience as an individual, before you had this corporation, did you tell these companies you wouldn't make a deal with them for the next year if they [fol. 1905] were going to force you to play these "cluck" pictures?

A. In making deals I have been able to get a cancellation.

Q. That was part of the deal?

A. That was part of the deal; that was taken into consideration.

Q. Of course, if you didn't make a deal, you would go ahead and play the pictures, is that correct?

A. That is right.

Q. Now, Mr. Ruffin, when you formed this corporation and sold half of the stock in it, what was your agreement with Mr. Stengel about the management?

A. The agreement with Mr. Stengel and Mr. Sudekum at the time that the deal was closed was that I would run my business just like I had in the past; I would do my

own booking, keep my own books, and if the set of books I was using and the system of bookkeeping satisfied me, it satisfied them, and that they wanted me to just continue running my business just like I had run it before I sold them my business.

Q. When was the film buying business turned over to Mr. Stengel?

A. January, 1937, is when we formed our corporation. In May, 1937, we decided to build the theater in Green- [fol. 1906] field; in May, 1937, I bought Mr. Shepherd's interest in the Chickasaw Amusement in Milan and Humboldt; and in doing all these duties and running the office and keeping the books there, it was impossible for me to do the buying and continue on managing the theaters like they should be, with managers in every town you operate. But I have always had the policy to, as often as we could, visit these particular towns and the manager myself to see how they are getting along and not to leave it with that particular manager. Another reason is, Covington is my home, and it is only a- hour's ride from Memphis to Covington. Well, I don't know how many film salesmen they have with them; but it seems as soon as a film salesman gets back, they run up to Covington to try out what their managers have told them, to see if it would work. Well; if it was a salesman that was a stranger, my wife and I had them in our home as a guest, and when a salesman sees a chance for a contract, they would stay as long as necessary to get the contract; and some of them stayed as long as a week; and if I had kept that up I don't believe I would have had a dime.

. . . . . .

[fol. 1907] Mr. Waller:

Q. One question I am reminded to ask you, Mr. Ruffin: Whether you play pictures later now than you formerly did; I believe I asked you that and you said you did?

A. Yes, sir.

Q. Does the corporation buy them later than you used to buy them as an individual?

A. Yes, sir.

Cross-examination.

Mr. Raftery:

—. By the way, these salesmen were out of what city?

A. St. Louis.

Q. How far is St. Louis from Covington?

A. Something over 300 miles, I would say.

Q. And how far is Covington from Atlanta?

A. Just about the same distance. I have checked up on that, and express from Atlanta to Covington, and the towns [fol. 1908] we are operating in is just about equal; there isn't any difference.

Q. Your towns are a good long distance from either Atlanta or St. Louis?

A. That is right.

Q. Now, let's take your Chickasaw towns: How big a town is Alamo, Tennessee?

A. Alamo is about 1100.

Q. You have one theater there?

A. Yes.

Q. And no opposition?

A. No opposition.

Q. How big is that theater?

A. Including the balcony, about 270 seats, I think.

[fol. 1909] Q. Now the next town I see is Benton, Kentucky?

A. Benton, Kentucky.

Q. You have a town here, how big a town is Benton, Kentucky?

A. Benton in the last couple of years has about doubled its population, it is around two thousand now, it has been on the upgrade due to that Kentucky dam at Gilbertsville, two thousand now.

Q. About two thousand?

A. Yes, sir.

Q. What is the colored population in each of these towns?

A. At Benton, Kentucky, there are only three or four families of negroes there.

Q. Alamo?

A. Alamo, I would say thirty percent or more of the population are negroes.

Q. Have you provision in your theatre at Alamo for colored people?

A. Yes, sir.

Q. And how about Humboldt, Tennessee, how big a town is that?

A. Humboldt is about just about fifteen hundred.

Q. And Halls, Tennessee?

A. Halls is around fifteen hundred.

Q. How big is your new theatre?

[fol. 1910] A. Four hundred and sixty seats, including the balcony.

Q. That Rex theatre in Humboldt?

A. Between six hundred and eighty and seven hundred.

Q. And Milan, Tennessee, how big a town is that?

A. Milan, I believe the last census gave it about thirty-one hundred.

Q. How big is your theatre there?

A. The Milan theatre there is around five hundred seats, including the balcony.

Q. And in each of these towns you have no competition?

A. No, sir.

Q. Now let's look sown at the Ruffin towns, you have two towns, Covington?

A. Thirty-five hundred.

Q. One theater in the town?

A. One theatre.

Q. How big is that theatre?

A. Seven hundred and eighty-fiine seats.

Q. And at Greenville, Tennessee?

A. Greenville is fifteen hundred.

Q. One theatre?

A. One theatre.

Q. The Palace?

[fol. 1911] A. The Palace theatre.

Q. How big a theatre is that?

A. About three hundred and sixty seats, including the balcony.

Q. And Martin, Tennessee?

A. Martin is thirty-five hundred.

Q. One theatre?

A. One theatre.

Q. The Capitol?

A. Capitol Theater.

Q. How big is that?

A. About five hundred seats, including the balcony.

Q. Newbern, Tennessee.

A. Newbern is seventeen hundred.

Q. And one theatre?
A. One theatre.
Q. The Palace?
A. Palace.
Q. How big is that?
A. About three hundred and fifty seats.
Q. You have no competition in any of those towns?
A. No, sir.
Q. And on the allocation of film rentals under the United Artists contract you worked that out with Mr. Stengel or Mr. Sudekum?
[fol. 1912] A. I have always worked that out with Mr. Stengel.
Q. And the price you are to pay for the product bought by you from the United Artists on that contract?
A. That is right.
Q. Under the contracts that have been made since Stengel was in there.
Q. And that was determined solely and wholly by you and Mr. Stengel?
A. That is correct.
Q. And Mr. Stengel or whoever it was, paid the United Artists?
A. Since the United Artists contract was approved, and as soon as it was approved, it was paid. Then we had notice of the approval by the United Artists contract, we mailed our check in the amount for the towns to the Crescent Amusement Company, or in other words, we didn't wait until one was dated, we mailed our check to them for it when we got the contract.
Q. You mailed the check, you had a separate price for each picture?
A. For each picture and each town.
Q. For each town?
A. And the total amount and number of pictures.
Q. I believe you said you had that 1938-1939 was a contract and that the number of pictures was stepped up to [fol. 1913] twelve, fourteen and next fifteen?
A. Yes, sir.
Q. This contract that is in evidence happens to be for the 1940-41 season; on that there are fifteen pictures listed?
A. Yes, sir.
Q. It is a fact that three of those pictures were not made, during the contract, Tanks A Million, Niagara Falls, and

Night Music, those pictures were not made by the producers?

A. I don't know that.

Q. They have not been made available?

A. That is right, they have not been made available.

Q. And you have had twelve made available under this contract how much of your playing time in any one of your towns does United Artists play under a contract like that, a series of pictures of product?

A. Oh might very well that you can have double features on Saturdays, which won't be ten per cent.

Q. How many days do you play these United Artists Pictures?

A. From one to two days, about twelve pictures.

Q. How many days maximum?

A. The maximum is two days.

The Court: Twenty-four days maximum?

Mr. Raftery:

[fol. 1914] Q. Did you run Sunday?

A. All except Covington, Milan and Humboldt.

Q. You were telling His Honor about Saturday business; isn't it wellknown in the theater business that in the average town where you play on Sunday, Sunday's receipts will average about three-tenths of your business?

A. I would say yes, sir, in an average small town they will usually gross as much on Saturday as they will gross during the rest of the week without Sunday.

Q. In your type of towns where you haven't Sunday, Saturday is fifty per cent of your week?

A. Yes, sir.

Q. Where you have Sunday what does the amount run to?

A. I would say yes, sir, where you have a town, it has got down now to Sunday operati[illegible] Monday is the worst day of the week, Sunday's business compared to Saturday is the next day of the week.

Q. Saturday is still your best day?

A. Still the best day.

Q. And on these percentage pictures, every distributor sells percentage, if he sells percentage, wants Saturday, or Sunday or both for playing time?

[fol. 1915] A. That is right.

. . . . . .

Q. What type picture is the one that is liked, is the one you try to take?

A. We have found a western, I tried to do without Westerns on Saturday, but we found out you have to have the Western pictures regardless of whether you double feature or not.

Q. Mr. Ruffin is there any obligation on your part as an [fol. 1916] exhibitor to take product of any distributor?

A. No, sir, and it is no obligation on the distributor to sell that product.

Q. And you feel free at any time you want to leave any distributor out of it out of any town you operate?

A. I have been doing it. In other words, Paramount was out of my operations five years and since I have been operating I have had to leave Loews out twice.

. . . . . .

Q. You have left United Artists out of your trades?

A. Yes, sir, because I couldn't get together with that Branch manager of yours over there, Featherstein, he wouldn't come to reasonable terms.

Q. He wouldn't come to your terms?

A. Yes, and the prices wasn't where I could use it. I am used to it.

Q. And you want to buy the product the same from United Artists——

[fol. 1917] A. I didn't get that?

Q. I will withdraw it. As a matter of fact, Mr. Ruffin, you have to pay some companies a little more than you pay others, do you not?

A. Yes, sir. In other words, I don't expect I have any two contracts identical, although I have had salesmen that have offered to sell me what I would pay the other company, because they would always pick out a company whose product was better than theirs, from the figures I heard.

Q. From the figures I heard Mr. Wright reading about Metro, you paid Metro some seventy dollars.

A. Yes, sir, seventy dollars flat.

Q. Whether you paid on the flat basis or paid on percentage of your top pictures, didn't the salesman, when he

made a flat offer to you, try to arrive at a figure on what he would get on percentage for them if the flat was used instead of a percentage?

A. That is right.

Mr. Wright: Your Honor please, I think that is something that would be for the salesman to testify to.

The Court: What was the basis of your information?

Mr. Raftery:

[fol. 1918] Q. Is that what the salesman asked you for? If the picture is on a flat basis, as to the manner of showing, doesn't he figure on what the picture would earn if it was on a percentage, and if that is not a precedent in the business?

A. Yes, sir. They work towards the end of what any particular picture would earn. The whole business is a gamble, it is a guess.

* * * * * * *

[fol. 1919] Mr. Wright: If the Court please, I want to see the document he has testified from.

A. Yes, sir, this is just a copy of a letter you have.

[fol. 1920] Cross-examination.

By Mr. Frolich:

Q. Mr. Ruffin, you testified this morning with reference to a compilation which is Government Exhibit No. 236, regarding the rental paid for your Theatre in Newbern to the Columbia Pictures Corporation for the season 1934-1935, down to and including the season of 1940-1941. You recall that, don't you?

A. Yes, sir.

Q. Now, I show you a group of contracts between the Ruffin Amusement Company and the Columbia Pictures Corporation for Newbern, Tennessee, and I ask you whether these contain your signatures? Please look at the little white sheet in here.

A. All of them bear my signature, except this one of Mr. Stengel's.

Q. These represent the contracts that were entered into by your Company, Ruffin Amusement Company with the Columbia Pictures Corporation for Newbern?

A. I didn't notice to see. It is considered so.

Q. Those all bear your signature from 1932 to 1940?

A. Yes, sir.

Q. Now, I will ask you, Mr. Ruffin whether it isn't a fact that after the contract of 1936-1937 the Ruffin Amusement Company took over Columbia's product for the following season under an agreement made between it and the Chickasaw Amusement Company and Ruffin Amusenrent Company to salvage $750.00 worth of unplayed product of an [fol. 1921] exhibitor, or two exhibitors, H. K. Perry and C. H. Lewis in Alamo, Tennessee?

A. I think that is correct.

Q. In other words, these two exhibitors had not carried out their contracts with Columbia Pictures in Alamo, Tennessee, prior to 1937 or during 1937?

A. Well, the reason of that is, those two exhibitors sold the theatre to the Chickasaw Amusement Company.

Q. And the Chickasaw Amusement Company took over the unplayed portion of the contract?

A. No, the Chickasaw Amusement Company assumed no contracts whatsoever in that town.

Q. Well, what did—How was the arrangement made for the $750.00?

A. In the regular selling season, that is for the year—What season is that, now?

Q. 1937-1938?

A. 1937 and 1938, for that year's product we had not been able to get together with Columbia and wasn't playing Columbia's product.

Q. In Newbern?

A. Wasn't playing it in any of the towns. In December, the Chickasaw Amusement Company bought the theatre at Alamo from those two exhibitors, Lewis and Perry, who had Loew's and the reason they were forced to sell was on account of the unreasonable prices they were paying for [fol. 1922] films. I didn't go to Alamo to buy the theatre, they came to me at Covington to sell it to me. I looked over the contracts and I realized I couldn't pay the prices. I went to Memphis, to your Branch Office and I saw the Branch Manager, Mr. Rogers, and I told him I wanted to complete the contract but there would have to be some kind of an adjustment. Mr. Rogers told me if I couldn't play the contract as it was, he would rather for me not to play it at all. So I didn't play it at all. And the next thing I

knew, through the Memphis paper, I saw there was a suit filed by the Columbia Pictures Corporation against these two exhibitors and the Chickasaw Amusement Company and Stengel and Sudekum and myself. The reason that we were included in the suit is that they figured possibly we hadn't paid those two exhibitors all we owed them for the equipment.

Q. That you had taken over?

A. Yes, sir. We were then operating the theatre. Then the suit went on and after numerous trips to Memphis and talking with their attorney and Mr. Rogers and with my attorney, I came to the conclusion it would be foolish on my part to see Mr. Lewis, who was the father-in-law of Mr. Perry, have to pay around $1400.00 for films he didn't have a theatre to play them in. And that is the way the suit was settled, in agreeing to play the $750.00 worth of product in any of the towns we operated in. The way the prices were made, they were just the schedule prices set up for [fol. 1923] each town, but we didn't have to play them in Alamo or Newbern, but anywhere we wanted to play them we could play them.

Q. So that the schedule of prices on this deal that you got from this man for 1937-1938, represented a schedule of prices that was arrived at by adjustment?

A. By an adjustment of the lawsuit.

Q. In the following year, 1938—No, 1939-1940, do you recall that there was a similar adjustment with reference to another situation?

A. Yes, sir.

Q. What was that situation, do you remember?

A. It was with reference to the towns that I was operating in.

Q. Was that Union City? Was Mr. Henry in Union City?

A. I don't believe it was Union City.

Q. Look at this and see if it refreshes your recollection.

A. I didn't make that contract.

Q. Didn't the Ruffin Amusement Company take over a part of the commitment of that contract?

A. Yes, sir.

Q. Do you recall that the prior commitment was for $2,000.00?

A. Yes, sir.

Q. And under that commitment—What town was it for?

[fol. 1924] A. I don't know.

Q. Suppose I refresh your recollection by showing you a document which Mr. Stengel entered into with reference to this commitment? I show you these towns. Do you see Newbern on this list of towns?

A. Newbern, yes.

Q. You played it in Newbern, the proportionate part of the $2,000.00 commitment, under the schedule?

A. The schedule prices of all the towns, yes, sir, that is right.

Q. So that the film rental that you paid for the 1939-1940 contract represented the actual play-off on a part of the commitment in settlement and adjustment of a controversy in Union City?

A. I wouldn't say Union City.

Q. In some other city, some city other than Newbern?

A. That is right.

Q. In other words, the very last contract that your Company entered into with Columbia in the ordinary and usual course of business, was the 1936-1937 contract, wasn't it?

A. No, the usual course of business, was 1940-1941.

Q. In 1940-1941?

A. Yes.

Q. That contract is not in evidence, I haven't got it. But I mean, up to this point, until 1939-1940?

A. 1936-1937 was, yes.

[fol. 1925] Q. Handled in the ordinary and normal manner?

A. Yes sir, that is right.

Mr. Frolich: I would like to offer in evidence Columbia Exhibit No. C-43.

Re-direct examination.

By Mr. Wright, for the Government:

Q. Can you tell us when these other theatres that are mentioned here were acquired? That is, the theatre at Greenfield; what was the date of that acquisition?

A. The theatre building was built, we built a building and opened it, as well as I remember, on July 25, 1937.

Q. That was built by your corporation?

A. It was built by the Ruffin Corporation.

Q. Then the Humboldt Theatre was taken over in September, 1938?

A. No; just two years ago, September, 1939.

Q. And the theatre at Halls, Tennessee, was acquired when?

A. The opening was the first part of December, 1939, as well as I remember.

Q. December, 1939.

Mr. Wright: I withdraw the three Exhibits relating to Halls, I think, and Greenfield—They are Government Exhibits Nos. 233, 234 and 237.

The Court: What are those exhibits?

Mr. Wright: Those are the tabulations for those towns [fol. 1926] which were acquired subsequent to the formation of the Rockwood Amusement Company. so that there could be no before-andafter comparison because he did not operate them subsequently.

The Court: Who owns the theatre at Alamo?

A. Chickasaw Amusement Company.

The Court: Humboldt?

A. Chickasaw Amusement Company.

The Court: Halls?

A. Ruffin Amusement Company.

The Court: Milan?

A. Chickasaw.

The Court: Covington?

A. Ruffin.

The Court: Also Greenfield, Martin and Union City?

A. That is right. Ruffin has six towns; Covington, Newbern, Martin, Greenfield and Hickman.

Mr. Wright:

Q. Chickasaw theatres were all acquired at the time—Chickasaw, your first interest in Chickasaw Theatres was acquired at the time you got your half interest in the Chickasaw Amusement Company?

A. No, in buying Chickasaw Amusement Company, I only got Mi- and Humboldt.

[fol. 1927] Q. What is your Chickasaw town?

A. Alamo, was the next town we added.

Q. Alamo was acquired after the Chickasaw Amusement Company was formed?

A. That is right.

Q. You didn't have any Alamo theatre up until that time?

A. Chickasaw bought Alamo in December, 1937.

Q. This tabulation that you have made refers exclusively to contracts that were made and pictures that were played after the Ruffin Amusement Company took over these operations, isn't that right?

A. Yes, sir.

Q. You have the fitures here as to what certain selected pictures——

A. You see, those are the pictures that they designated as their "4-O Top".

Q. "4-O Top" pictures.

A. Yes.

Q. You have shown here the gross that the pictures took in at your own theatre?

A. Yes.

Q. All these tabulations showing the number of days that you played them?

A. No, but our records do.

[fol. 1928] Q. You have records that show how long they played. Do your records also show the day of the week they played?

A. Day of the week and whether it was a cash-out or not.

Q. All that these records show, as I understand it, is the flat rentals that you paid on the Loew pictures actually run, from 41 per cent, or from 39 per cent to 63 per cent of the gross?

A. That is right.

Q. Of course, for the flat rental pictures, you were able to play them any day of the week that you chose?

A. That is right.

Q. Or as long as you wanted to?

A. Oh, I would say this; We had the privilege, when we bought the pictures flat rental, to play them either two or three days. Most of those larger pictures were played three days, which really helped the pictures' gross more on flat rental. Nevertheless, you can see what we paid. I didn't bring that evidence here to use it, but as it was, Scott asked me, and I knew we were paying more for product—I don't like to say anything that I couldn't back up and I more or less got that information up for myself.

Q. Now, you have complete records, haven't you, you say you have the amount that each picture grosses while it is played in the theatre?

A. Our system of running our business, we have a daily [fol. 1929] report, we have a weekly report and we have a cut-off book which shows a cut-off on each Company.

Q. You have been keeping those same records for the period both before your Ruffin Amusement Company was organized and after?

A. Frankly, we only started keeping this system after I made my connection with Mr. Stengel.

Q. Didn't you, prior to that time, keep a record of the grosses?

A. No, it was individual business. I didn't even have daily reports printed; we just used a five-cent note book.

[fol. 1930] Q. So you haven't any record which would enable you to compare the percentage of the gross receipts received from the exhibition of any particular company's pictures with the film rent after and before the period that Ruffin took over?

A. I was going to tell you there that if I had kept that kind of system I couldn't present it because on January 29, 1936, we had a fire and we lost everything. We didn't save anything then in the theatre except a popcorn machine.

Q. You haven't any records at all which would enable you to make a comparison then between the percentage of gross that you had to pay in film rentals to these companies after Ruffin took over and what you had to pay before?

A. The only way that I could get that information would be from the distributors own files themselves because all my records——

Q. Their files wouldn't show the gross of your theatre?

A. No, but if it was a percentage picture it would show what we paid them.

Q. Yes. And one of your objections to percentage pictures is that it does give the distributor a line on your gross, is that right?

A. Yes. I don't think you understood me there; that if I did have those records, I couldn't produce them because they were lost in the fir-.

Q. I understand you haven't the records, in any event.

[fol. 1931] Q. Does Mr. Stengel also hold an office with the Chickasaw Amusements?

A. Yes, sir.

Q. What is his position with that company?

A. Vice President.

Q. And he does the film buying also for Chickasaw?

A. Yes, sir.

Q. And what compensation does he receive for that?

A. $50.00 a week, but I might say this, that he is not drawing any money at the present time out of Ruffin or Chickasaw. We have dispensed with salaries.

Q. Now, when did that happen?

A. That happened January 1st.

Q. You don't mean he is no longer connectec with the company?

A. I might add this; we are not paying our officers cash money in salary. We are crediting it to their account on the books.

Q. Subject to later distribution from earnings, is that it?

A. That is it, if we have it.

Further this witness saith not.

[fol. 1932] Earl Hendren, next witness, recalled, testified as follows:

Direct examination.

By Mr. Wright:

Q. You are the same Earle Hendren that testified here?

A. Yes, sir.

Q. Since that time you have made a search of the records of the Cherokee Amusement Company to see if you could find the records to show how that organization of the Parrott-Hendren theatres was handled?

A. Yes, sir.

Q. Have you been able to find any records that show?

A. No, sir.

[fol. 1933] Mr. Armistead. If I may, Mr. Wright; last evening we asked that the book-keeper check up and see if he could find the set-up when Parrott and Hendren sold out their theatres. There was no allocation made to the respective theatres at Erwin and Lafollette, just using those two towns for illustration, there were no allocations made as to them and the various leases, and when the government came down to check the books for income tax pur-

poses, those representatives could not find any allocation at that time. I just name that statement to show that there is nothing trying to be withheld. It just is not in existence.

Mr. Wright.

Q. Mr. Hendren, you also made search for what agreements the Cherokee Amusement Company had, in which any one agreed not to compete with Cherokee?

A. Yes, sir.

Q. And I believe the only agreements you were able to locate or that have been produced is the one with reference to Newport, Tennessee, a copy of which was already introduced in evidence, and t-is is the agreement, dated November 9, 1939, with Mr. Godchaux is that correct?

A. Yes, sir.

[fol. 1934] Q. Those are the only two you could locate?

A. Well there is one there for sprucepine too.

Q. No, this is Godchauz one of the agreements that refers to Marshall, Tennessee, and that Spruce pine one I believe has also been introduced in evidence before. Other than those three you have not been able to locate any?

A. That was all there were.

Q. I will ask to have this agreement with Mr. Godchauz marked with the next Government exhibit number, and offered in evidence. Agreement with Mr. Godchauz with respect to the town of Marshall, Tennessee.

Mr. Armistead. Is that the original; that is the only original that the witness has made; you may have it copied and substitute a copy?

The Court. Yes. For how long a period of time does that cover?

Mr. Wright. That I believe is for five years and is limited to the situation at Marshall. That is all.

Cross-examination.

By Mr. Armistead.

[fol. 1935] Q. Mr. Hendren, the records of Cherokee Amusements, Inc, which you were called to search for and produce, and turn them over to Mr. Simons to be Simonized, did you not?

A. Yes, sir, I made the search.

Q. Now I will ask you if when the Crescent Amusement Company entered Greenville, Tennessee, if during the time you continued to operate your theatre there, if any of the product was taken away from you which you had at the time The Crescent Amusement Company entered?

Mr. Wright. Of course, if the Court please, I think this is a part of the defendants' case. Mr. Hendren is secretary-Treasurer of one of the defendants in the case, I assume he will be available as a witness for the defense at a latter date, for that reason I do not see any necessity for him to put long on their case, they are not at this particular point, he was called by us as an adverse witness under rule 43 (b).

Mr. Armistead. And at the time he was questioned about the film contracts he had at Greenville and Maryville, Tennessee, and cross-examination was reserved until a future day.

Mr. Wright. I assumed that was when you were going [fol. 1936] to call him as part of your case.

Mr. Armistead. He was asked to come back and bring certain papers, and I reserved cross-examination.

The Court. I recall your reserving the cross-examination, I do not recall that he was examined about these particular matters.

Mr. Wright. I did examine with reference to the business at Greenville and Maryville, prior to the time Cherokee took those towns over.

The Court. Yes, sir, then this would be competent as cross-examination.

Mr. Wright. Yes, I can see that, the only question was whether it should be done now as a part of our case, or at a later date.

The Court. Go ahead then, let's get him in while we are here.

Mr. Armistead:

Q. Do you recall what product you were using at Greenville?

A. At the time the Crescent came in there?

[fol. 1937] Q. Yes, sir?

A. We were using Vitagraph, Fox, RKO, Paramount.

Q. Now then you were questioned about if you were able to obtain Warner film product for Greenville, if it was not sold to Crescent rather than to you; did you endeavor to

get or tell a fellow named Salesman Bryan, that you were sore because you would not sell product, Warner product for Greenville, wouldn't sell Warner Product for Greenville?

A. I didn't tell him I was sore, I told him that I didn't think it was good for Greenville.

Q. Did you make a remark about that for Greenville? That you had no pr-duct for Greenville?

A. No.

Q. Why not?

A. I didn't want it, I had plenty of pictures.

Q. Why were you talking to Bryan then telling him you didn't want it?

Q. There were two reasons for that, may be more; one was to get rid of him because I knew he sold Crescent and he couldn't sell me for Greenville, and he was very persistent, wanted to sell me the other theatre, just like a book agent, I couldn't get rid of him, and I said if you can do this, I didn't want it, but I knew it was impossible for him to do it.

Q. Let's get to Maryville, Tennessee; Sudekum, or Crescent, was already there when you entered Maryville, was it not?

A. Yes, sir, I went in on Crescent.

[fol. 1938] Q. What product did you get there in Maryville?

A. Well for the time we did call on Paramount, RKO Fox, United Artists, and I believe some Universal.

Q. Well at any time, did you take Fox away from Crescent?

A. Yes, sir.

Q. Well you were there in Maryville, was it while you were there in Maryville?

A. Yes, sir.

Q. Did at any time Crescent take any product away from you?

A. They did Paramount after we had had them for a while.

Q. How many years product did you have available for use there in Maryville?

A. We had two years.

Q. Do you remember what two years that was?

A. It was 1933, 1934, *1934*, 35, and anything back of that that we wanted, they had prints of it.

Q. Did you have enough pictures there to make your show?

A. Yes, sir.

Q. Did you have enough pictures to make as many changes in your theatre as the Crescent Amusement Company was making in its theatre?

A. Yes, sir.

Q. At Maryville?

A. Yes, sir.

[fol. 1939] The Court: Were they all the pictures you had to operate in 1933-34, and 1934-35?

A. No, sir, that was not Fox.

The Court: Paramount, Fox and Universal?

A. Yes, sir, well Fox was 1934-35, we didn't have them the first year, Mr. Sudekum had them and we got them later.

Mr. Armistead: That is next year's product?

A. Yes, sir.

Q. I will ask you if you did not also before you sold out to Crescent use product for the 1936-37 product of RKO?

A. In Maryville?

Q. Yes?

A. Yes, sir.

Q. Now did you try to purchase that 1935-36 product Paramount, before Mr. Sudekum bought it out at Maryville?

A. What product?

Q. Paramount 1935-36?

A. No, they tried to sell it to me.

Q. And then sold it to Mr. Sudekum?

A. Yes, sir.

Q. Mr. Hendren, did you happen to be in Morristown [fol. 1940] when Tim Smith opened his theatre there?

A. Yes, sir.

Q. Did you talk to him?

A. Yes, sir.

Q. I will ask you if in substance he did not tell you that Crescent or Mr. Sudekum would give him fifteen thousand dollars that he would sell out his theater in Morristown and would not enter Columbia, Murfreesboro or Maryville.

Mr. Wright: This does not come under the head of cross-examination now, because I did not go into any Morristown situation with this witness.

The Court: Do you have any further cross-examinaton?

Mr. Armistead: Yes, sir.

The Court: Go ahead and answer the question.

A. Yes, sir, he told me that.

The Court: What did he tell you?

A. He told me that if Mr. Sudekum would give him, he said he had sent word to Mr. Sudekum if he would give him fifteen thousand dollars he would turn over the equip-
[fol. 1941] ment he had in the theatre which he had opened in Morristown, and that he would agree not to build a theatre in Columbia, Murfreesboro and Maryville. I might add this, I asked him if he thought Mr. Sudekum would pay out that kind of money, and he said, well it would be worth fifteen thousand dollars to Mr. Sudekum for a nuisance value.

Mr. Wright: Did you pass the proposition along to Mr. Sudekum?

A. I think he had sent it by somebody else.

Q. What did you do after he told you that?

A. It was so ridiculous I didn't know that I did anything.

Q. You didn't inform Mr. Stengel or Mr. Sudekum?

A. I don't believe I did, I may have later, I don't think I did at the time, I am sure I didn't.

Q. When youtold him that later, when was the first time?

A. Oh probably the next time I had occasion to see him, I don't know just when.

Q. Did you know what Mr. Sudekum said about it?

A. I didn't tell him until after and he just kind of laughed.

The Court: Said it would be worth it as a nuisance value?

A. Yes, sir.

[fol. 1942] The Court: Might have been at that.

A. I wouldn't say he said the word nuisance, but he said trouble, aggravation, or something like that. That was what he meant.

Mr. Wright:

Q. You said you were buying Paramount, Fox for your theatre at Maryville? 1934-35, or was that at Greenville?

A. I was buying Fox for all the towns.

Q. You had Paramount for both Greenville and Maryville for the 1933-4 and 34-5 seasons?

A. Yes.

Q. You were not in Maryville for the 1933-4 season?

A. I was using it, the 1933-4 included from the fall of 1933 to the fall of 1934.

Q. You went in in the fall of 1934 into Maryville?

A. Yes, sir.

Q. And when you bought the 1934-5 Paramount pictures, you also talk about the 1933-34 at the same time, is that right?

A. Yes, sir.

[fol. 1943] Mr. Wright:

Q. Then you say the pictures were offered to you at Maryville for the 1935-1936 season?

A. Yes sir.

Q. Who made the offer to you?

A. L. C. Law.

Q. Who is he, a Paramount salesman?

A. Yes.

Q. Where did you have this conversation with th-m?

A. He talked to me several times; once in Knoxville, once in Maryville and two or three times in Greenville.

Q. When was the first time?

A. I couldn't recall that but that was the topic of conversation and negotiation for, oh, four of five months.

Q. When did it start?

A. I couldn't say just when it started; probably six months before they sold Mr. Sudekum.

Q. When did they sell Mr. Sudekum?

A. The first I heard about it was in the Spring of 1936.

Q. You are referring now to the 1935-1936 season product?

A. Yes sir.

Q. How did you hear about it?

A. I believe a Columbia salesman told me.

Q. Well, did you notice when the pictures started to play in Sudekum's opposition theatre there?

[fol. 1944] A. They didn't start to play until after they sold out Sudekum; that was the 1936-1937, he bought, I believe that is right.

Q. 1936-1937?

A. I believe it was 1936-1937.

Q. What happened with the 1935-1936?

A. I believe we had that. I believe what we bought was 1934-1935 and 1935-1936. As I recall it, Sudekum didn't play any Paramount pictures while we were in Greenville or Maryville.

Q. You had 1934-1935 and 1935-1936, before he came in there?

A. I think that is the way it was—Not before he came in there; he was already in there. We went in there on him.

Q. Now, this product, you say, this Fox product you say you took away from Crescent; where was that, Maryville?

A. Yes.

Q. What season was that?

A. That was 1935-1936.

Q. That was for what theatre?

A. That was for the Park, in Maryville.

Q. That was the theatre that had been previously leased by Sudekum?

A. That was the theatre we were operating.

Q. Yes, but before you operated it?

A. Sudekum operated it before we did, yes.

[fol. 1945] Q. When did he drop it?

A. We got the lease, his lease expired and we got it before it expired, or something of that kind.

Q. When was that?

A. We got the lease, I believe it was along in August, 1934; it was signed, maybe, in the middle of the summer, I am not sure.

Q. He had showed the Fox pictures in 1933-1934 season?

A. Yes.

Q. You played them at the same theatre for 1934-1935 season?

A. We played them in the 1935-1936 season.

Q. What did they play for the 1934-1935 season?

A. Who, Sudekum?

Q. Now, where did Fox 1934-1935 product play in Maryville?

A. They played in the Crescent house, I presume. I am sure they did because we bought them second run.

Q. What was the name of the Crescent house?

A. The Capitol.

Q. When was it the Crescent began operating the Capitol there?

A. It was in 1935.

Q. That was after you had taken over the Park?

A. Yes sir.

Q. Do you remember when, in 1935, that was?

[fol. 1946] A. No. I believe it was in May.

Q. May, 1935?

A. I am not sure, I believe that was the date, the month.

Q. When did they play this 1934-1935 Fox product?

A. Well, they played it in 1934 and 1935.

Q. Well, they didn't operate there until May, 1935, according to what you have just said?

A. Oh yes, they had the Palace theatre there.

Q. When did they acquire the Palace?

A. They acquired it when they found that we had taken their lease.

Q. When was that?

A. I don't know the date—you mean, when we took the lease?

Q. Yes?

A. We took the lease in 1934.

Q. Then they opened the Palace there in 1934?

A. Yes sir.

Q. And they played the 1934-1935 Fox product at the Palace?

A. I don't know where they played it.

Q. Do you know that they played it at all?

A. Yes.

Q. You don't know where it was played?

A. Yes I do. I do know some pictures they played at the Palace and they probably played some in the Capitol after the Capitol was opened.

[fol. 1947] Q. That was during the 1934-1935 season?

A. Yes sir.

Q. When was it you bought Fox for the Park?

A. We bought Fox for 1935-1936.

Q. The 1935-1936 season. When was it that you made the contract, do you recall?

A. No sir, I don't remember the date.

Q. Do you remember what time of year it was?

A. No, I don't remember that.

Q. Do you remember what year it was?

A. Well, it was a year before we made the deal with Mr. Sudekum.

Q. Do you remember who made the offer to you?

A. I believe Mr. Wilson, Paul Wilson and Mr. Fairchild.

Q. As a matter of fact, it was not offered to you until very late in the season, isn't that right?

A. I don't recall.

Q. Probably in the Fall, late Fall of 1935?

A. That is about when you buy pictures anyway, in the Fall.

Q. You don't recall whether the Fox pictures were offered to you in October, November or December?

A. I couldn't say about that.

Q. It might have been that late, might it not?

A. I beg pardon?

Q. It might have been as late as December, might it not?

A. It might have been.

[fol. 1948] Q. Or even January, 1936?

A. I don't believe it was that late. As I recall, we played Shirley Temple on Christmas day.

Q. You knew, didn't you, that Crescent had previously declined to buy Fox pictures for that season, isn't that a fact?

A. They didn't tell me that.

Q. The salesman didn't tell you that?

A. No sir.

Q. Don't you know that was at the time when Fox was selling away from Crescent, generally?

A. He sold us away from Crescent.

Q. Didn't they tell you they were trying to sell other independents at that particular time?

A. I don't know that they were.

Q. You say in Greenville the only product you lost to Crescent was Warner Vitagraph?

A. We didn't lose that, we just refused to buy it.

Q. You refused to buy it after they had already sold it, as I understood your testimony?

A. No, I refused to buy it, I don't think they had sold it when I refused to buy it.

Q. You previously testified one of the reasons you didn't buy it, was because they had already sold it?

A. That was later, I refused to buy for Lenoir City and Sweetwater and other towns because they had sold to Crescent.

[fol. 1949] Q. They sold to Crescent before they gave you the opportunity to buy, isn't that right?

A. No, the salesman tried to sell me long before Crescent opened their house.

Q. Who was that salesman?

A. Randal Bryan.

Q. When did he try to sell it to you?

A. He tried to sell it, oh, in the spring after it was announced, that Crescent was coming in there. He tried to sell it several times.

Q. When was the first time?

A. I couldn't be positive about that?

Q. You didn't buy it because you had so many pictures you didn't know what to do with them, isn't that right?

A. Yes.

Q. Crescent was coming in there in opposition and you needed more pictures than you could get?

A. That was one reason I didn't buy it. I couldn't get along with their salesman. He had a lot of ideas that didn't fit into our set-up.

Q. After Crescent came in, you still had all the pictures that you needed?

A. Yes sir.

Q. You could buy just as good pictures as the Crescent played?

[fol. 1950] A. Played better.

Q. Made more money than you ever did before?

A. No sir.

Q. Why didn't you make more money.

A. I never did make much money.

Q. Well, you made just as much while they were competing, isn't that right?

A. Well, some weeks we made more, some weeks we made less.

Q. How about the whole time they were in there, as compared with the time before they were in there?

A. Well, I guess we made less.

Q. When, during which period?

A. Probably right after the first came there.

Q. I believe you said you made a search for the correspondence or any memoranda that you had of your dealings with the distributors while you were with Parrott & Hendren?

A. Yes sir.

Q. And you didn't find anything, is that right?

A. No sir, we did not.

Further this deponent said not.

* * * * * * *

[fol. 1951] Mr. Wright: If the Court please, we have a letter here that should have been offered before and I would like to offer it at this time. It relates to the testimony of Mr. Hendren. You may recall he testified to having bought the Fox 1935-1936 product for Maryville, and this letter is a letter from Mr. Hendren and Mr. Parrott to the Fox Film Corporation, dated February 7, 1936, which was produced by Fox and I would like to offer it at this time. It relates to that transaction of the purchase of the Fox 1935-1936 product by Mr. Hendren for Maryville.

The Court: I don't recall his particular testimony about that.

Mr. Wright: I asked him whether he—He at first testified, when Mr. Armistead examined him, that he had taken away this 1935-1936 product from the Crescent. Then I asked him, if you remember, when he bought it, if it wasn't a fact that he had bought it late in the year after it had been rejected by Crescent, and then he said he didn't have any [fol. 1952] such statement as that to be the fact. This letter, I think, shows that was the fact.

The Court: All right.

Mr. Wright: The letter, as I say, is dated February 7, 1936, and is addressed to Mr. Fairchild, Fox Film Corporation, Atlanta, Georgia, and is as follows:

"Dear Fairchild:

I went over to LaFollette this week and had a long conference with Mr. Parrott, and he asked me to inform you and Mr. Wilson that we could not submit a proposition for our holdings at this time.

We have been discussing a proposition with other interest parties, and Mr. Parrott feels obligated to those parties, and does not feel like it is the thing to do until something has been definitely decided as to a possible disposal of our competitive situations to parties now interested and with whom we have been negotiating.

If your office intends to approve or reject a deal from Mr. Sudekum, I can assure you that it will be to your [fols. 1953-1961] advantage to quit stalling and make some immediate disposition of the situation, or it might be too late for us to be of any benefit to you in the event your service became available for Maryville.

I might add, that should you take immediate action and advise us of the avilability of your pictures for Maryville and an additional year in Greeneville, the present negotiations might be discontinued.

Let me also suggest that you either close with Crescent or be in a position to sell us immediately as I can only assure you that immediate action is necessary.

Yours very truly, —— ——."

This will be the next number.

The Clerk: Exhibit No. 258.

The plaintiff here rested its case in chief.

[fols. 1962-2244] [Stamp:] Filed Gov't. Exhibit No. P-23 J. D. Henry, Testimony, July 16, 1941, L. B. Ormes, Clerk. By S. E. Dann, chief D. C.

April 19, 1939.

Paramount Film Distributing Corporation, 1501 Broadway, New York, N. Y.

GENTLEMEN:

Re: Union City, Tennessee.

Referring to our agreement dated July 28, 1938 as of November 1, 1937, and all riders thereto, it is understood and agreed that the license therein granted with respect to Union City, Tennessee, shall be and the same hereby is amended and modified so that the remaining unexhibited flat rental feature photoplays, short subject photoplays and Paramount Sound News shall be exhibited in either the Capitol, Opera House or Ritz Theatres in Union City, Tennessee instead of in either said Capitol or Opera House Theatres. It is expressly understood and agreed however, that the feature photoplays licensed upon percentage basis shall be exhibited in only said Capitol Theatre.

Except as herein expressly provided, the aforementioned agreement and all riders thereto shall be and remain in full force and effect.

Kindly signify your agreement hereto by signing underneath the words "Agreed to" at the bottom this letter.

Very truly yours, Crescent Amusement Company.
By Tony Sudekum.

Agreed to:
Paramount Film Distributing Corporation.
By O. Morgan.

* * * * * * * * *

[fol. 2245] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DIRECTING EXHIBITS TO BE SENT UP IN ORIGINAL FORM —January 11, 1944

By consent of the parties, and for good cause shown, it is ordered that the following exhibits designated in the Amended Praecipe of Appellants, The Crescent Amusement Company et al, be sent up with the record in their original form, towit:

Plaintiff's Exhibits: P 16; P 24; P 29; P 30; F. 8; F 12.
Defendant's Exhibits: 220; 221; 222; 227; 228; F 15.

The Clerk will include a copy of this order in the transcript of the record.

Approved for entry:

George H. Armistead, Jr. (S.), William Waller (S.), Attorneys for Appellants, The Crescent Amusement Company, et al. Horace Frierson, U. S. Atty.

Enter: Jan. 11, 1944. Elmer D. Davies (S.), Judge.

[fols. 2246-2254] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

MOTION OF THE DEFENDANT EXHIBITORS, THE CRESCENT AMUSEMENT COMPANY, ET AL., TO STRIKE PORTIONS OF PLAINTIFF'S EVIDENCE AND EXHIBITS—Filed August 5, 1941

Come the defendants, The Crescent Amusement Company, et al., referred to as defendant exhibitors, and having, for convenience, joined in the making of this motion, and now move the Court to strike the following portions of plaintiff's proof and exhibits:

(For convenience, defendant exhibitors will be referred to by abbreviations such as Crescent, Cumberland, etc., rather than by their full corporate names, and similar abbreviations will be used for the distributors.)

* * * * * * *

[fol. 2255] 24. All inter-office or inter-company memoranda and correspondence of Universal. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Universal, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were [fol. 2256] written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

25. All inter-office or inter-company memoranda and correspondence of United Artists. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and United Artists, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written

them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

26. All inter-office or inter-company memoranda and correspondence of Columbia. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Columbia, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

27. All inter-office or inter-company memoranda and cor-[fol. 2257] respondence of RKO. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and RKO, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

28. All inter-office or inter-company memoranda and correspondence of Fox. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Fox, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their duties, and these facts are not relevant or material to any issue in the case.

29. All inter-office or inter-company memoranda and correspondence of Paramount. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Paramount, and no such case has been proven. In any event, said exhibits are no proof [fol. 2258] of the truth of their contents, because the only evidence relating to them is that the letters and memoranda

were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

30. All inter-office or inter-company memoranda and correspondence of Warner Brothers. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Warner Brothers, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

31. All inter-office or inter-company memoranda and correspondence of Loew's. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Loew's, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not [fol. 2259] relevant or material to any issue in the case.

William Waller, Geo. H. Armistead, Jr., Attorneys for Defendant Exhibitors.

Armistead, Waller, Davis & Lansden, Of Counsel.

[fol. 2260] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

SUPPLEMENTAL MOTION OF THE DEFENDANT EXHIBITORS, THE CRESCENT AMUSEMENT COMPANY, ET AL., TO STRIKE PORTIONS OF PLAINTIFF'S EVIDENCE—Filed August 7, 1941

Come the defendants, The Crescent Amusement Company, et al., referred to as defendant exhibitors, and having, for convenience, joined in the making of this motion, now move the Court to strike the following portions of plaintiff's proof:

(For convenience, defendant exhibitors will be referred to by abbreviations, such as Crescent, rather than by their full corporate names, and similar abbreviations will be used for the distributors.)

1. That portion of the testimony of the witness, Rubel D. Page, in which he, in substance, testified that Mr. McClure, a representative of Fox, told him that the Fox pictures for the season 1938-1939 had been sold in Mt. Pleasant, Tennessee, to Crescent.

This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that [fol. 2261] they intended to introduce proof that Crescent and Fox had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in Mt. Pleasant, Tennessee, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Fox to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

2. That portion of the testimony of the witness, W. O. Taylor, in which he, in substance, testified that Watson, a representative of Paramount, in the Spring of 1938 told him that he was very sorry to inform him that Paramount had made a franchise with the circuit (Crescent) and had given the circuit in the towns of Martin and Greenfield clearance over Dresden.

This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Paramount had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in Dresden, Tennessee, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Paramount to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

3. That portion of the testimony of the witness, Robert L. Curry, in which he, in substance, testified that Butler, a representative of Loew's, had informed him that Loew's was negotiating with Crescent for a five-year franchise for its films, and that Loew's accordingly could not sell the Dixie Theatre in East Gadsden, Alabama, its 1939-1940 product.

[fol. 2262] This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Loew's had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in East Gadsden, Alabama, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Loew's to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

4. That portion of the testimony of the witness, H. T. Bailey, in which he, in substance, testified that Butler, a representative of Loew's, told him in December, 1940, that Loew's was ready to make a contract with the Dixie Theatre, East Gadsden, Alabama, for its 1940-1941 product.

This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Loew's had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in East Gadsden, Alabama, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Loew's to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

5. That portion of the testimony of the witness, Tim Smith, in which he, in substance, testified that Randal Bryant, a representative of Warner, informed him before he opened his theatre in Newport, Tennessee, that he, Smith, could buy first-run product of Warner for Newport.

[fol. 2263] This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Warner had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in Newport, Tennessee, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Warner to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

6. That portion of the testimony of the witness, W. F. Roth, in which he, in substance, testified that Lowe, a repre-

sentative of Paramount, told him in the Summer of 1937 that Paramount would not sell a franchise to anybody.

This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Paramount had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in Gallatin, Tennessee, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Paramount to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

William Waller, Geo. H. Armistead, Jr., Attorneys for Defendant Exhibitors. Armistead, Waller, Davis & Lansden, Of Counsel.

[fol. 2264] IN THE UNITED STATES DISTRICT COURT

AMENDMENT TO MOTION OF DEFENDANT EXHIBITORS, THE CRESCENT AMUSEMENT COMPANY, ET AL., TO STRIKE PORTIONS OF PLAINTIFF'S EVIDENCE AND EXHIBITS—Filed August 8, 1941

Come the defendants, The Crescent Amusement Company, et al., referred to as defendant exhibitors, and having, for convenience, joined in the making of a motion heretofore filed to strike portions of plaintiff's evidence and exhibits, now amend said motion by moving the Court to strike the following additional portion of plaintiff's proof and exhibits:

1. The testimony of W. O. Taylor, and exhibits thereto, and all exhibits relating to the town of Dresden, Tennessee, because the said testimony and exhibits are not relevant or material to any issue in this cause, but are wholly outside the issues made by the pleadings in that the towns of Martin and Greenville, Tennessee, referred to as being towns adjoining Dresden, Tennessee, where Mr. Taylor's theatre is located, are not so-called "Crescent towns" but are towns in which Ruffin Amusement Company, Inc. (which [fol. 2265] is not a defendant in this case) operates theatres.

Geo. H. Armistead, Jr., William Waller, Attorneys for Defendant Exhibitors. Of Counsel: Armistead, Waller, Davis & Lansden.

[fol. 2266] IN UNITED STATES DISTRICT COURT

PORTIONS OF TRANSCRIPT RELATING TO MOTION TO STRIKE AND THE ACTION OF THE COURT THEREON

Mr. Raftery: May it please the Court, under Rule 7, which permits the making of an oral motion during the trial, I now move, under Rule 41-b to dismiss this action; that upon the facts and the law the plantiff has shown no right to relief as to the defendants Universal Pictures Company, Inc. That is the company that Mr. Wright, in reading into the record, described as being a producer and not engaged in distribution; and no evidence has been offered against Universal Pictures Company, Inc., except the suggestion that it owns control of the stock of the [fol. 2267] defendant Universal Film Exchanges, Inc., which is the distributor referred to in Paragraph 24, page 7, of the printed complaint.

The Court: Now, I find Universal Film Exchanges, but I don't find the other defendant.

Mr. Raftery: The Universal Pictures Company, Inc., is named at 23, page 6, of the printed complaint.

The Court: Yes; I have it.

Mr. Wright: If the Court please, I don't see that it makes any difference whether Universal Pictures, Inc., were dismissed or not. I don't see why it is of any importance here one way or the other.

The Court: All right; let the motion be granted.

Mr. Raftery: I now move, under the same rules, to dismiss the action; that upon the facts and the law the plaintiff has shown no right to relief as against the defendant Universal Film Exchanges, Inc. Now, from the beginning of the case——

[fol. 2268] The Court: Mr. Raftery, if it would suit you just as well, before entering into the argument of the motions, suppose that we let your motions be made and then any other defendants that wish to make motions, make them, and let's have all the motions first. There may be some that I may want more argument from than others.

Mr. Raftery: All right, sir. I now move, under the same rules, to dismiss the action; That upon the facts and the law the plaintiff has shown no rights of relief as against the defendant United Artists Corporation, referred to in Paragraph 25, described in Paragraph 25 of the complaint.

The Court: All right. Any other motions?

[fol. 2269] The Court: Any other motions?

Mr. Frolich: I move under the same rule as Mr. Raftery moved under, to-wit Rule 41, that the court dismiss this complaint against the defendant Columbia Picture Corporation, on the ground that on the facts and the law, the plaintiff has shown no right to relief, and there has been no proof of any kind under the allegations of the complaint with respect to said defendant.

Mr. Mitchell: May it please the Court, under the same rule and because the plaintiff under the facts developed in the evidence, and under the law of this case, has made no case; I move the dismissal of this action against Louis Rosenbaum, and for the same reasons and under the same rule, I move that this action be dismissed against defendant Nettie Sudekum, and for the same reasons I make the same motion for the dismissal of this action against the partnership known as Muscle Shoals Theatres, composed of Louis Rosenbaum and Nettie Sudekum.

The Court: All right, sir.

[fol. 2270] Mr. Armistead: May it please the Court, I have here motions on behalf of the Cumberland Amusement Company, The Crescent Amusement Company, the Lyric Amusement Company, they are combined in one motion, the Rockwood Amusement Company, the Lyric and Kentucky; and another for the Strand Enterprises, and another by Nu Strand, and the individual defendants.

I will just read one of the motions.

The Court: They are the same?

Mr. Armistead: Yes, sir.

The Government, or the plaintiff, having completed the presentation of its proof, Cumberland Amusement Company moves the court for a dismissal of this case as to it, and I will file the motions after I have read them.

(Reads Motions to dismiss and motions to strike evidence.)

* * * * * * *

The Court: As to the personal defendants, those are Messrs. Sudekum, Stengel and Baulch.

[fols. 2271-2272] Mr. Armistead: Yes, sir. And I have another motion to strike, made by the defendant exhibitors, to strike portions of the evidence. (Reads.)

The Court: You would want that motion acted upon before I acted on your other motion?

Mr. Armistead: Yes, sir, I should have made this motion to strike first. And the same motion as to the United Artists, Columbia, RKO, Fox, Paramount, Warner Bros. Loews, or all eight distributors.

. . . . . .

[fol. 2273] The Court: Gentlemen, I have considered these motions just as thoroughly as I could. The motion of Universal Film Exchange has caused me the most concern. There is evidence in the record of an isolated transaction pertaining to the negotiations between Mr. Henry and Universal Film Exchange, through its branch manager at Memphis. I have gone over this evidence thoroughly, read it two or three times. I can not escape the conclusion that the evidence establishes on its face prima facie, that the Universal Film Exchange had taken an application from Mr. Henry for the 1938-1939 season's product, with a rider for the next two years, and that this application was approved, forwarded to the Memphis Branch, Mr. Henry was notified by the Branch Manager by telephone that the application had been approved, and he would come in within the next few days and deliver them, but Mr. Henry told him he would be in Memphis next Tuesday I believe it was, and it would not be necessary for him to do that, he could deliver them, but he would call for them and he did call by for it and the manager was not there. The secretary told him that the contract [fol. 2274] was in the office and had been approved, but she could not deliver it, and did not deliver it in the manager's absence. About a week later he saw the manager, or later on he saw the manager and the manager told him that it had been held up pending negotiations with the Crescent Company. Then after making several trips to the Memphis branch, not getting any satisfaction about his contract, Mr. Henry called up Mr. Graham, the manager of the company, district manager at Atlanta, about his contract and wanted to know what was holding it up. Mr. Graham advised him that he had never heard of it, and necessarily it would have to come across his desk. The conclusion the court draws from that is that here was a case of an independent actually had a contract

that had been approved by the distributor, but for some reason or other that the Court thinks requires an explanation, that contract was never delivered; instead, finally a contract was given him, that is prima facie evidence on its face that the Court feels under the circumstances, that even though there is evidence in the record and other independents that had Universal's product, that is one of the specific charges made by the Government in this [fol. 2275] case, and the Court can not say that there is no evidence in the record that would tend to establish a conspiracy. Furthermore, the Court has no reason, particularly at this time, for reflecting upon the credit of Mr. Henry in that respect, or particularly in respect to this transaction. Aside from any reason that the Court would have for thinking Mr. Henry was tealling a fairy tale about the whole transaction, the Court feels that the evidence does constitute prima facie sufficient evidence; for that reason the motion of the Universal Film Exchange will be denied.

Now as to the Motion of Columbia. There are two isolated transactions in this case and, as in the case of the Universal, probable more so, there is evidence of numerous deals that Columbia has made with the independents, particularly with reference to competition of the Crescent Circuit, and other matters, two instances relied upon by the Government, are the instance of the salesman which he made on an application for a contract, submitted relative to the season's product for the town of Earlington, Kentucky, which contained the stipulation, that in the event that Madisonville, a nearby town, was sold the Columbia product, that Earlington would have the right to cancel the contract, and that this clause had been sug- [fol. 2276] gested at the instance of Mr. Sudekum, while the evidence clearly shows that the previous year's contract had carried the same clause, no evidence that the clause in that year's contract had been suggested by Mr. Sudekum. I have indicated my idea of it as to just what I thought about that situation. I think probably it is an overzealous or over-ambitious salesman, trying to sell both independent and Crescent at the same time. And, nevertheless, regardless of that situation, and regardless of Columbia's willingness to do what Mr. Sudekum might want them to do, nevertheless, nothing was done,

Earlington got their contract for that year, not only for that year, but for the next three or four years, and the last two years, the contract had an additional clause that Earlington would have fifteen days clearance over Madisonville.

Now the other instance is the testimony of Tim Smith, that when he attempted to buy Columbia's product, that Mr. Anderson told him he had three years' product open, but he would have to see Mr. Sudekum before he would sell it to him.

[fol. 2277] The Government has the theory that, in view of that statement made by Mr. Smith, that is is reasonable to presume that Anderson did make that statement and also that the statement made by the salesman relative to Hopkinsville and Bowling Green, in connection with Earlington contract, be considered as true.

Well, I would be much more impressed with the Government's theory in that matter if this testimony had been given by any other witness than Mr. Smith. I was not impressed with Mr. Smith's testimony, I was not impressed with his credibility as a witness. He was, apparently, anxious to say anything in this suit the Government wanted him to say. On cross-examination, he was evasive, indifferent and almost unwilling to answer any questions that Counsel for Defendants asked him. I was not impressed with his appearance as a witness and his lack of interest in this cause.

I shall have to find in the finding of facts in this case, that Anderson did not make any such statement to Mr. Smith; I don't believe what Mr. Smith said about it. Eventually, if I should have to do that, there is no reason why I shouldn't do it at this time. And, in view of the Court's construction, based upon these two isolated transactions, [fol. 2278] which really didn't amount to anything particularly to the course of conduct that has been proven on the part of Columbia relative to its dealings with the independents, the motion of Columbia must be granted.

The motion of Strand Enterprises has also given me some concern. As I view the evidence that is introduced, the only evidence that has been introduced is that, in some cases, the Strand has bought out their competition. But it is not proven that in buying out competing theatres, Strand Enterprises has been guilty of any of the acts complained of in the bill of complaint. In fact, the evidence

shows that it has not been guilty of any such acts with respect to clearance and with respect to restrictions imposed upon sellers of theatres, that they would not enter into the business again. There is no evidence that Strand used any unfair methods in anyway in disposing of any of their competition. As the Court views it, as long as no methods are used by any person which would be a violation of the Sherman Act which could be construed as unfair competition, under the terms and provisions of the Sherman Act, the mere matter of elimination of competition, without any other objections or without any other transactions that [fol. 2279] could be in anyway interpreted as being violations of the Sherman Act, is certainly not within the purview of the statute; and I have no reason to doubt his statement in any way when he states he had made all of the contracts for the film rentals of the Strand Enterprises and that Mr. Sudekum has never assisted him or advised him in anyway. Furthermore, the Strand Enterprises is not a party to any of these franchises; and not only that, the evidence shows that he has done business with several of the distributors at times when the Crescent was not doing business with them. I think the evidence shows his transactions have been disconnected with Crescent's.

[fol. 2280] Motions of the other defendants will be denied, and in addition the motions of the Kentucky Amusement Company and the Lyric Amusement Company, and the Court wishes to state that the principal ground upon which those motions are denied is the fact that they were included in several of those franchises.

The motions to strike certain evidence filed in the case by the defendants, as amended, will be denied.

All right.

Mr. Armistead: May it please the Court, this Columbia inter-office correspondence goes out of the record, does it not?

The Court: Well, I assume on a finding of fact that it would go out of the record. I hold that it is not sufficient to constitute a conspiracy.

Mr. Armistead: Now, may I ask, did your Honor consider the motion made by Mr. Baulch or did you overlook that?

The Court: Yes. There is probably less evidence with respect to Mr. Baulch's dealings than there is about any of the other defendants, but there are several transactions, particularly with reference to the theatres at Hopkinsville,

I believe, and some other transactions—some of the East [fol. 2281] Tennessee theatres. That is evidence. Now, I am not saying how I shall pass on that later on in the finding of facts but for the purposes of this motion, I hold that is evidence.

Mr. Raftery: If your Honor please, in the interest of aiding the preparation of the defense it will be helpful to state the grounds on which the United Artists motion was denied the same as you did on Universal, so that——

The Court: I just hold that there was more evidence as to United Artists than there was to Universal. There are many more different transactions and the seventy-three film deal proposition——

Mr. Raftery: The only other places, I think, where United Artists was mentioned was Buchanan and Miller.

The Court: Well, there is some correspondence,—I can't keep it in my mind right now—relative to the Henry matter too, as I recall it.

Mr. Raftery: The correspondence in the Henry matter shows that we sold him and he played, that is, we sold Henry complete, we sold Tim Smith complete, we sold Roth com- [fol. 2282] plete; we sold everybody complete with the exception of Buchanan and Miller.

The Court: Possibly it was Buchanan instead of Henry.

Mr. Waller: As your Honor knows, the defendant exhibitors made a number of general objections throughout the record to evidence and then at the conclusion of the plaintiff's evidence we made motions to strike. Now, where we omitted specifically in the motions to strike any evidence which was previously objected to, we want the record to show that we were not waiving those objections but continuing to rely upon them.

The Court: All right.

Mr. Waller: And I want to call your Honor's attention to the fact that we objected to the first one of those so-called non-competitive agreements that was put in the record, and if the record doesn't clearly show that that objection was to be considered as applying to all those others, we would like to have it appear in the record at this time also, and at this time renew our motion to—not to renew our motion, but to make a motion to strike all those non-competitive agreements on the ground that they are outside the scope of the issues in this case. There are no allegations

[fol. 2283] about them, as we called your Honor's attention to earlier in the proceedings.

Mr. Mitchell: It would be quite helpful to Muscle Shoals Theatres in connection with the action on this motion to indicate as you did in some of——

The Court: Well, I can't review all the evidence in this case. I just am of the opinion that there is evidence in the case against your client.

Mr. Mitchell: Well, your Honor spoke of franchises.

The Court: The reason I reviewed particularly the evidence of the Universal Company is that up until about thirty minutes ago I had practically been of the opinion that I would grant their motion; otherwise, I would have just dismissed all the motions, or granted or denied them without making any explanation.

* * * * * * *

[fol. 2284] In United States District Court

Portions of defendants' evidence

August 18, 1940

Court met pursuant to adjournment.

The Court: Have counsel for the defendants planned as to how they will present their proof?

Mr. Armistead: Yes, sir, it was to put Mr. Sudekum on first.

The Court: That will mean the Crescent Amusement Company will put on its proof first.

Mr. Armistead: Yes, sir.

The Court: You may proceed.

Anthony (Tony) Sudekum, called for defendants, being sworn previously, testified as follows.

Direct examination.

By Mr. Armistead:

Q. This is Mr. Anthony Sudekum, is it not?

A. Yes, sir.

Q. Mr. Sudekum, how old are you?

A. Be sixty-three Thursday.

[fol. 2285] Q. Where were you born?

A. Here in Nashville, out on Humphreys street and the railroad.

Q. What business did you first engage in?

A. Baking business, ice cream business.

Q. What is your present occupation?

A. Theatre business.

Q. President of the Crescent Amusement Company, are you not?

A. Yes, sir.

Q. Do you belong to any civic organizations?

A. I belong to the Chamber of Commerce, Rotary Club, Masons.

Q. I believe you recently had a degree conferred upon you by Cumberland University, did you not?

A. Yes, sir.

Q. Are you also chairman of the Nashville Housing Authorities?

A. Yes, sir.

Q. Mr. Sudekum, when did you first start out in the moving picture business?

A. About 1907.

Q. What caused you to become interested in and become engaged in that business?

A. Well it looked like the only thing I could get in for a little money and started that; all my life, I wanted to get [fol. 2286] hold of a circus.

Q. Wanted to do what?

A. Wanted to get hold of a circus, and couldn't do that, and then pictures came along, and I went in that.

Q. What year was that you first started out in the moving picture business?

A. About 1907.

Q. How much did you invest in pictures?

A. Well I had about seven hundred dollars, two parties had seven hundred dollars, that is my father and Mr. Williams, a very good friend of mine.

Q. Where did you have your first show, where was it located?

A. On Fifth Avenue between—right near the Arcade.

Q. What kind of a show was it, did they have these slides, were they reels or what?

A. Well we had reels and illustrated songs, slides, it was a very good house for that day. Had several steps to go up,

seat about a hundred and fifty or a hundred and eighty people.

Q. Was there any other theatre, moving picture theatre in Nashville, at that time?

A. Well there had been about three or four with folding chairs, but later on they closed up but one opened below the Arcade called the Chrystal, and he was doing fairly well with that and I opened up this Dixie just a few weeks afterwards,

Q. What did you do down there, did you devote all your [fol. 2287] time, your entire time to it?

A. Not at the start, wasn't so much business, I did everything, made signs——

Q. Did what?

A. Paint signs, sell tickets, catch tickets, operate, most anything, had a piano player, had Miss Druat to play the piano, Sinnett to do the singing.

The Court: You say you had illustrated songs?

A. Yes, sir, we had illustrated songs.

The Court: I believe one of the most famous was ALWAYS IN THE WAY.

A. Yes, sir, it was, and we had one AT THE END OF THE LINE, I will never forget that one.

Mr. Armistead:

Q. Did you operate the machines in that house?

A. Yes, sir, when we first started, relieved the operators.

Q. How long did you operate that Dixie Theatre?

A. Well I don't know how long we operated it, we operated it for some little time, and then there was a theatre across the street, he wanted to sell out and I wanted to buy it, he was getting more films from the General Film Company at that time than we were getting more film than we could use, right at that time, and they wanted to sell out [fol. 2288] and I persuaded my mother to let me buy it.

Q. How old were you then?

A. Oh I was, well, I don't know about twenty-two or three, I guess, may be a little older.

Q. You said something about films from whom, that you purchased your films, from whom did you purchase your films?

A. They were purchased, we first made arrangements with a St. Louis concern after I got my lease and got started on the building, O. T. Crawford I think ran a little exchange and he got film from him and may be I would get everything that had been run or a film that he had run or had been run two or three days or may be the day before, and this man said he would take care of it all right, so when I got ready to open I realised the situation, I wired him and I got a wire back and he said he was sorry he couldn't take care of me, and I didn't know much about the business, so I had to scramble around and get pictures somewheres, and the first few days I would get pictures that had been run by the other man just a day or two before, I didn't think that would do, so, and I couldn't do any better, and I had to run some pictures straight, and that was very good for those days, so I got to dealing with the General Film Company, who supplied me my films at that time.

Q. Did they have exchanges in those days?

A. Yes, sir, I think there were some, but mostly owned by [fol. 2289] private people.

Q. Did you have any opposition in Nashville?

A. Theatre opposition?

Q. Yes?

A. Yes, this Crystal and then there were several houses opened up on Fifth avenue, about seven or eight of them opened up, in that one block.

Q. Who got the films first, you or the opposition?

A. Sometimes I would get them out of Memphis, may be, and he would get them maybe a couple of days before, something like that, for the Crystal theatre, then he would make arrangements, and then I might make arrangements to get them out of Birmingham a day or two before, and I would try to get them somewhere else, and we were both getting them on release date and sometimes may be one and then the other, but there was a little difference, and there were different ones at that time.

[fol. 2290] Q. Well now, when was the Crescent Amusement Company incorporated?

A. Well, I don't know the year. We bought this Crescent Theatre out and it had a lease on it that couldn't be transferred, so we bought the stock and put the Dixie Theatre in there and called it the Crescent Amusement Company.

Q. Sir?

A. That was called the Crescent Amusement Company.

Q. Since that beginning of the Crescent Amusement Company have you and your family, members of your family, been the principal stockholders in the Crescent Amusement Company?

A. No*t*, not all the time.

Q. Have you, personally, been one of the principal stockholders of the Crescent Amusement Company all along?

A. Yes sir.

Q. Mr. Sudekum, did you open up any other theatres here in Nashville?

A. Well, the Fifth Avenue Theatre was started by Mr. Waller and Mr. Furlong and it had got the walls up and they ran into some difficulties and wanted to make some kind of a sale of it and I bought out, I think, a half interest with them at that time and finished the building and opened it up.

Q. When was the first time the Crescent opened up a theatre outside of Nashville, do you recall that?

[fol. 2291] A. No, I don't. I think it was Columbia, Tennessee. I don't think they had a theatre there and we opened up a theatre in Columbia, but I don't know the date. That must have been twenty-five years ago.

Q. Now, you told us about having someone to play the piano and have these songs on the screen, flashed on the screen; how long did that continue, that kind of music?

A. Well, that continued for some time.

Q. What was the next kind of music you had in the theatre?

A. Well, they had, to start with, they had these little grind organs, little pianos out in front of the theatre that would play and attract attention, then it went on into automatic organs and things, and big instruments that furnished music and that would change to band instruments and the like of that. After that they came along with these synchronized machines that would have a couple of turntables and also have a library of records and automatically play music that would be suitable to the scene of the picture. After that, that was followed then by organs that came in and of course the big houses would have big orchestras at that time, but more generally the smaller houses would have these organs put in, some few would have organs and orchestras, and then after that, of course, the talking pictures came in. They were doing mostly everything at that time to bolster the business because the picture business

[fol. 2292] was getting very quirt and talking pictures came along and just give it a big boost at that time.

Q. What did you all do with your big organs? Were they expensive?

A. Well, we gave them away to different organizations; we gave one to Hobson's Chapel and one to the Tennessee Industrial School and different places.

Q. Were the organs expensive?

A. Well, they cost five or ten or twelve thousand dollars.

Q. When did the sound movies first start in, say along about what year?

A. I don't know.

Q. Was it in the 20's, the early 20's?

A. I couldn't guess. Some little time—We had the first sound movie in Tennessee, the first sound picture at the Knickerbocker Theatre in Tennessee.

Q. What did you pay for that sound picture equipment at the Knickerbocker?

A. I think about $23,000.00 or $27,000.00. I have forgotten. An awful price.

Q. Was that, you say, the first theatre equipped for sound?

A. That was the first one in Tennessee equipped for sound. They had boxes all over the Boulevard.

[fol. 2293] Q. Had what?

A. Big boxes, big crates, fifteen or twenty men running around there in the theatre, popping their hands and snapping their fingers to get the acoustics. Now, a couple of men can bring it in.

Q. Well now, was that sound on discs?

A. That was on discs, records.

Q. Now, you have sound films?

A. Now it is on films, yes sir.

Q. That equipment now isn't near as expensive as the other, is that correct?

A. Of course, now nobody uses those discs anymore; they were in big boxes and had a lot of expense for transportation. Then the sound film was pretty expensive at first but now it has got down more reasonable.

Q. Mr. Sudedum, on June 30, 1929, I will ask you if you did not have the following theatres in the following towns: Ritz and Star in Alabama City, Alabama. The Capitol, the Diamond, the Princess and the Opera in Bowling Green, Kentucky, Capitol in Clarksville. Princess and

Vogue in Columbia, Tennessee. Princess and Dyer and Star in Decatur, Alabama. Palace and Capitol in Gadsden, Alabama. Princess and Rex and Alhambra, in Hopkinsville, Kentucky. Princess and Temple in Harriman, Tennessee. Palace in Halls, Tennessee. Princess and Howard in Lebanon, Tennessee. Princess in Murfreesboro, Tennessee. Princess and Strand, in Morristown, [fol. 2294] Tennessee. Palace, and Princess in Maryville, Tennessee. Princess in Obion, Tennessee, Capitol in Paris, Tennessee. Princess in Ridgely, Tennessee; and Princess in Springfield, Tennessee; Virginia Dare in Tiptonville, Tennessee. Capitol in Union City, Tennessee?

A. Yes sir.

Q. That is a total of 38 theatres in 21 towns?

A. Yes sir.

Q. I notice at that time you had theatres in Obion, Ridgely, and Tiptonville, and Halls, Tennessee. Did you dispose of those theatres?

A. Yes sir.

Q. Are those little towns?

A. Yes sir.

Q. Why did you ever buy those theatres in those towns, how did you happen to acquire them?

A. We had to take those with the Dyersburg deal when they sold out the two theatres in Dyersburg, they had those and we had to take them in the deal.

Q. You mean, the man or company or party that you purchased the Dyersburg theatres from also had theatres in those other four small towns?

A. Yes sir.

Q. What did you do with those theatres?—That is, the ones in the four small towns?

[fol. 2295] A. We got rid of them the best we could.

Q. Sell them?

A. Well, practically gave them away.

Q. Now, I will ask you if on June 30, 1940, if the Crescent Amusement Company—June 30, 1941, I mean—if the Crescent Amusement Company did not have the following theatres in the following towns? The Ritz, in Alabama City. Capitol and Diamond and Princess in Bowling Green. Capitol in Brownsville, Tennessee. Bohemia and Princess in Cleveland, Tennessee. Capitol and Lillian in Clarksville, Tennessee. Lyric and Princess in Columbia, Tennessee.

[fol. 2296] Mr. Armistead (Continuing). Princess and Roxy and Capitol in Decatur, Alabama; Capitol and Frances in Dyersburg; the Earl and Roxy in Earlington, Kentucky; the Roxy in Franklin, Kentucky; the Gadsden, Capitol and Princess in Gadsden, Alabama; the Roxy in Gallatin, Tennessee; the Capitol and Palace in Greeneville, Tennessee, and the Princess and Prince in Harriman, Tennessee; Alhambra, Kentucky and Princess in Hopkinsville, Kentucky; Princess and Ritz in Lebanon, Tennessee; Capitol and Cameo in Madisonville, Kentucky; Capitol and Park in Maryville, Tennessee; Princess and Ritz in Morristown, Tennessee; Princess and Roxy in Murfreesboro, Tennessee; Capitol and Princess in Paris, Tennessee; the Capitol in Princeton, Kentucky; Princess and Capitol in Springfield, Tennessee, and the Capitol and Ritz in Union City, Tennessee?

A. Yes sir.

Q. That is a total of forty seven theatres in twenty three towns?

A. Yes sir.

Q. Now, since August 11th, 1934 I will ask you if the Crescent Amusement Company has not entered and opened theatres in the following towns; Greenville, Tennessee——

Mr. Wright: Excuse me a minute. As I understand it, this information is, where they had gone in in August, 1934, has already been introduced in evidence in the answers to the interrogatories. Now, is this information any different [fol. 2297] from that?

Mr. Armistead: No. but his answers haven't been introduced in evidence.

Mr. Wright: I understood that the acquisitions since August 11th, 1934 have been read in evidence, is my understanding.

Mr. Armstead: I don't recall. Anyhow, I want to question him about these theatres.

The Court: All right. Go ahead.

By Mr. Armistead:

Q. I will ask you since August 11th, 1934 if the Crescent Amusement Company has not entered the following towns: Greeneville, Tennessee, Earlington, Kentucky, Franklin, Kentucky, Gallatin, Tennessee, Brownsville, Tennessee and Princeton, Kentucky?

A. Yes.

Q. Now, let's take the situation at Greeneville, Tennessee. There was at the time you entered that town,—I think the proof shows that Parrott and Hendren were operating two theatres there? Why did Crescent enter Greenville, Mr. Sudekum?

A. Well, I had had numerous letters from different people there wanting to know if we would not build a house [fol. 2298] there, and the town looked like a good town and the theatre wasn't so good, and I tried for sometime to get a location there, and I never could get a location, get a good location until one day one of the fellows of the Chamber of Commerce called me and asked me if I still wanted a place there and I told him Yes, and he said, "Well, two stores—"

Mr. Wright: Just a minute. If the Court please, I object to all this recital of what went on between Mr. Sudekum and——

The Court: Well, it is hearsay testimony.

Mr. Armistead: That is correct; it is hearsay.

Mr. Wright: I might say that it is not quite clear to me just what evidence has been offered as part of the plaintiff's case that this evidence is supposed to rebut. In any event, I don't see the materiality of it.

The Court: Well, just a general background.

Mr. Armistead: Well, I understood it was the theory of the Government that the Crescent had been expanding and going out and getting all these theatres, and going into these towns for the purpose of running out the opposition. I wanted to ask him why he went into Greeneville, Tennes- [fol. 2299] see. I think that is material.

Mr. Wright: There is not any question in the record but what he did expand and he did run out the opposition. Now, I don't see how this sort of testimony either adds or subtracts from the record that has been made.

The Court: Well, that is a question for the Court to say. Overruled.

Mr. Armistead:

Q. Did you construct a theatre in Greeneville, Tennessee?

A. Yes sir. It was Mr. Kizer at the Chamber of Commerce, was the man that kept writing me all the time and insisting that we come over there and build a theatre.

Mr. Wright: Now, if the Court please, we object to that sort of thing.

The Court: Sustained.

By Mr. Armistead:

Q. Did you or not have requests from citizens of Greeneville that Crescent come into Greenville and construct or open up a house?

A. Yes sir.

[fol. 2300] Mr. Wright: That is objected to as a conclusion, as to what the citizens of Greeneville wanted. The only people that could tell us that would be the citizens themselves. He is not in a position to say here that he went into Greeneville to fill a great public need. He can give us his own conclusion that that was the effect.

The Court: He is just saying he had requests from citizens to come in and open up a theatre.

Mr. Armistead:

Q. Have you a picture of your theatre in Greeneville, Tenn.?

A. Yes sir.

Q. I am going to hand you a picture and ask you whether or not that is a picture of the Crescent Theatre at Greeneville, Tennessee?

A. Yes sir.

Q. Will you file that as Defendant's Exhibit No. 74?

Mr. Wright: We object to it without any further identification—are you going to identify that as to when it was taken?

Mr. Armistead: Yes.

Mr. Wright: We object to it without any further identification as to when it was taken, who took it and what it is [fol. 2301] supposed to show.

The Court: What difference does that make?

Mr. Wright: I don't know what difference the picture of the theatre makes in any event, but what is the purpose of the offer?

Mr. Armistead: The purpose is to show that the Crescent Theatre in Greeneville, Tennessee, from this picture, is a very attractive, modern and up to date house. I am going to prove that by Mr. Sudekum, that it is a modern, up to

date theatre and far superior to the theatre that was there when we entered Greeneville.

Mr. Wright: Well, what it is today has got nothing to do with what it was at the time he entered. Now, if that is a picture of it at the time he put up the theatre, it might have some relevancy but just what he is offering it for—I don't see what kind of theatre he has got there today as compared to what was in Greeneville when he went in there, has any bearing whatsoever ever on the proposition that he is advancing.

By Mr. Armistead:

Q. Does this picture substantially represent the theatre [fol. 2302] that you constructed there in Greeneville, Tennessee?

A. Yes.

Q. And is that the same theatre that is standing there now?

A. Yes.

Mr. Wright: I still think we are entitled to know when the picture was taken before it is offered.

The Court:

Q. Do you know when the picture was taken?

A. No.

Mr. Wright: Well, we object to it.

The Court: Overruled; go ahead.

By Mr. Armistead:

Q. Now, Mr. Sudekum, can you tell us approximately the amount Crescent spent in constructing that theatre there?

A. About, my guess would be $35,000.00, remodelling the theatre. We don't own the property.

Mr. Wright: Without interrupting, may we have a general objection to this entire line of testimony as to cost and appearance of theatre buildings?

The Court: All right, Sir.

[fol. 2303] Mr. Wright: So far as we are concerned it has nothing whatsoever to do with it.

The Court: Well, it may not. That is a question for the Court to decide later on. The Court may hold that the mere

fact that they went in there and put up an expensive find theatre wouldn't be any excuse for a violation of the Sherman Act at all but that is a question for the Court to pass on.

Mr. Wright: I take it that we may have the same objection without repeating it to each of these questions?

The Court: All right.

By Mr. Armistead:

Q. You say the Crescent doesn't own the property but has it under lease, is that correct?

A. Yes sir.

[fol. 2304] Q. Now, let's come to Earlington, Kentucky. I believe the proof shows that Mr. Dozier was operating a theater there when Crescent entered that town. Have you a picture of the theater operated by Mr. Dozier in Earlington, Kentucky? I hand you here a picture and ask you if that is a picture of the theater that Mr. Dozier was operating in Earlington, Kentucky?

A. Yes, sir.

Q. Where was that theater located in Earlington?

A. Well, it was about a block around the corner from the town; I don't know the streets there, the old opera house there.

Q. Will you file that as Exhibit No. 75 to defendant's proof in this case?

A. (Yes, sir.)

Mr. Wright: We object to this, also, on the specific grounds that there is no evidence whatsoever as to when this was taken, or the conditions under which it was taken.

Mr. Armistead: Well, does that picture that I have asked you about—the Dozier theater—does that substantially represent the condition of the theater, the appearance of it there as you saw it, the theater?

[fol. 2305] A. The theater?

Q. Yes, sir.

A. Yes, sir.

Mr. Wright:

— When, what time?

A. Today; it looked about like it does today, or when it was taken.

Mr. Wright: Well, here is a picture of the theater, taken today, after it has been closed for two years; what possible relevancy has that got to this lawsuit? If they closed it down and it is lying there, what of it?

Mr. Armistead: All right; I want to show it had steps to go up; and I want to show the Crescent Theater here as a comparison.

The Court: There is no question about that.

Mr. Armistead: It had steps the first time you ever saw it?

A. Yes, sir.

The Court: All right.

[fol. 2306] Mr. Armistead: I just want to say this: If this is incompetent evidence——

The Court: I think we are just wasting time about something that is not important.

Mr. Armistead: Well, the plaintiff thinks it is very competent evidence, as they have been going over Kentucky taking pictures.

The Court: We will pass on that when we get to it.

Mr. Armistead:

Q. I show you here a picture of a theater in Earlington, Kentucky, and I will ask you if that is a picture of the theater constructed there by the Crescent Amusement Company?

A. Yes, sir.

Q. Will you file that as Defendants' Exhibit No. 76?

A. (Yes, sir.)

Mr. Wright: Same objection.

The Court: Overruled.

Q. Now, Mr. Sudekum, the theater at Greeneville, Tennessee; does that have modern conveniences in it and nice [fol. 2307] appointments?

A. Yes, sir.

Q. How does that theater compare with the theater which was being operated by Parrott & Hendren when Crescent entered Greeneville?

A. Well, it was a much nicer theater than that one.

Q. You mean the Crescent Theater was a modern, up-to-date theater?

A. The other was an old house.

Q. Now, how much did Crescent invest in that Earl Theater at Earlington, Kentucky?

A. I think about twenty or twenty-three thousand dollars.

Q. Does it have modern conveniences and good equipment?

A. Yes, sir.

Q. Now, when Crescent purchased the Roxy Theater—Mr. Dozier's theater—did it also operate the Earl Theater, or did it close it, or what happened to the Earl?

A. We closed the Earl Theater and operated the Roxy for a while.

Q. Why did you close the Earl and operate the Roxy?

A. Well, it was less expensive to operate the Roxy and I thought if we couldn't operate it we could be saving some money.

Q. Well, did you continue to operate the Roxy?

[fol. 2308] The Court: Was the Roxy the one that had steps up to it?

A. Yes, sir. Well, we had a petition, and the merchants came down to see us about it, and it looked like they wouldn't permit us to operate the Roxy; so we had to go back to the Earl.

Q. I hand you these papers and ask you what that is?

A. That is one of the petitions that was sent down to me or brought down, I don't know which.

Q. From citizens of Earlington?

A. Yes, sir.

Q. A petition for what?

A. To reopen the Earl Theatre instead of the other one.

Q. Well, after you got that petition, did you reopen the Earl?

A. Yes, sir.

Q. And closed the Roxy?

A. Yes, sir.

Q. Now, Franklin, Kentucky: When did Crescent enter Franklin, Kentucky?

A. I wouldn't know the date.

Q. Well, it had been there for several years, had it not?

A. Yes, sir.

Q. Was there a theater there when Crescent went into Franklin?

[fol. 2309] A. Yes, sir.

Q. Do you remember who was operating that theater?

A. No, I don't.

Q. Do you remember where it was located?

A. Around the corner from the main street; I don't know the name of the street.

Q. Now where is the Crescent Theater located?

A. Well, it is on the main street, just a few doors off of the corner?

Q. Was there any particular reason that Crescent opened up a theater there in Franklin, Kentucky?

A. Well, it looked like a good place, and we were going through there all the time going to Bowling Green, and the Masons had a lot they wanted to sell——

Q. Well, did you discuss the matter with any of the citizens there in Franklin?

A. Yes.

Q. What was the attitude of the citizens of Franklin?

Mr. Wright: I object to that, if your Honor please.

The Court: Sustained.

Mr. Armistead:

Q. I hand you here a picture, and ask you if it is a picture [fol. 2310] of the opposition theater in Franklin, Kentucky?

A. Yes, sir.

Q. Will you file that as Defendant's Exhibit No. 77?

A. (Yes, sir.)

Q. I hand you another picture and ask you if it is a picture of the Crescent Theater in Franklin, Kentucky?

A. Yes, sir.

Q. Will you file that as Defendant's Exhibit No. 78?

A. (Yes, sir.)

Q. Can you tell me approximately how much Crescent has invested in that theater in Franklin, Kentucky?

A. About fifty or fifty-five thousand dollars, I should think.

The Court:

Q. Fifty-five?

A. About fifty or fifty-five, somewhere along there.

Mr. Armistead:

Q. Is that a modern, well equipped, up to date theater?

A. Yes, sir.

Q. Now, Gallatin, Tennessee: The proof shows that Crescent opened this theater in Gallatin, Tennessee, on or

about November 4, 1937. A picture of that theater is already in the record. Now, can you tell us approximately how much is invested in that situation?

[fol. 2311] A. Well, we have a large theater, and some stores and offices there, and a big parking lot, and I think we spent about one hundred and eight or one hundred and ten thousand dollars on the project there.

[fol. 2312] Q. Well was that a modern, up to date, well equipped theatre?

A. Yes, sir.

Q. Where is that located?

A. That is right on the main street there.

Q. Now I hand you a picture and ask you if that is a picture of the opposition theatre in Gallatin, Tennessee? My attention has been called to the fact, may it please the Court, that is a picture of Mr. Roth's theatre.

The Court: That is already in the record.

Mr. Armistead: Yes, sir.

Q. Now, Mr. Sudekum, I believe the proof shows that Crescent entered Brownsville, Tennessee, in 1935; what kind of a show or theatre was there when Crescent entered Brownsville?

A. It was a store-room show.

Q. That is the one operated by Mr. Lawing?

A. Yes, sir.

Q. How did the Crescent theater when it opened up, what kind of theatre is that?

A. It is a pretty nice theatre.

Q. Well equipped?

A. Yes, sir, good equipment.

[fol. 2313] Q. Is it larger than the Lawing Theatre, the theatre there operated by Mr. Lawing?

A. Yes, sir.

Q. Now you mentioned the fact that since August 11, 1934, Crescent had entered these towns, that the last one is Princeton, Kentucky; what kind of a theatre has Crescent in Princeton, Kentucky?

A. A very nice theatre.

Q. Did Crescent construct the theatre?

A. Yes, sir.

Q. Is it a modern up to date theatre, well equipped?

A. Yes, sir, very good.

Q. How much has Crescent invested in that situation?

A. I think about eighty-five or ninety thousand dollars.

Q. I hand you here a picture and ask you if that is a picture of the Capitol theatre in Princeton, Kentucky?

A. Yes, sir.

Mr. Wright: If the Court please, I will point out one additional objection, that is a town we did not offer any evidence on at all, Princeton, Kentucky.

Mr. Armistead: I think we are entitled to show the class of theatres the Crescent Amusement Company had.

[fol. 2314] The Court: All right, go ahead.

You asked him how much he had invested in the theatre at Brownsville?

Mr. Armistead: Yes, I overlooked that.

Q. How much did you have invested in the theatre at Brownsville?

A. About ninety-two hundred dollars. We didn't own the property I think.

Q. A leased building?

A. Yes, sir.

Q. Will you file this picture of the Crescent's Capitol theatre in Princeton, Kentucky, as defendants' exhibit number 79?

A. Yes, sir.

Q. Now, Mr. Sudekum, has Crescent gone into these towns and constructed these theatres, remodeled these buildings, for the purpose of running opposition out of town?

A. No, sir.

Mr. Wright: If the Court please, that is a pure conclusion.

Mr. Armistead: I think we h-ve a right to show what his intent was, and is, may it please the Court.

[fol. 2315] The Court: All right, I will overrule the objection.

Mr. Armistead:

Q. Mr. Sudekum, in the Crescent theatres has it been and is it the purpose of the Crescent Amusement Company to see that the public has conveniences and comfortable places to look at pictures?

A. Yes, sir.

Mr. Wright: Rather as an additional objection, I do not think that that is relevant to any issue in the case. Any-

body that is engaged in selling service to the public tries to please his public, I do not see how that is connected with this case whatever.

The Court: I may decide it does not have anything to do with it. Overruled.

Mr. Armistead:

Q. Now, Mr. Sudekum, do you go around from time to time and inspect these Crescent theatres?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

Q. Do you keep in touch with your managers?

A. Yes, sir.

[fol. 2316] Q. How do you select your managers, have any of them been with you any appreciable length of time?

A. Well there is no set way of selecting them, just try to get good men, agreeable to get in with people, and if we get somebody that we think is all right, they usually stay with us. We have managers that have been with us fifteen, twenty or twenty-five years at some locations, still get along all right.

Q. How do you pay your managers, are they on a fixed salary or other basis, or what?

A. We paid them a salary for a long time, but I talked with Woolworth's managers, different concerns and kind of got their system and kind of figured out one of our own, where they give them so much a week, and a percentage over that in addition to their salaries.

Q. Do you find that is an incentive to get these managers to work harder and get more patrons in the theatres?

A. Yes, sir, they will do everything they can to increase the business.

Q. Now, Mr. Sudekum, I wish you would tell us some of the methods that Crescent uses to exploit pictures?

A. Well they have various different ways, or kind of extra ballahoo, inside displays, and anything that they can think up to attract the attention to get people interested in pictures.

[fol. 2317] Q. Well do they take steps like that to attract the public to get them in the theatre?

A. Well there *there* are very few pictures you do not.

The Court: Kind of like a circus parade?

A. That is right, get them interested in the pictures.

Mr. Armistead:

Q. Do you have contests between managers?

A. Yes, sir, we have different contests during the year, where we have certain kinds in certain months, where we have good prizes, and then we help them out with it all we can by suggestions and bookings, special bookings, things like that to see if we can't help them win some prizes.

Q. What are those prizes?

A. Well this last one I think the big prize was a thousand dollars.

Q. You mean the first prize was a thousand dollars?

A. Yes, sir.

Q. What campaign was that?

A. I think they called it the Lake Campaign.

Q. Do you have them every year?

A. They do not in the same way all the time, different kinds.

Q. Tell me something about this Campaign, how is it conducted, how do you find out who is entitled to the prize, what [fol. 2318] is the basis of the contest?

A. Well certain increase of business over the same time the year before. We try to have it as fair as we can. We have a prize for the best exploitation stunt. We have a prize for the best scrap book, or advertising displays, stunts, extra advertising, things like that, take pictures that we put into the scrap book, they put them in and send it in and we get somebody, some of the other managers that may not be interested in that particular contest, or the paper people, or somebody to take it and see which one wins the prizes.

Q. You mentioned a scrap book; I hand you this and ask you if this is the book kept by the manager of the theatre at Harriman, Tennessee, and I call your attention to a picture South of Suez, and ask you if the manager at Harriman, Tennessee, advertised that picture in the manner set out in that scrap book?

A. Yes, sir.

Q. I wish you would for the purpose of the record, I will ask you if it does not have a picture of Brother, Sister, Mother, Grand-mother, father and Grand-father, all of them billed as an advertisement, and state that the whole family is going to see South of Suez?

A. Yes, sir.

Q. Now were those methods adopted by them?

[fol. 2319] A. Yes, sir.

Q. And that was adopted by the manager at Harriman, so far as the advertising the picture?

A. Yes, sir.

Q. That was a kind of a novel bill?

A. That was kind of a novel bill, and a little different from anything else we had.

[fol. 2320] Q. Did that idea originate with him, or did Crescent suggest it to him?

A. I suppose it originated with him.

Q. I hand you another scrap book for the Princess Theatre in Columbia, Tennessee, in which there is an advertisement relative to the "Penny Serenade", and ask you if that is the method adopted by the Manager at Columbia, Tennessee, to advertise the picture?

A. Yes, sir.

Q. Now, I notice that it has "Good morning. Be sure to see 'Penny Serenade' with Cary Grant and Irene Dunn at the Princess Theatre today and Monday." How did he advertise, what did he do with those bills or hand-bills?

A. Well, he would tack those on laths and go around town to the residences and stick them up in the lawn so that when they came out in the morning they would see that sign there "Good morning. Be sure to see 'Penny Serenade'."

The Court: Did he have another man to come around and clean them up?

A. He would like to let them stay as long as he could.

Mr. Armistead:

Q. Now I hand you one in which the picture "Road to Zanzibar" is advertised. I will ask you if the Manager at Brownsville, Tennessee used any particular method to exploit or advertise the picture, if so, tell us what he did?

[fol. 2321] A. Well, this is a photograph where he has some colored fellows with another colored fellow with some leopard skins on, riding on some poles around the town.

Q. Was that advertising that picture?

A. Yes, sir, that is a South African picture.

Q. Now, I hand you a scrap-book of the Roxy Theatre at Decatur, Alabama, and in that is an advertisement of the picture "The Philadelphia Story". I will ask you if the

Manager there used any particular method of exploiting or advertising that picture, if so, what?

A. Well, that is a hanger to put on the door knob at homes.

Q. You mean, that goes around the door knob, the top of that, and right under that is the advertisement of the pictures?

A. Yes, sir.

Q. Now, there is one from Gadsden, Alabama. I will ask you if the Manager there used any particular method to advertise the picture, "Kentucky Moonshine", and if so, please tell us what course he adopted or pursued in advertising that picture?

A. This is the letter he sent out.

Q. Just read into the record that method he used to advertise, just read that letter?

A. (Reading)

Dear Miss Weaver:

The Princess Theatre and its patrons, who have [fol. 2322] signed this letter are delighted at the success you have attained in motion pictures and have a feeling of genuine pride in the fact that Gadsden was at one time your home.

As a token of appreciation and in order that you may know that we do hold you in great esteem the undersigned movie fans of Gadsden signed this letter at the theatre when they came to see your latest picture "Kentucky Moonshine", Sunday and Monday, May 22nd and 23rd.

Due to the crowds at rush periods, there were several thousand who did not have an opportunity to sign the letter, however, all were in accord to acclaiming and expressing themselves that you have reached new heights in "Kentucky Moonshine", and we send our best wishes for your continued success and happiness.

Q. Now, I hand you a scrap book kept by the Manager of the Capitol Theatre in Princeton, Kentucky, and ask you if he adopted any particular methods to advertise the picture "Scattergood Bains"?

A. That is a hand-bill he got out there.

Q. What does that hand-bill say?

[fol. 2323] A. It says:

"Wanted!—100 Carpenters, 50 Bricklayers, 30 Plasterers, 20 Electricians, 200 Laborers—Their Families,

Friends, and all other citizens of Princeton to see and enjoy "Scattergood Baines"—Clarence Budington Kelland's beloved character of American Magazine and radio fame now on the screen with all the homespun philosophy, sage, wit, that has made him a favorite for more than twenty years—at the—Capitol Theatre—Tues. & Wed., May 27-28."

Q. Now, those are, I believe, from Alabama, Kentucky, East Tennessee, Middle Tennessee, and West Tennessee?

A. Yes, sir.

Q. Now, all of those Managers entered these contests, is that right?

A. Yes, sir.

Q. And those were the methods adopted by each Manager that I have questioned you about as his idea as to how to [fol. 2324] advertise a picture?

A. Yes, sir.

Q. Mr. Sudekum, these managers, do they encourage them to mix with the citizens in the community in which the theatre is located?

A. Yes, sir, we do everything we can to get them to be a part of the town and to take an interest in things in the community.

Q. Do you suggest that they join civic organizations such as the Rotary Club?

A. Yes we pay their dues in whatever ones they belong to.

Q. Are the Crescent Theatres, from time to time, used by citizens for public meetings?

A. Well, not so much the public meetings, as the Churches and Sunday Schools and like that.

Q. Do you make charges for them?

A. No.

Q. How about vacations for your managers, do you allow them to have vacations?

A. Yes, all of them have two weeks vacation with pay.

Q. Now, every December, does Crescent have, in all of its towns, any show for the benefit of the under-nourished, or under-privileged children?

A. Well, I wouldn't know right now about all the towns. That is the usual custom for them to do it. I think they all [fol. 2325] are doing it.

The Court: You put on an aluminum drive a week or so ago, didn't you?

A. Yes, a very big one.

Mr. Armistead:

Q. Mr. Sudekum, would Crescent rather see and prefer to have a house full of patrons with cheap admission prices, rather than to have the same amount of revenue with higher admission prices and have the house half full of people?

A. We would rather have the volume of business than to see the house half-filled with a few people. People enjoy the shows better when they have got a good crowd.

Q. Is it more or less a habit that you try to get the public into, to go to the theatres and see the pictures.

A. Yes, I think it is more or less a habit.

Q. Now, there has been introduced in evidence some income tax returns of Crescent. Does Crescent sell popcorn at its theatres?

A. Yes, sir.

Q. Does it sell screen advertising?

A. Yes, sir.

Q. Does it also derive revenue from the rental of offices and buildings?

A. Yes, sir.

[fol. 2326] Q. Does or not the amount of revenue produced from those sources amount to a substantial sum?

A. Oh yes.

Q. Well now, take the Hippodrome, in Nashville, does the Crescent derive substantial revenue from the rental of that to various parties?

A. For rental and roller skating. Roller skating has been very good for the last two or three years.

Q. Do you have popcorn, is that sold in all of your theatres?

A. Well, most all of them. There might be some few that don't handle it; popcorn, soft drinks and candy.

Q. Well now, how do they get that popcorn? Is it kept in one central place, do they get it from one central place, or how is that handled?

A. We have standing orders with a wholesaler to ship so much a week to each one of the places and we keep a supply here. We have a special concrete room to keep it in, we keep a supply here in Nashville.

Q. Now, Mr. Sudekum, did you ever tell anyone that you, or Crescent Amusement Company, could get pictures and they could not?

A. No sir.

Q. Did you ever tell anybody that if they didn't sell the theatre to Crescent, or to you, that Crescent would open up [fol. 2327] another theatre and put them out of business?

A. No sir.

Q. Did you ever make the statement to anyone, in substance, that if he didn't sell his theatre to you, that he would have a hard time getting pictures?

A. No.

Q. Did you ever authorize Mr. Lee Castleberry to make any statement about Crescent's ability or non-ability to get pictures, or did you ever authorize Mr. Castleberry to make the statement to anyone, that if they didn't sell out that the Crescent would enter the town and put them out of business, that Crescent could get the pictures and they couldn't.

A. No sir.

[fol. 2328] Mr. Wright: That is objected to on several grounds. In the first place, the answer is virtually putting the words in the witness's mouth by Mr. Armistead; and in the second place, it is a pure conclusion as to what Mr. Castleberry did, what conversations he had. He can say just what Castleberry's duties were, what he did, what conversations he had with him and what he may have told him to do.

The Court: He can state whether or not he ever told Mr. Castleberry any such thing or whether he ever knew that Mr. Castleberry ever did any such thing.

By Mr. Armistead:

Q. Did you ever until this lawsuit started hear, or until the trial of this case started, I mean, hear of any contention—I mean any statement alleged to have been made by Mr. Castleberry that Crescent would see that they couldn't get pictures?

A. No sir.

Q. What does Castleberry do anyhow?

A. He is manager of the Fifth Avenue Theatre.

Q. Here in Nashville?

A. Yes sir.

Q. Does he do a lot of driving for you, drive you around?
A. Yes sir.
Q. Has he been doing that for a long number of years?
A. Yes sir.
[fol. 2329] Q. How long has Castleberry been with you?
A. I don't know; sometime.
Q. He is one of your oldest employes, is he not?
A. No, not that but he has been there quite a while, ten or twelve or fifteen years maybe; ten or twelve years.
Q. Does he take any part in or has he ever taken any part in the purchase of pictures for Crescent?
A. No, he never did.
Q. Does he know what pictures Crescent negotiates for?
A. He don't know anything about the pictures.

Mr. Wright: If the Court please, Mr. Castleberry can testify as to what he knows better than Mr. Sudekum can.

By Mr. Armistead:

Q. Has Mr. Castleberry ever been present when you were negotiating for the purchase of any films?
A. No. He might have walked through the room or something like that but he never had nothing to do with any deal at all.
Q. Does Castleberry know what pictures he is going to get at the Fifth Avenue Theatre until they are booked for him?
A. No. There may be some few that he might ask for—to try to get them for him, would be the only thing. He wouldn't know what he was going to get.
Q. Now, Mr. Sudekum, have you at any time instructed Mr. Rosenbaum what pictures to buy?
[fol. 2330] A. No sir.
Q. Does he do his own buying?
A. Does all his own buying; has always.

Mr. Wright: That is a conclusion as to what Mr. Rosenbaum did or what he instructed him to do. He can state whatever conversations he had with him and describe what the relationship was, but just to say that Mr. Rosenbaum negotiated his own film buys, I don't think meets the issue of whether or not Mr. Sudekum had anything to do with it.

The Court: Well, he has already stated he didn't have anything to do with it; that he had never instructed Mr. Rosenbaum about buying any films.

By Mr. Armistead:

Q. Now, I wish you would please tell us something about film buying. Do these distributors have film salesmen who come around and call on you from time to time?

A. Yes sir.

Q. Well, tell us something about that. Do you make a contract with them right away?

A. Well, there is no special way that I know of to go about it. They usually come in right after a salesmeeting and tell you how good everything is going to be, how much bigger and better it is going to be than last year, and wind up by telling you how much more they want than they got [fol. 2331] last year. You just hardly can't do anything with them. I mean you can't make any deal. And then they, some of them get mad and go out and come back again maybe in a few days or a week or something like that and go over the same thing again, and that goes on until you finally get together some way or another.

Q. Well, do you purposely wait until late in the season to buy pictures for Crescent?

A. No, we don't. We buy them whenever we can; whenever we can get together.

Q. Do you have any difficulty in getting together with them?

A. Well, they just, it looks like, try to wear you out to where you just break down and give them anything they want to get rid of them. I take them and ride them around until train time so they won't have a chance to talk with me.

Q. Now, who does the purchasing of films for the Cumberland Amusement Company?

A. Cowan Oldham.

Q. Has he been doing that for some time?

A. Well, he has until Mr.—since Mr. Hill gave it up. Mr. Hill got sick.

Q. That reminds me—there is in the record Government Exhibit No. 176, a letter from Mr. Avey to Mr. Connors, dated August 17, 1937, in which it is stated:

> "He then informed me that he merely wanted to learn what he could from each company's representative and make his buying plans afterwards, and that [fol. 2332] Mr. Sudekum, who owns a considerable interest in the Hill circuit, had requested them not to buy at what he called this early date. He also stated

that he doubted if they would ever make a deal until after the Sudekum deal was made."

Now, did you ever instruct Mr. Hill or request Mr. Hill not to buy any particular product?

A. No sir. He may have talked to me about things at different times but he always did his own buying.

Q. Now, when Mr. Crute was living did he purchase films for Lyric?

A. Yes.

Q. Now, there is an inter-office communication, Government's Exhibit No. 201, which is as follows: "Sold new product here with the exception of three top features, Crute has just returned from Nashville and said Sudekum told him to lay off them. I have personally talked to Sudekum over the phone and he advised me that he had instructed both Crute and Rosenbaum at Florence to lay off percentage this year."

Is that correct or not?

A. I guess so because I didn't think percentage buying was very wise at that time.

Q. Well, did you instruct Crute not to buy?

A. No, I didn't instruct him not to because they would have went ahead and done it anyway if they had wanted to.

Q. How about Rosenbaum?

A. Rosenbaum, the same.

[fol. 2333] Mr. Wright: He has already testified that the statement there is correct and now he is attempting to impeach his own witness here by having him say it wasn't correct.

Mr. Armistead: No, I am not endeavoring to do that at all.

Mr. Wright: Well, the answer was quite clear that what was stated there was correct.

Mr. Armistead: I asked him did he instruct Rosenbaum to lay off percentage pictures.

Mr. Wright: Before that you had asked him if what the salesman had reported in the exhibit was correct and he stated it was.

The Court: He said "He guessed so"; he didn't think percentage buying was very good at that time.

By Mr. Armistead:

Q. Did you understand the question?

A. What was it?

Q. This inter-office communication here says this: "Sold new product here with the exception of three top features. Crute just returned from Nashville and said Sudekum told him to lay off them. I have personally talked to Sudekum [fol. 2334] over the phone and he advised me that he had instructed both Crute and Rosenbaum at Florence to lay off percentage this year." That is what this salesman writes to the home office and the salesman is Sands of Warner's, and that is an inter-office communication of date August 23, 1935.

A. I don't know anything about that. What I mean was we probably had discussed the percentage arrangement sometime earlier. I don't know about that date or about that letter, and I know nothing about the telephone call.

Q. Sir?

A. I don't know anything about that telephone call.

Q. I know but I am particularly anxious to find out whether or not you ever instructed Mr. Crute not to buy percentage pictures?

A. No.

Q. And I also want to know whether or not you did instruct Rosenbaum not to buy percentage pictures?

A. No.

Q. Sir?

A. No.

Mr. Wright: He has already testified he didn't remember, whether he did or not; he didn't remember anything about the conversation. Now, he is telling us that he didn't.

The Court: That all goes to the weight of the testimony.

[fol. 2335] By Mr. Armistead:

Q. Now, did you ever tell T. C. Hutton or his son—you remember that young boy who testified here from Jefferson City in east Tennessee?

A. Yes sir.

Q. Did you ever tell either one of them that you had gone into a town in West Tennessee or any other place and taken practically all the business from the opposition?

A. No.

Q. Did you ever tell Tim Smith that Harriman and Morristown were not large enough for two theatres?

A. No.

Q. Did you ever tell a distributor that if it wanted your business or wanted to do business with Crescent it would have to refrain from selling your opposition pictures?

A. No.

Q. Did you ever tell a distributor that if it didn't sell Crescent in a particular town that Crescent wouldn't buy films from it for the other towns?

A. No.

Q. Did you ever tell a distributor how much it should charge for its films—I mean charge the opposition for films?

A. No.

Mr. Wright: What was that last question?

(Question read by reporter.)

[fol. 2336]. By Mr. Armistead:

Q. Do you know what film rentals are being paid by independents?

A. I wouldn't know.

Q. In the past have the salesmen representing distributors told you how much some operator in a near-by town close to one of your towns, Crescent towns, was paying for films?

A. I don't remember a single instance. I wouldn't believe them if they did.

Q. Well now, why do you make that statement?

A. Well, they would probably tell me so high I wouldn't believe it.

Q. Did you ever tell any distributor that it had to take its product from the opposition house and sell it to Crescent?

A. No.

Q. Now, Mr. Sudekum, there has been filed in this case a paper on which there is some data relative to a Fox franchise and you were questioned about that the other day. Do you remember that your name was signed to that paper?

A. Yes.

Q. Who were you representing when you signed that?

Mr. Wright: Now, if the Court please, that is a pure conclusion. There is a memorandum that speaks for itself.

It has got the companies listed there and it has Mr. Sudekum's signature on it and I don't think there is anything.

[fol. 2337] The Court: Yes sir, Crescent Amusement Company by Tony Sudekum, if I remember correctly.

Mr. Armistead: That is exactly right, your Honor. Now, what I want to ask him now: Were you signing that or did you sign that as a representative of or on behalf of Rockwood or Muscle Shoals?

A. Just the Crescent Amusement Company.

Mr. Wright: I object to that,—a contradiction of the instrument itself.

The Court: Well, if it is a contradiction, of course, the objection is good.

Mr. Armistead: I don't think it is a contradiction, may it please the Court.

The Court: Well, let's see the instrument. Is it at your office?

Mr. Armistead: No, it is here. It is Exhibit No. 286.

The Court: All right. Let's take a short recess while you find it.

(Recess.)

[fol. 2338] Resumption after recess.

The Court: Did you find that exhibit?

Mr. Armistead: No, sir; I expect it is at my office, may it please the Court.

The Court: All right, we will pass over that.

Mr. Mitchell: It is in the exhibits of July 22nd.

The Court: Well, let's go ahead to something else.

Mr. Armistead: Q. Mr. Sudekum, these pictures which you were questioned about, were they taken in the usual course of business, is that customary, for Crescent to take pictures of its theaters?

A. Yes, we try to keep pictures of all our places.

Q. In other words—this is a little leading—but those pictures were not taken for purposes of this lawsuit?

A. No; we had them.

Q. Now, I hand you a picture and ask you if it is a picture of the Princess Theatre at Gadsden, Alabama?

A. Yes, sir.

Q. Will you file that as Exhibit No. 80 to Defendant's proof?

[fol. 2339] A. (Yes, sir.)

Q. Now, can you tell us what Crescent had invested in that theatre, approximately?

A. I think something over a hundred thousand dollars.

Q. Sir?

A. I think something over a hundred thousand dollars.

Q. Now, I will ask you if the theatre at Columbia, Tennessee—What is the name of that?

A. Princess Theatre.

Q. Princess Theatre; if you have from time to time remodeled that theater?

A. Yes, sir.

Q. Have you made extensive changes in it?

A. Yes, sir.

Q. Why did you do that?

A. Well, it had steps in it at first; we took those out first, and we changed it about, about three times that it has been remodeled.

Q. I hand you a picture and ask you if it is a picture of the Princess Theater at Columbia, Tennessee?

A. Yes, sir.

Q. Will you file that as Exhibit No. 81 to defendant's proof?

A. Yes, sir.

[fol. 2340] Q. Now, what is the investment that Crescent has in that theater?

A. I think about fifty or sixty thousand dollars.

Q. Now, I hand you a picture and ask you if it is a picture of the Capitol Theater at Clarksville, Tennessee?

A. Yes, sir.

Q. What is the investment that Crescent has in that theater?

A. I think about one hundred and five thousand dollars.

Q. Now, I hand you a picture and ask you if it is a picture of the Princess Theater which was recently opened at Decatur, Alabama?

A. Yes, sir.

Q. Will you file that as Exhibit No. 82 to Defendant's proof?

A. Yes, sir.

Q. I hand you a picture and ask you if it is a picture of the Capitol Theater at Union City, Tennessee?

A. Yes, sir.

Q. Will you file that as Exhibit No. 84 to Defendant's proof?

A. Yes, sir.

Q. What investment has the Crescent in that situation?

A. Which one?

[fol. 2341] Q. At Union City?

A. I think about thirty-five thousand dollars.

Q. Now, I will ask you if this is a picture of the Capitol Theater at Paris, Tennessee?

A. Yes, sir.

Q. What is the investment that Crescent has in that situation?

A. About seventy-five thousand dollars.

Q. Will you file that as Exhibit No. 85 to Defendant's proof?

A. Yes, sir.

Q. Now, I hand you a picture and ask you if it is a picture of the Princess Theater at Morristown, Tennessee?

A. Yes, sir.

Q. What is the investment that Crescent has in that?

A. About ninety thousand dollars.

Q. Now, I hand you a picture and ask you if it is a picture of the Princess Theater at Harriman, Tennessee?

A. Yes, sir.

Q. How much is the investment in that situation?

A. About eighty-five or ninety thousand dollars.

Q. Will you file that as Exhibit No. 86 to the defendant's proof?

A. Yes, sir.

[fol. 2342] Q. I hand you a picture and ask you if it is a picture of the Capitol Theater at Brownsville, Tennessee?

A. Yes, sir.

Q. Will you file that as Defendant's Exhibit 87?

A. Yes, sir.

Q. Now, Mr. Sudekum, there has been a letter introduced in this record which you wrote Mr. Morgan, that you own a half of Cherokee; is that correct, that you own a half of Cherokee?

A. No, sir.

Q. And also a letter that has been introduced where you wrote Mr. Baird that you owned a half interest in Cherokee; is that correct?

A. No, sir.

Q. Why did you make those statements?

A. Well, I suppose, Stengel, my son-in-law, he was looking after them; I might have said I had a half interest,

among other things; I might say I have a home, and it don't belong to me, it belongs to my wife.

Q. How is that; I didn't catch that?

A. I say I might say I have a home, and it don't belong to me, it belongs to my wife; I just probably told them that.

Q. Now, I will ask you if Cumberland Amusement Com-
[fol. 2343] pany was not looking for a location to construct a theater in McMinnville, Tennessee, long before, or years before, the Center Theater opened there?

A. Yes, sir.

Q. Do you know that of your own knowledge?

A. I went there a couple of times, several times, to help find a location.

Q. Was that before you ever had any knowledge or had ever heard that the Center Theater was going to open up?

A. Yes, sir.

Q. Mr. Sudekum, did the Crescent at any time ever purchase a film or picture and not play it for the purpose of keeping it away from the opposition?

A. No, sir.

Q. Now, does the Crescent Theater generally show Western pictures on Fridays and Saturdays?

A. Mostly Saturdays.

Q. Why is that?

A. Well, the Saturday crowd look like they like Westerns better than anything else you can show.

Q. Well, does the Crescent derive more revenue from showing Westerns on Friday and Saturday than it does from other pictures shown during the week?

A. Yes, sir.

[fol. 2344] Q. Now, how much more revenue does Crescent get, would you say, from showing Western pictures than it does from showing the general run of pictures?

A. I wouldn't know that.

Q. Well, does it amount to a substantial amount, or a small amount?

A. Well——

Mr. Wright: I object to that; we submit, if the Court please, that the books and records are the best evidence, and Mr. Sudekum says he doesn't know, and I judge he wouldn't be permitted to——

Mr. Armistead: I imagine he had dollars and cents in mind when he said he doesn't know.

The Court: Well, the best evidence would be the records.

Mr. Armistead:

Q. Now, before Crescent entered Gallatin, Tennessee, do you know how many shows Mr. Roth was showing there during the week?

A. From only what I heard about it; I heard he only ran one show.

Q. How about matinees?

[fol. 2345] Mr. Wright: We object to that, may it please the Court.

The Court: Sustained.

Mr. Armistead:

Q. Well, you kept up—or did you keep up with opposition houses, I mean, with the operators in various towns, and find out generally how many times they were showing a picture, making changes, or how often they kept the theaters open?

A. No, I don't know that I kept up with that so well.

Q. Now, Mr. Stengel, is your son-in-law, I believe you stated?

A. Yes, sir.

Q. When did he become connected with Crescent, about what year?

A. I wouldn't know what year; sometime——

Q. Well, what business was he in before he came with the Crescent?

A. He was with Caldwell & Company, stocks and bonds, salesman.

Q. Well now, did he have any experience in the picture business before he became affiliated with Crescent?

A. Well, he told me he used to work in the Post room in [fol. 2346] Chicago, I believe, when he was a kid; that is about all I know.

Q. Now, how did he get along; did he catch onto the business quick, or was he slow or——

A. Very good.

Q. Now, did he discuss with you about buying any theatre for himself?

A. Yes, sir.

Q. Which one?

A. The first one was Tracy City.

Q. Then did he discuss with you any other theaters, the purchase of any other theaters?

A. Yes, sir.

Q. Which one?

A. I think Rockwood, I believe.

Q. Now, do you remember when the Rockwood Amusements was incorporated?

A. No.

Q. Well, Mr. Sudekum, most of the towns that the Crescent Amusement Company operates theatres in, are they larger or smaller than the Rockwood towns?

A. They are larger.

[fol. 2347] Mr. Armistead: Just a moment, Your Honor, I think I am about through. (Consults)

Your Honor, we have located this Government's exhibit 286. This is in connection with the Fox franchise, and signed Crescent Amusement Company by Tony Sudekum, and there are no other signatures on the paper. I believe that is all, may it please the Court. (Exhibit passed to the Court.)

The Court: Well, of course that memorandum is signed Crescent Amusement Company by Tony Sudekum. As I recall the objection was made to the memorandum as to whether or not he was signing for any other company other than the Crescent Amusement Company. Of course on its face he was signing for the Crescent Amusement Company. However the memorandum will have to be looked at as a whole, it covers a number of other towns, several of which were not in the Crescent circuit. It is a memorandum for a franchise for all of those towns as a whole, some of which belonged to other companies.

Mr. Mitchell: May it please the Court, my only objection to that exhibit was that it was not admissible in evidence as [fol. 2348] against Muscle Shoals Theatres, because that other things introduced by testimony and records, that Muscle Shoals Theatres was dissolved as a corporation, to years before that date, in 1937, and at the time of the institution of this suit, and for two years prior to that time, covered by that piece of paper, Mrs. Nettie Sudekum owned

a one-half interest in the Muscle Shoals Theatres, and Rosenbaum the other half.

The Court: I do not think it would be evidence against the corporation, Muscle Shoals Theatres; it would be competent evidence against the partnership, if that is what you have in mind.

Mr. Mitchell: The point was that Mr. Sudekum's signature on here had no effect unless it was shown he had a representation through agency from the partnership, and there is nothing to show that the Crescent Amusement Company signed that piece of paper. Crescent Amusement Company had no dollar of investment at that time it was claimed by the Government that the signature of Crescent on that paper was an indication that Muscle Shoals and Crescent was of one concern. He called it that, that is not [fol. 2349] proof of agency, and that as proof of agency was not even admissible.

The Court: I think the purpose for which the Government introduced this memorandum was to show that the Crescent circuit and its affiliates, together with the partnership, Muscle Shoals Theatres, all figured in one deal, for the franchise, and that Mr. Sudekum approved it on behalf of Crescent Amusement Company.

Mr. Mitchell: And we said that could only be admissible if it were indicated by some measure of proof that Sudekum had some authority to tie our situation into that one piece of paper.

The Court: Did you get the franchise?

Mr. Mitchell: We got the franchise, we did indeed, our objection was to this piece of paper.

The Court: I will overrule the objection as to the memorandum, and overrule the objection to the question asked the witness by Mr. Armistead, relative to who he was signing for, the paper shows itself who he was signing for.

[fol. 2350] Mr. Armistead: Shall I proceed?

The Court: Yes, sir.

Mr. Armistead:

Q. Mr. Sudekum, I forgot to ask you if the Crescent got into financial difficulties in the twenties?

A. Yes, sir.

Q. Did you sell any theatres, and if so, where?

A. We sold one in Jackson, Tennessee, and one in Columbia, two in Knoxville and one in Clarksville, I believe that is about all I remember.

Q. This sound equipment you said you paid twenty-thousand dollars for that was placed in the Knickerbocker; that was sound on disks; when sound on films came in, what did you do with that equipment that was in the Knickerbocker?

A. It was no good, with sound on films coming in.

Q. Sir?

A. They were no good, you couldn't get any records for them any more, they just quit making them.

Cross-examination.

By Mr. Wright:

[fol. 2351] Q. Mr. Sydekum, in connection with this business of exploiting pictures, you gave the kind of exploitation a particular situation may require, do you not?

A. They had their own ideas about that.

Q. Sometimes—I notice in this same book on Gallatin, Tennessee, of another method of exploitation that the manager used there; they had a lottery of bed room furniture?

A. Yes, used that a lot of places.

Q. And at the time you ran this lottery there was a competing theatre there, wasn't there?

A. Yes.

Q. That is not a method that would primarily be used?

A. Oh yes, it would, we used it in nearly every place.

Q. You found that that is one way of attracting business from the competing theatres?

A. That is one way of attracting business anywheres.

Q. The primary object of anything you do in connection with showing the pictures is to attract business to your theatre, isn't it?

A. That is right.

Q. And where there is a competitor, the primary object is to attract business from him, from the competitor's business to yours?

A. Go get all the business you can.

Q. And the business where you have competition comes to [fol. 2352] some extent from him?

A. No, I wouldn't know whether it is his business or not.

Q. You wouldn't care?

A. No, sir.

Q. And sometimes in exploiting a picture it is better not to give a picture particularly good exploitation?

A. I don't know what you mean by that.

Q. Where you have a percentage picture, you may be thinking about a future deal, you may not want that percentage picture to do very well?

A. That is right.

Q. That happens, doesn't it?

A. That happens.

Q. And so in those cases you might not give the picture any exploitation at all?

A. Well no, we wouldn't probably spend as much money on it.

Q. Well you might not spend any at all, if you thought it was advantageous not to do so in making your next film deal, is that right?

A. You can't hardly keep a manager from doing that, if he is in on a percentage arrangement.

Q. Here is a letter of February 21, 1940, from Mr. Cowan Oldham; I will ask you to read that and see if that refreshes your recollection on that point?

A. Yes, but I don't know hardly what it means.

[fol. 2353] Q. Read the second page.

A. Well that is the way it is, I don't spend anything on percentage pictures.

Q. Well in this statement he makes here, we have played off this and it is not very good, from a percentage from Warner but did not gross much money for I did not spend anything for advertising it, is a correct statement?

A. I do not know, that is Cowan Oldham.

Q. The letter was written to you?

A. Yes, but I don't know what he told him.

Q. What?

A. I don't know what he told his manager.

Q. You had no reason to believe that is not correct, have you?

A. It may be, he says he was trying to get on and arrange to make a franchise.

* * * * * * *

[fol. 2354] Q. When you said when Oldham negotiated, you didn't want the Court to get the impression that you didn't discuss them with him, did you?

A. He probably talked to me about them, but he always made his own deals.

Q. You don't want the court to get the impression that you didn't give Oldham advice and assistance in connection with film deals?

A. I want him to get the impression I didn't ever make the deals.

Q. I don't think the reporter was able to get the question, may be, you interrupted before I finished. Let's try again. I say you didn't want the Court to get the impression, did you, that you didn't discuss film deals with him and give his assistance and advice in connection with them?

A. That is right.

Q. And the same is true with respect to Mr. Rosenbaum, isn't that right?

A. Well, he talked sometimes about it. I didn't see him very often.

Q. Well, you saw him often enough to keep track of what is going on in the Muscle Shoals Theatre business?

A. No, I wouldn't say that.

Q. He testified that he came up here and talked to you a couple of times a month. Do you think that is wrong?

[fol. 2355] Mr. Mitchell: I object to the question because the testimony is not as stated in the question. He said he talked to him every two months or so. The question suggested is not as stated, is not quite true.

The Court: Yes, I recall the witness said once every month or so, or month or two, something like that.

Mr. Wright: Isn't that what I said?

The Court: No, you said twice a month.

Mr. Wright:

Q. I will correct it to whatever the testimony was, that he came up every month or so and talked to you, is that right?

A. I don't know, I don't have any record of when he comes. He comes sometimes, just drops in.

Q. When you said he negotiated his own film deals, you didn't want the Court to get the impression that you and he never sat down perhaps and negotiated a deal at the same time with the film companies, did you?

A. He has negotiated hundreds of them I never heard of.

Q. I know, but just answer the question.

A. What was the question?

(Question read by the Reporter)

A. Well, we talked about it.

Q. When he made a franchise deal, you and Mr. Rosen-
[fol. 2356] baum and Mr. Stengel would all talk to the film representative together, isn't that right?

A. We might have all been together, yes.

Q. And worked out the deal together?

A. No, I worked out my own and they worked out theirs.

Q. But in the course of working these out together, you knew what was being done on their situations, just as they knew what the deal was in yours?

A. Not necessarily so. I probably heard what their deal was, they might have heard what mine was, I don't know whether they did or not.

Q. They could have heard from you all sitting down together and working out the deals, couldn't they?

A. Well, he wasn't there when I was making my deal, but they usually went out and made their own deals.

Q. You mean, you would leave the room while Stengel and Mr. Rosenbaum talked, and that Mr. Stengel and Mr. Rosenbaum would leave the room while you talked?

A. Not exactly that, no. Usually, they would go upstairs in Stengel's office and carry on.

Q. You might happen to be in there all the time?

A. I have not been in Stengel's office upstairs, I don't guess, twice in a year.

Q. You and Mr. Stengel and Mr. Rosenbaum were all
[fol. 2357] associated together and had negotiations with Metro on the 1939-1940 product didn't you?

A. That might have been, he could have been there.

Q. You didn't buy any 1939-1940 product during the 1939-1940 season, neither did Rosenbaum or Stengel, isn't that right?

A. Well, I don't know about the years. There was a couple of years we didn't buy them.

Q. 1939-1940 all three of you didn't get together?

A. I don't know, I don't know whether Mr. Rosenbaum did *not* or did not, I couldn't say.

Q. You say you don't know?

A. I don't know, no sir.

Q. Although you were negotiating a deal with Metro with Rosenbaum and Stengel, you now say you don't know whether Rosenbaum made a deal or not.

A. I am telling you I don't remember, I don't remember every conversation, there are so many of those things going on in the business of film deals, I don't remember.

Q. That was a fairly important one, wasn't it, talking about a five-year franchise?

A. Well, there was very little talk about it.

Q. You don't make a five-year franchise every day, do you?

A. I didn't make that one. I asked them about it and they said, no, they wouldn't make no five-year franchise.

[fol. 2358] Q. You don't remember whether Rosenbaum made a franchise with them or not?

A. No sir.

Q. You haven't any idea to this day whether he has one or has not?

A. No sir.

Q. When it comes to building a theatre, you build the theatres that you think will make you the most money in a particular situation where you put it, isn't that right?

A. We try to build a nice theatre.

Q. Sometimes when you put a theatre into a situation to prevent somebody else from coming in, you may not build such a nice theatre, isn't that right?

A. To prevent somebody from coming in?

Q. Yes.

A. I don't know how we could ever do that.

Q. You never heard of a situation like that, where you might lease a house or build one because you were afraid that somebody else was going to come into the town?

A. Oh, well, that may be true.

Q. And in some of those situations, you would build just enough of a theatre to keep the other fellow out, without much regard to how good it was, wouldn't you?

A. No, we usually build one for a second house with a view of catering to the farm trade with cheap admission prices.

[fol. 2359] Q. Does the farm trade require any rest room?

A. I should think so. I don't know why they wouldn't as much as any other.

Q. You opened a theatre out here in Lebanon, Tennessee, a short time ago, didn't you?

A. Yes.

Q. A second house, as you call it?

A. Yes.

Q. A converted store room?

A. Yes.

Q. How long ago did you open it?

A. I don't know, several months ago.

Q. It hasn't got any rest room facilities, has it?

A. Yes.

Q. You say it has.

A. Yes.

Q. When were they put in?

A. When it was built.

Q. Do you know the name of the theatre I am talking about?

A. The little house, I don't know the name. Built it off the Square there.

Q. It is in a store about 18 feet wide, isn't it?

A. I don't know how wide the store show is, it is a small house.

Q. A converted store building?

[fol. 2360] A. It was a show there, here several years ago, then remodeled into a store and then we put it back into a theatre.

Q. You put it back into a theatre because you heard somebody might come in there?

A. I heard that somebody might come in there, but the reason I took it was because a man wanted to fix up the building for us at a reasonable rent and we said, all right, go ahead and fix it.

Q. It was one of the reasons, and one of the reasons, too, was that you thought somebody might come in and operate it, if you didn't?

A. There is always that danger of somebody coming in.

Q. The danger was particularly imminent at that time, at the time you opened?

A. No, I don't think so, because I heard that in all the towns, the same party, at least, three or four of the towns and nothing ever happened.

Q. Out here in Murfreesboro, you picked up a second house a couple of years ago, didn't you, when you heard somebody was coming in there?

A. We got a second house; I heard rumors there, too.

Q. The house you put in there was a converted store show?

A. It was a store then, yes sir.

Q. You didn't open that house until just a few months [fol. 2361] ago, did you?

A. No, it has been some time ago.

Q. How long ago?

A. Well, I thought you said two years ago, awhile ago.

Q. That is when you acquired it?

A. Well, we started to work as soon as we got possession of the building.

Q. But you didn't open it for a year and a half after you acquired it, did you?

A. Well, I wouldn't know when we acquired it, but I think the people in there had a pretty long time for their lease to run; as soon as we got possession of the building, we went to work on it.

Q. But you had it leased for a long time, at least a year and a half or two years before you opened it?

A. I say, I don't know how long we had it. Just as soon as we got possession of the building, we went to work on it.

Q. Can you tell us where those rest rooms are in this theatre, this second house?

A. Well, on the side.

Q. Which side?

A. On the right hand side as you go in.

Q. On the right hand side as you go in?

A. Yes sir.

[fol. 2362] Q. Have you got signs on them or marks?

A. I don't know as they have, I don't think they have signs on them.

Q. Are they secret rest rooms?

A. Kind of secret, yes sir. I have been in them.

Q. Are you talking about rest rooms you maintain for the use of your employees, or something that is there for the public to use?

A. Everybody uses it, employees and the public.

Q. Why don't you have a sign on them?

A. I couldn't say whether there is a sign on it or not, myself.

Q. Are you ashamed of them?

A. Well, yes.

Q. In a number of situations, you have leased a theatre and just kept them closed so that they couldn't be opened or run by anyone else, isn't that right?

A. No. The only reason we keep them closed is because we don't think we can make any money out of them where we have got one closed.

Q. Yes, but you continue to lease them for substantial periods of time, even after they are closed, isn't that right?

A. If we have a lease on it, we have to pay the rent.

Q. Sometimes you go on and renew the leases?

[fol. 2363] A. That is right.

Q. Isn't that correct?

A. That is right. We may hope to open it up some time if business conditions get better, we might want to open it up.

Q. You always want to be in position where, if competition does materialize, you can reopen?

A. No, we like to be in position where we can take care of the public if the situation demands it.

Q. The extent to which you are willing to take care of the public frequently depends, does it not, on the particular competitive situation that you find yourself in?

A. No, I wouldn't say that.

Q. You don't think that is so?

A. No sir.

Q. You had some theatres at Dyersburg, Tennessee, they were in very poor condition, up until a year ago, isn't that right?

A. No, I wouldn't say they were in poor condition.

[fol. 2364] Q. They were so bad there were numerous complaints from the people of Dyersburg about them, is that not right?

A. No, I never heard no complaints.

Q. You never heard of that?

A. Most of the complaints we had was because we built a new one at Union City and Paris and the people, some of them, thought they ought to have a new theatre there. We had been looking for a lot to buy there for the last two or three years.

Q. They saw what you had done in the competitive situations and they wondered why they couldn't have——

A. That is right.

Q. — good service in Dyersburg where there wasn't any competition?

A. Well, they had good service there but they just wanted something better.

Q. Well, let's see if I can refresh your recollection on that. I show you a letter dated June 22, 1940 from your manager at Dyersburg and I will ask you to read that.

(Wintess reads letter to himself).

A. Yes, I got it.

Q. Now, that you have read that letter, do you recall that the Frances Theatre was in terrible condition there?

A. No, it is not in a terrible condition.

Q. I don't mean what it is now. I said what it was at the time this letter was written.

A. It is now just like it was then. That is where the [fol. 2365] manager was a relief manager and had been there for two weeks, a young boy, and he just wanted something to write about.

Q. When he says here: "The floor is just about ready to fall in and is patched with tin in some places; the walls look very bad and the ornamental work has started falling. At least, a piece fell about a month ago." You think that was just a figment of his imagination?

A. I think so.

Q. He never saw a piece fall?

A. I think so, yes. He said "about a month ago." He said the floor "is falling in."

Q. Did you take a look at the theatre after you got the letter?

A. No.

Q. You didn't?

A. No.

Q. Then you don't know whether—you don't have any reason to believe that is not so, isn't that true?

A. I know the floor couldn't fall in when it is on the ground.

Q. You don't think the floor might deteriorate as long as it is on the ground, is that it?

A. I don't think it could fall in.

Q. And you don't think it would be possible for the plaster on the walls to fall?

A. That might be, but the manager has been there a long time and I had rather pay attention to what the manager says than a boy just there on relief.

[fol. 2366] Q. Well, you just did nothing about then after you got this letter?

A. Well, I won't say that. They might have put new carpets in.

Q. Might have what?

A. Might have put new carpets in. They were talking about fixing it up but I don't know whether it has been all attended to or not. The main thing if, I would like to buy a better location there and build a better theatre, in a better location, if we could. I was down there *here* sometime ago looking at a piece of property that somebody had for sale.

Q. You might be a little faster about making up your mind about a new location if it appeared that somebody else was going to come into Dyersburg, is that right?

A. I don't know.

Q. That might hasten your decision?

A. I am ready to buy it now if we can get a place and start building.

Q. Well, as a matter of fact, what determines your decision as to what to do in all these situations is whether you can do it profitably or not, is that not right?

A. You mean building a house?

Q. Yes.

A. Yes, we like to think it is going to be profitable.

Q. Now, Mr. Sudekum, I believe you testified on your direct examination that you didn't know what film rentals [fol. 2367] were paid by independent operators. Now, that statement just isn't true, is it?

A. Yes, I think so. I don't remember knowing about any of them.

Q. You don't? Don't you ever remember being asked to assume a contract that an independent had made in a theatre that you took over?

A. Yes sir. Then I would know when we took over a contract.

Q. Very definitely?

A. Yes sir, because we assume the contract.

Q. Yes, and the practice is ordinarily not to assume the contract but to make a new contract because the independent —the rentals called for by the independent contract are more than you care to pay, is that not right?

A. Well, sometimes. What I mean by that was the salesman wouldn't tell me what other people would pay.

Q. Well, they show you the contract they have when they ask you to assume it, wouldn't they?

A. Well, the salesman wouldn't. The man that is selling me a theatre would ask me to assume the contract and then he would give me the contract.

Q. Well, the company itself would want you to assume it, wouldn't they?

A. Yes sir.

Q. They try to get you to assume it?

A. That is right.

Q. And in most cases you decline to assume them, is that [fol. 2368] not right?

A. Well, I wouldn't in most cases. In some cases we don't assume them.

Q. And in those cases where you don't assume them you buy pictures at a much cheaper rate than that called for by the contract they ask you to assume?

A. Well, we would try to. I don't know whether we are always successful or not.

Q. Well, if you weren't successful there wouldn't be any point in not assuming the contract, would there?

A. Well, they want you to assume them.

Q. And you don't want it?

A. Well, that depends on what they are.

Q. But in any event, in the course of the discussion about contracts you find out very definitely what the independent has been paying for films and there is no doubt about that?

A. They give me the contracts.

Q. All you have to do is to read them to know what the independent has been paying?

A. That is right.

Q. Now, Mr. Sudekum, you testified on direct examination about this amount of money that you get from the Westerns and other pictures and you have records, do you not, showing exactly what comes in from all the Crescent theatres every day, is that not right?

A. We get a report.

[fol. 2369] Q. Get a daily report?

A. Yes sir.

Q. And you get a daily report also from all the houses that are operated by companies in which the Crescent has a financial interest too, don't you?

A. Well, I don't know whether we get a daily report or weekly report or monthly report on them.

Q. Well, you get reports on all of those theatres?

A. We get some kind of report on them.

Q. That includes Cumberland?

A. Cumberland, yes sir.

Q. And these reports, whether they are daily or weekly or monthly, show all the receipts of the theatre and the expenses that are paid out, is that not a fact?

A. That would show it, yes sir.

Q. And you also have a record of the——

A. It wouldn't show who it was paid to or the items, itemized, anything like that.

Q. Then you have a record showing the films that are played there and the dates the receipts were taken in, do you not, also?

A. Well, that would have the name of the picture on it, if it is a daily report.

Q. I say the names of the feature pictures?

A. It wouldn't have what was paid for it or anything like that.

Q. Well, you also keep a record, don't you, of what you [fol. 2370] pay the distributors for the particular feature pictures that play those houses?

A. No, we don't, only the Crescent Amusement Company.

Q. Well, your Crescent Amusement Company records show you what was paid for each picture that played Crescent houses?

A. Yes, Crescent theatres.

Q. And then at the end of the year from these reports you have a profit and loss statement on the performance of each theatre?

A. Well, we don't get it from each theatre. The Crescent Amusement Company wouldn't care——

Q. I didn't understand your answer.

A. The Crescent houses do.

Q. You have for your Crescent houses an annual profit and loss report for each theatre?

A. That is right.

Q. How about with respect to houses on which you have been getting reports, which are operated by subsidiaries of Crescent?

A. Well, we get a yearly statement from them.

Q. A profit and loss statement?

A. Yes.

Q. For the company?

A. For the company.

Q. How about for the theatres?

A. We wouldn't get it for the individual theatres.

[fol. 2371] Q. But you have records available to make it up if you want it?

A. Oh yes, could be.

Q. Now, Mr. Sudekum, you recall that your deposition was taken last June, on June 17th, I believe. You remember giving your deposition in this case?

A. Yes sir.

Q. And then before you signed it you read it over and you made some corrections in the testimony you had given there. You attempted at that time to make all the corrections that were necessary in your testimony?

A. No, I did not. There were some there that I didn't think amounted to anything; I didn't try to correct it. I read it over very hurriedly.

Q. Well, there was a statement that you recall—do you recall making the statement in the deposition that there was no connection between the sale of your theatres to Warner Brothers and the negotiation of the Warner franchise?

A. I don't think there was.

Q. That would be your testimony now?

A. Yes sir.

Q. Have you examined the agreements that were put in evidence here?

A. No.

Q. I call your attention to the fact that those agree-
[fol. 2372] ments or that the franchise, the original franchise was negotiated on the same date as the theatre sale agreement, and that when the theatre deal was settled, by the same instrument that settled the theatre deal the franchise was extended. Does that refresh you?

[fol. 2373] A. Well, I wouldn't think that would make any difference.

Q. Would that refresh your recollection, on that report?

A. No, I wouldn't think that would make any difference because they just wanted a franchise for the pictures.

Q. You don't want to correct this statement, then, that you made, that there wasn't any connection between the sale of your theaters to Warner Brothers and your franchise; that is your testimony now, is that right?

A. I don't think there was; I don't remember any.

Q. You state now there was no connection, is that right?

A. I don't think there was.

Q. And I think you also stated that at the time that that position was taken you made the statement you would have to take whatever clearance the distributor told you you could have; that is a statement that is quite obviously incorrect, isn't it?

A. No, I don't think so.

Q. You don't think you have ever been able to get a clearance that distributor might have been reluctant to grant you, is that so?

A. Well, I think I would have to be satisfied with what he wanted to give me.

Q. You recall instances where you were able to obtain clearance where the distributor didn't want to give it?

[fol. 2374] A. Well, that might happen; we might be able to persuade him to let us have our way one time.

Q. In any event, your statement that you had to take whatever clearance the distributor told you you could have, was clearly incorrect, isn't that right?

A. No, that is generally true.

Q. Now, in some cases you were able to get the clearance after the contracts had already been made without any clearances, isn't that right?

A. That might have been; that might have happened.

Q. Do you remember in the current Warner franchise you were able to get clearance that they told you that you couldn't have, do you recall that?

A. No, I didn't fool with the clearance much after the deal was made.

Q. Well, you recall, don't you, that you did get clearance?

A. No, I don't.

Q. Now, another statement which you made at the time your deposition was taken was a statement if in a particular situation the other man had a product, you wouldn't negotiate for it, because you wouldn't feel like taking it away from the other man; do you remember making that statement?

[fol. 2375] A. Well, that is about right.

Q. That is right? That is your testimony now?

A. Yes, sir.

Q. You don't want to correct that statement?

A. No, sir.

Q. And you recall testifying further that if you needed film, where you said if you needed film in a particular situation and an independent had played it, he would still get it whether he wanted it or not; is that your testimony now?

A. I didn't understand that exactly.

Q. The testimony that you have at the time your deposition was taken was the statement that if we needed a film in a situation and the independent was playing it, he could still get it whether he wanted it or not?

A. That he could still get it whether he wanted it or not.

Q. That he could still get it whether he wanted it or not?

Mr. Mitchell: May it please the Court, we object to the question, because it seems that——

The Court: Overruled.

A. Well, I don't quite understand that; you mean that——

Court here adjourned for noon recess. Until 1:30 P. M.

[fol. 2376] Resumption after Recess:

Mr. Wright:

Q. The testimony that you gave at the time your deposition was given, to which I referred before the recess, which you said you couldn't understand is as follows, at page 239: You were asked "Q. Well, as far as you were concerned, if you needed a film in a particular situation, the mere fact that some independent had been playing it before you wanted it, wouldn't make any difference, would it? A. What is that question? (Question read by the Reporter.) A. Sure, it would make a difference; he would still get it whether he wanted it or not." Now, that answer plainly isn't true?

Mr. Armistead: Now, may it please the Court, I respectfully submit—and I say it most respectfully—that that is improper cross-examination. In the first place, Mr. Sudekum isn't questioned on direct-examination about that in the least, about these deals and the independent, but as I understand, the plaintiff came out and made out his case along that line of cross-examination——

Mr. Wright: This question goes to Mr. Sudekum's credibility, and these are statements made under oath in the [fol. 2377] course of the proceedings, whether it related to the issues we are trying in the suit; we are entitled to show that he made statements under oath in that connection which were not correct, as reflecting upon his credibility. It doesn't matter whether he was asked that on cross-examination or not. We are entitled to have his testimony given in the suit with reference to the issues.

The Court: Well, I haven't enforced that rule strictly with reference to cross-examination; the question itself might be objectionable as formed; as I recall, after reading the statement, the question that is asked, is, "That is clearly untrue?"

Mr. Wright: I should have asked him first: Do you recall making the statement, and of course, after he had said that—I will withdraw the question and I will proceed and read the colloquy.

Mr. Waller: We object to reading anything out of the deposition. Rule 26 provides this, in taking a deposition: "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the [fol. 2378] proponent as a witness." Now, Mr. Sudekum hasn't testified about these things at all. Now, he brings up a matter that he hasn't testified about and asks him didn't he testify about it, and then proceeds to ask him if he didn't testify to a falsehood; that is the fact about it. The rules of Civil Procedure authorize the use of that deposition for the purpose of contradicting something that the witness may have said in the course of his testimony. Now, this is not what they are trying to do. Now, it is entirely outside of any proper use of the deposition.

Mr. Dobey: The rules provide that a deposition of an adverse par y may be had for any purpose.

Mr. Raftery: Circumstances change in different cases. If Mr. Sudekum had testified differently to what he is being asked, under the ordinary rules of impeachment then Mr. Wright would have the privilege of reading the question and the answer merely to contradict something he has testified to. That is the established rule—that you can't use the deposition just for any purpose, as Mr. Waller says. You can use it for what the rule provides. [fol. 2379] Mr. Wright: That is precisely what the rules

provide. We are entitled to use this testimony that he gave under oath to impeach his credibility.

The Court: I think that would be true if you had the deposition filed.

Mr. Wright: What we are trying to do is not attempting to prove the truth or falsity of anything he said in this particular deposition; we are attempting to establish that Mr. Sudekum made false statements in the course of the proceedings.

The Court: It might involve the question of truth or falsity?

Mr. Wright: The primary purpose is that of impeachment. Now, there is no necessity to introduce the deposition unless he says, no, he didn't make those statements; but if I call his attention to the testimony first and he says, yes, I testified that way, then of course there is no necessity to introduce the deposition to show who made the statement; then we ask him whether or not the statement is true or not; then if he says it is not true and he has made a false [fol. 2380] statement, that fact may be considered by the court in evaluating all the other testimony he has given in the case which shows that he in the course of the proceedings made statements under oath which were not true statements, and that would show, as reflecting upon the truth or falsity of any other statements he may have made in the case.

Mr. Waller: Then according to that, your Honor, they could ask the witness: Didn't you five years ago, in the case Skipp against Jones say to Mr. Robertson that——

Mr. Wright: No, we are talking about the testimony relating to the issues in this case. I don't say for a minute that we could apply this to testimony given in some other case, as the only purpose is to test his credibility and answer questions and tell the truth under oath.

Mr. Armistead: Mr. Sudekum was not questioned about that at all on direct-examination.

Mr. Wright: It doesn't matter what Mr. Sudekum was questioned about on direct-examination; we are entitled to [fol. 2381] impeach his credibility on the statements that were made, in showing prior false statements made under oath in matters relative to the issues in the case in the same proceeding.

The Court: Well, as I recall, I allowed counsel for the defendants to cross-examine some of the witnesses for the

plaintiff on matters that were not covered by the direct-examination, for the purpose of reflecting on their credibility.

Mr. Mitchell: May it please the Court, on different phases of this testimony, as this question may arise again, and I am interested in it; it seems so entirely simple to me; it is like setting up a man of straw and knocking it down; this witness has not been interrogated by the Government on the point now submitted, and from his deposition taken before the trial he is reading some things that at the time of this testimony may have been relevant, and the next time it might be irrelevant. Didn't you tell this back in there, and isn't that a lie? That is not material in this case. But that is his best justification for putting it in here, that it [fol. 2382] is in this case; but if you want to prove a man is a purgerer, you prove his conviction for perjury. Of course, if it is relevant matter, the Court will pass on that question when the question is asked of this witness on the stand; and if his answer is not satisfactory to the Government, they can impeach him with the deposition.

[fol. 2383] But the idea of setting up every interrogatory in this deposition and every answer he makes, that are not necessarily in this court, on this testimony or anybody's testimony, or anybody else's testimony at all, and then say, isn't that a lie? It is just incompetent, there is no precedent for it, none can be offered.

The Court: I do not think that rule 26 applies in this matter at all. The deposition is not being offered for any purpose, but the witness is being cross-examined on statements which were made in the depositions, and it would be in the same category as any other statements made under oath, the matter is governed by rule 43, relative to the reception of evidence. This rule says:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any [fol. 2384] case, the statute or rule which favors the reception of the evidence governs."

Of course under that rule the evidence would clearly be competent, because under the rule of the State of Tennessee, cross-examination has a wide latitude. In any case the statute or rule which governs,

"In any case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Of course this evidence goes to the credibility of the witness. That has nothing to do with the competency of the evidence; but as I understand it, the cross-examination is being made on these previous statements which were made in a deposition for the purpose of testing the credibility of the witness; and not for the purpose of offering in evidence those statements about which he is examined. Is that correct?

[fol. 2385] Mr. Wright: That is correct, Your Honor.

The Court: I think the cross-examination is proper and the rules I have tried to follow in the examination of witnesses is to allow a little more latitude in cross-examination than is ordinarily allowed under the old Federal Rules of Evidence. All right, proceed, let the objection be overruled.

Mr. Waller: May I offer this further objection on this, which is plainly a typographical error, and the question and answer are wholly indefinite.

The Court: He can ask him that.

Mr. Wright: I am going to read to you, Mr. Sudekum, three questions that were asked, and the answers that you gave as they appear in the deposition, that you may tell me whether that is correct, whether that is a correct statement, and what was asked you and what you said at that time. The question is:

"Q. Well, as far as you were concerned, if you needed the film in a particular situation, the mere fact that some independent had been having *having* it before you wanted [fol. 2386] it, wouldn't make any difference, would it?

"What is that question?

And the question was read by the reporter, and then your answer: "A. Sure it would make a difference. He would still get it whether he wanted it or not.

Next question:

"Whether he wanted it or not would depend on whether you could offer the distributor a larger deal than he could, wouldn't it?

"A. No, sir, I do not think that is true."

Now, is that—do you recall having made those answers to those questions?

A. Yes, sir.

Mr. Waller: Your Honor is not ruling that a lawyer can cross-examine a witness, just take a deposition that was not being offered and reading some of it, and saying that is not true, is it?

The Court: He hasn't asked him that yet, he just asks him if he remembers making that statement. He says, yes. Let's see what he is going to ask him now.

Mr. Wright:

[fol. 2387] Q. Is that statement that you made then, are those answers you now regard as being true?

A. Yes, sir.

Q. You do not want to make any correction?

A. No, sir.

The Court: He says they are.

Mr. Waller: Now they want to prove they are not.

Mr. Wright: No, we do not want to prove they are not, a witness has somewhat under an obligation of his own.

Mr. Armistead: We object to that and ask that it be stricken from the record.

The Court: I do not think that is proper at this time; he may have had a different idea about it.

Mr. Wright: There is one more statement you made,——

A. I was thinking you meant by that if a independent theatre had product bought that he would still get the product if he wanted it, which I think is true.

Mr. Wright:

[fol. 2388] Q. Then your statement that he would get it whether he wanted it or not, was not correct, was it?

A. I do not quite understand that, whether he wanted it or not.

Q. You evidently——

The Court: Whether you wanted it or not, I do not understand exactly, I do not understand that myself.

A. I do not quite understand that.

Mr. Wright:

Q. Do you recall making this statement at the time when you built your Gallatin house, you were building and were not able to get pictures to put in there, just some that were not being used, you could get?

A. I probably did, I do not remember it, I probably made it.

A. I call your attention and see if this will refresh your memory.

Mr. Waller: We are renewing our objection to this type of cross-examination.

The Court: All right, overruled.

Mr. Wright:

Q. You customarily open a new house without having any [fol. 2389] prior arrangements for pictures.

The Court: I can't hear you.

Mr. Wright: The question is:

"Q. Do you customarily open a new house without having made prior arrangements for any product for it.

"A. Well when the Gallatin house was opened I was about the only man in the United States that ever built a house without he had any pictures to put in it.

Q. Without any pictures to put in it?

A. Yes, sir, just some not being used there that were no good."

Q. Do you recall making that statement?

A. Yes.

Q. Do you want to make any correction in that statement now?

A. No, sir.

Q. Your testimony is still you only got pictures there that the opposition did not want or hadn't used?

A. No, I didn't say altogether.

Q. What?

[fol. 2390] A. I didn't say we couldn't, I didn't say every one we used, I do not think that is true.

Q. Then your answer here, you said the—just some pictures that were not being used there, you do not want to leave the impression that the only pictures you could get were those that had not been used, is that right?

A. I did not know what we could get there at that time, I do not know what we got there at that time. That has been quite a while ago, I think most of the pictures we got were not being used there.

Q. You were questioned on your direct examination about these receipts from popcorn sales; you have records which show exactly how much you got out of popcorn sales, haven't you?

A. Yes, I guess we do.

Q. You have records which give the percentage or proportion of your receipts which came from rentals of store buildings you may have acquired in connection with your theater operations?

A. Yes, sir.

[fol. 2391] Q. The skating that is done in the Auditorium, that is leased to the operator?

A. Yes, leased to him.

Q. That is a separate subsidiary of the Crescent?

A. Yes sir.

Q. I will show you these memoranda dated July 1, 1938 and July 2, 1938 and ask you if those are in your handwriting?

A. No sir.

Q. Whose are they?

A. I don't know.

Q. They were produced in response to the subpoena by you and the Crescent Amusement Company.

A. I don't recognize the handwriting, I don't know whose it is.

Q. It was not prepared by you?

A. No sir.

Q. Do you know how it came into your possession?

A. No sir. Somebody else must have got it, I don't remember it.

Q. Did it ever come to your attention before?

A. No sir.

Q. You didn't take this out of the files, then in response to the subpoena?

A. No sir, I did not.

Q. Do you know who did?

A. I do not.

[fol. 2392] Q. Do you think you could find out about it?

A. I doubt it. I don't even recognize that writing. I could go around to the office, but I don't know what I could do.

Q. Will you make an effort to find out who did write the memoranda, which was taken out of your files?

A. Yes.

Q. Did I understand you correctly to say, on your direct examination that you never had talked to any film representative about selling or not selling your opposition?

A. No, I neve did that I remember, about not selling them.

Q. Do you ever recall having expressed disapproval when they were sold?

A. No sir.

Q. I show you a letter here from Mr. Page Baker, Branch Manager of RKO, dated April 11, 1936, in which he refers to a conversation with you, and ask you if that refreshes your recollection?

A. Well, this is somebody writing to Page Baker. I don't know; he might have told him that.

Q. Do you recall now telling Mr. Baker——

A. No sir.

Q. That you didn't like the idea of their selling the opposition in Brownsville?

A. I never told him that.

Q. You don't know whether you told him that or not?

A. I know I did not.

[fol. 2393] Q. You think he was mistaken here when he said you did?

A. I don't know what his idea was about it. I didn't tell him that.

Q. You testified that Mr. Castelberry has been working for you about ten or fifteen years?

A. Well, that is my guess; some time.

Q. Do you know what his nickname is.

A. Nickname?

Q. Uh-huh, what do you call him?

A. Mr. Castelberry, as ever I heard.

Q. Did you ever hear him called "Windy"?

A. No, I never did.
Q. You never did?
A. I never did.

Cross-examination.

By Mr. Mitchell, For Muscle Shoals Theatres:

Q. Mr. Sudekum, the Muscle Shoals Theatres Corporation was dissolved in August, 1937, was it not?
A. Yes sir.
Q. At the time of the dissolution, Crescent Amusement owned no stock in that corporation, did it?
A. No sir.
Q. Your wife owned a half interest and Mr. Rosenbaum owned a half?
A. Yes sir.
[fol. 2394] Q. Since the date of that dissolution, you have not owned a penny of investment in Muscle Shoals Theatres, have you?
A. No sir.
Q. You have had no place in the management and no control over the business, have you?
A. No sir.
Q. A Government Exhibit was shown to you this morning with some Fox deals on it, signed Crescent Amusement Company, with your name as an officer of the Crescent Amusement Company. You had no request from Muscle Shoals Theatres, or Mr. Rosenbaum, did you sign any such document?
A. No sir.
Q. You have no knowledge, have you, that Muscle Shoals Theatres or Mr. Rosenbaum knew that you were signing any such document?
A. No.
Q. The total management of Muscle Shoals Theatres, since August 1937 has been in Rosenbaum, has it not?
A. Yes sir.
Q. Your wife has never been active in that business?
A. No sir.
Q. Do you regard Mr. Rosenbaum as a competent manager?
A. I certainly do.
Q. Well, do you regard him as an expert?
A. Might good.

[fol. 2395] Q. You were asked this morning about a Metro deal, something about Muscle Shoals and something about Crescent. Was that for the year 1939, or 1938?

A. I don't know, I don't know what year it was.

Q. Mr. Rosenbaum was not present when you negotiated your contract with Metro, was he?

A. No.

Q. If Mr. Rosenbaum or Muscle Shoals Theatres had negotiated a contract with Metro, you were not present, were you?

A. No.

Q. It was not in any sense a joint deal, was it?

A. No sir.

Q. In the purchase of pictures over a period of these many years since 1925, isn't it true that there have been very few instances when you had any knowledge or any detailed knowledge of what Muscle Shoals Theatre was doing?

A. That is right.

Q. Muscle Shoals Theatre has had no knowledge or understanding of what Crescent was doing, except in some very rare instances?

A. No sir.

Redirect examination.

By Mr. Armistead, For Crescent:

Q. Mr. Sudekum, you were questioned about percentage pictures on cross examination, and I believe you stated that [fol. 2396] sometimes they were not advertised as widely as perhaps a flat rental picture would be advertised. I will ask you if the picture "Philadelphia Story" was not a percentage picture?

A. I think that was one of them.

Q. That is one you were questioned about this morning on direct examination, which was extensively advertised, is that correct?

A. Yes sir.

Q. Now, I will ask you also if you have not, from time to time, in practically every town in which Crescent had a theatre, heard rumors of opposition going to enter the town?

A. Numbers of times.

Q. Now, the situation at Dyersburg, I understood you to say that you had been endeavoring to find a location there for the purpose of constructing a theatre. How deep are those lots or is the average lot there in the business section of Dyersburg, approximately?

A. Well, around the square there, just about one hundred feet, maybe a little more.

Q. Well now, is a lot a hundred feet deep a good lot upon which to construct a theatre?

A. It would not be a good lot to construct a big nice theatre on.

Q. Is that what you contemplated erecting or constructing in Dyersburg?

[fol. 2397] A. Yes sir.

Q. Are you still hunting for a place?

A. Yes.

Q. Endeavoring to locate a place in Dyersburg?

A. Yes sir.

Q. Now, you were questioned about a theatre in Lebanon, Tennessee. I hand you here a picture of what purports to be a picture of the Princess Theatre at Lebanon, Tennessee, and ask you if that is a picture of that theatre?

A. Yes sir.

Q. Is that your large theatre there in Lebanon?

A. Yes sir.

Q. Practically, I mean, approximately what investment have you in that situation?

A. I would say fifty or sixty thousand dollars.

Q. Will you file that picture as Defendant's Exhibit No. 89?

A. I will.

(Picture marked Defendant's Exhibit No. 89)

Q. Let's get back to Dyersburg just a second. Is it hard to find or difficult to find a lot down there to locate a good theatre on?

A. Well, we have been on the lookout for one for the last two or three years, trying to find one, and have had the real estate people and different ones to try to help us locate one.

[fol. 2398] Q. What is the trouble?

A. Well, we just haven't been able to get a good location. I went down and looked at a garage, just off the Square, here some time ago. We looked at it but there was a filling station on one side of it and I didn't think it would be good.

Q. Why?

A. Well, it would be a little hazardous for people to pass in crossing in front of a filling station to come to the theatre. I didn't think that would be good. We just haven't been able to get one.

Q. You were questioned about a theatre at Murfreesboro, Tennessee, I will ask you if this is a picture of the Princess Theatre at Murfreesboro, Tennessee?

A. Yes sir.

Q. Will you file this as Defendant's Exhibit No. 90?

A. Yes.

Mr. Wright: If the Court please, I think it should be pointed out that those theatres that we were questioning him about in those towns were second houses. I don't see what these first run houses have to do with the ones cross-examined about.

Mr. Armistead: He has endeavored to show the bad, I want to show the good.

The Court: All right, go ahead.

[fol. 2399] By Mr. Armistead:

Q. What has Crescent invested in that situation, approximately?

A. I guess about $85,000 or $90,000.

Q. Now, when you were questioned this morning relative to the Cumberland purchasing a lot, endeavoring to purchase a lot in McMinnville, Tennessee did you have at that time a picture of that new theatre?

A. This morning?

Q. Yes sir.

A. It was in the office.

Q. Well, it was brought to the court during the morning, was it not?

A. Yes.

Q. I will ask you if this is a picture of the new Park Theatre that Cumberland constructed at McMinnville and if this little picture is a picture of the opposition house?

A. Yes sir.

Q. Will you file that large picture as Defendant's Exhibit No. 91 and the small one as Defendant's Exhibit No. 92?

A. Yes sir.

(Pictures so filed and marked)

Q. My attention has been called to the fact that on direct examination you—I should have asked the question and I would like the privilege of asking it at this time. It was an oversight on my part. Has the Crescent Amusement Company any understanding or agreement with any of the other defendant exhibitors to suppress competition?

[fol. 2400] A. None whatever.

Mr. Wright: That is objected to, if the Court please. That is the conclusion we are trying to arrive at in the suit and I don't think he is competent——

Mr. Armistead: I think it is competent to ask whether he has got any agreement, whether Crescent has with any of these other defendant exhibitors to suppress competition.

The Court: Well, that is a question that the Court will have to pass on or determine. Of course, there may be a difference between an agreement, working agreement or understanding and an explicit agreement. I think it is proper for you to ask him whether or not he has any specific agreement with any of the other officials of any of those affiliated companies. Even then it may not be necessary for a specific agreement to be had when the Crescent circuit is interested in the management of those companies.

Mr. Armistead: Well, I know ultimately——

The Court: He asked him, has he any agreement with any of the other exhibitors?

[fol. 2401] Mr. Armistead: Yes sir. That was my question, your Honor.

The Court: Go ahead.

Mr. Armistead:

Q. Did you?

A. No.

Q. Has the Crescent any agreement with any of the defendant exhibitors to keep the opposition or independents, so to speak, from obtaining pictures?

A. No.

By Mr. Raftery:

Q. Have you any such agreement with any distributor of motion pictures?

A. None whatever.

Q. Of either class?

A. No, no kind.

Recross-examination.

By Mr. Wright:

Just one more question.

Q. Did I understand you to state to Mr. Mitchell that the deal for the 1939-1940 Metro product was not discussed by you and Mr. Rosebaum and Mr. Stengel?

By Mr. Mitchell:

I object to the question.

By Mr. Wright:

Q. And the Metro representative?

[fol. 2402] Mr. Mitchell: I object because that is an incorrect representation of my inquiry. I asked if Rosenbaum was present when he made the deal with Metro and he said no. I asked if he was present when Mr. Rosenbaum made his deal with Metro and he said no. I asked him no question of the kind Mr. Wright asked him.

Mr. Wright: I will withdraw the question.

Q. When you told the Court you weren't present at the time the deal was made you mean you weren't present at the time that the contracts were signed, is that right?

A. Well, I don't remember Rosenbaum being there at all when that was made.

Q. Well, did you want to give the Court the impression by the answer that you and Rosenbaum and Stengel did not all participate in the negotiations?

By Mr. Armistead: Now I object to that form of cross-examination, that method of cross-examination—did you want to give the Court the impression. Let him ask what he did and what he said.

The Court: Well, that is the impression I got. The impression I got was that he did not participate in any way with either Mr. Stengell or Mr. Rosenbaum in the negotia-[fol. 2403] tions with Metro.

A. That is right.

Mr. Waller: That is about two different things. Mr. Wright asked him about the negotiations for the five year franchise and Mr. Mitchell was asking about the actual deal

that was made—two entirely different things that were asked about.

The Court: Well, what were you asking about, Mr. Wright?

Mr. Wright: That is all I had covered in my examination, just what Mr. Mitchell was trying to prove, was the proposed five year deal there that was discussed with Mr. Rosenbaum and Mr. Stengel and Mr. Sudekum, which was not made.

Mr. Mitchell: May it please the Court, I misunderstood Mr. Wright's evidence and he misunderstood mine. The testimony that I elicited from this witness was that Muscle Shoals Theatres bought their product and I judge from the testimony I heard this morning that Crescent had bought Metro product, and my information was, my information from the source where I get information is that neither one of them had anything to do with the other one's contract. I undertook to prove that by this witness and he said that was true.

By Mr. Wright:

Q. Let's see if this letter from Mr. Avey to Mr. Postman [fol. 2404] of February 16, 1940—I will ask you to read that first paragraph.

Mr. Waller: I think that is improper cross-examination, to ask the witness if a letter between two other parties refreshes his recollection.

Mr. Wright: Well, it refers to conversations with Mr. Sudekum.

Mr. Waller: It is improper to refresh his recollection by a letter he has never seen between two other parties.

Mr. Wright: He can't be refreshed until he sees it.

The Court: I don't know whether it will refresh him or not. I think he can ask him whether it does or not.

Mr. Waller: Well, that is just an indirect way of getting incompetent evidence into the record, your Honor.

(Witness read letter to himself.)

A. Well, there were several meetings there. I didn't read all the letter but there were several meetings there and this Mr. Avey was writing Mr. Postman here. Now, as far as I was concerned or whoever was there at the time, there was very little said about a five year franchise because

when that come up and them franchises come up, I asked about a five year franchise and he said three years, I believe, was the longest they could make it, and he kinder cut it [fol. 2405] pretty short. He says they wouldn't do it and couldn't do it.

Q. Well, after you read that you recall that negotiations were carried on with you and Mr. Rosenbaum and Mr. Stengel, don't you?

A. Well, he says here that negotiations were with Sudekum, Rosenbaum and Stengel but that could have been there at the office and I know nothing about that. He might have talked with me and all of them separate for all I know, but there was nothing much talked about a five year franchise.

Further this witness saith not.

[fol. 2406] T. J. Connors, called on behalf of Defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Waller:

Q. Are you connected with Loews, Incorporated?

A. Yes sir.

Q. In what capacity?

A. I am sales manager for the southern, eastern and Canadian sections of the country.

Q. Does that include the district where the Crescent Amusement Company and its affiliates operate?

A. Yes sir.

Q. In other words, the Atlanta and Memphis exchanges are both under you?

A. Atlanta is under me and Memphis was under me until the first of January.

Q. Of this year?

A. Of this year.

Q. How long have you known Mr. Sudekum?

A. Oh, I should say some eighteen or twenty years.

Q. Have you made deals with him on behalf of Loews, Incorporated?

A. I have.

Q. With the Crescent Amusement Company?

[fol. 2407] A. With the Crescent Amusement Company.

Q. Have you made deals for any of the other corporations such as Muscle Shoals—that is a partnership, I believe—Strand Enterprises?

A. Yes sir, with Mr. Rosenbaum.

Q. What about Strand Enterprises? Did you ever make any deals with Strand Enterprises?

A. I don't know just——

Q. The Haines circuit in West Tennessee?

A. No, I haven't.

Q. Have you ever had an instance where Mr. Sudekum threatened that if you did not give the Crescent Amusement Company product for a town where he had had opposition that he would not take your product in the other towns of his circuit?

A. I did not.

Mr. Wright: I want to object to this, if the Court please. Now, if he wants to go into what the negotiations were and have the witness say what was said on either side that is another matter but as to him putting words in his mouth here about whether there were any threats made or not, of course, that is pure conclusion.

Mr. Waller: It is negative.

The Court: I overrule the objection.

[fol. 2408] By Mr. Waller:

Q. Has Loews, Incorporated at any time since you have held the position with it that you testified about been obliged or coerced by the Crescent Amusement Company to discriminate against any independent exhibitor or any individual theatre owner?

A. It has not.

Mr. Wright: We make the same objection to that.

The Court: Sustained.

Mr. Wright: That is what we are trying to find out in the case.

The Court: Sustained.

By Mr. Waller:

Q. To your knowledge has there ever been since 1934 or any time prior to that any understanding or agreement be-

tween Loews, Incorporated and the Crescent Amusement Company or Mr. Sudekum or the other exhibitor defendants in this case that the competition of an independent exhibitor would be suppressed?

A. It has not.

Mr. Wright: We make the same objection to that, if the Court please.

[fol. 2409] By the Court: Overruled.

Mr. Wright: It is one of the issues in the case also.

By the Court: Overruled.

By Mr. Waller:

Q. Do you recall, Mr. Connors, whether or not the question of sale of product in Brownsville, Tennessee in 1935 came to your attention, as to whether this product would be sold to Mr. Lawing or to the Crescent Amusement Company?

A. It did.

Q. Did you have any recommendation from the branch manager at Memphis on that proposition?

A. Yes, there was a recommendation.

Q. Was that Mr. Willingham?

A. Mr. Willingham.

Q. What was Mr. Willingham's recommendation and what did you do with it?

A. Mr. Willingham recommended that we accept application of contract submitted by our Memphis branch from Mr. Lawing's theatre in Brownsville. I rejected the application.

Q. Did you determine that the product would be sold if satisfactory deal could be made to the Crescent Amusement Company?

A. I did.

[fol. 2410] Q. Does a branch manager, such as Mr. Willingham, have authority to make a contract?

A. He has authority to accept application of contract, not to make a contract or to confirm a contract.

Q. Why did you overrule Mr. Willingham on the Brownsville situation?

A. Well, as I recall the Brownsville situation, the reports that were sent to me by our branch manager disclosed that Mr. Lawing could not or would not give us a deal for as much revenue as we had formerly received from the

situation and that the application submitted was for less money than we felt our product was worth in the situation. I also had information that Mr. Lawing's theatre was a very small store type theatre having approximately a hundred and eighty seats and I knew from my experience in the picture business that a theatre with a hundred and eighty-three seats was old-fashioned and obsolete and sooner or later a new theatre would have to be built in the situation in order to give the people of Brownsville a proper home. When theatres are being built we receive from our salesmen information, as they constantly travel the territory and advise of new theatres, and knowing that a modern theatre was being built, I felt that we could secure in the way of revenue that which our product was worth and a great deal more than we had been receiving in Brownsville.

Q. Now, in 1937-1938 did the question come before you [fol. 2411] as to the sale of your product in Gallatin, Tennessee?

A. It did.

Q. Did you have a recommendation from the Atlanta branch on that proposition as to whether or not the product would be sold to Mr. Roth, the old account, or to the Crescent Amusement Company?

A. Yes, I did.

Q. Will you state what the recommendation was, and what your disposition of the matter was?

A. As I recall the Gallatin situation, Mr. Roth, couldn't buy what we term our output and I believe that Mr. Avey, our Atlanta branch manager informed me that he had visited Mr. Roth and had finally been unable to close or secure the type of deal that we felt that we were entitled to. On a subsequent visit to Mr. Roth he offered a split of the product because Mr. Roth had informed him that he couldn't use all of our product.

[fol. 2412] Q. Now, before that came up, let me ask you if you considered Mr. Roth a satisfactory account?

A. I did not.

Q. Why?

A. Because, in the trade paper, in a column published under the heading of "What the Pictures did for Me", exhibitors report to this trade paper results of pictures in their theater, and that column does have an influence with other exhibitors, and at the same time Mr. Roth deliber-

ately went out of his way to say mean things about our product.

Q. Now, notwithstanding that experience with Mr. Roth, you overruled the recommendation of your Atlanta Branch that the product be sold to the Crescent Amusement Company, is that correct?

A. That is correct.

Q. Now then, the product was subsequently sold to the Crescent Amusement Company, was it?

A. That is correct.

Q. Was that after you had information that Mr. Roth had declined to accept the product in January or February, 1938?

A. That is correct.

Q. In either of those situations, where you decided to [fol. 2413] sell the product to the Crescent Amusement Company, were you influenced by the size of the Sudekum circuit, or did you decide those matters on their own bases?

A. Those matters were decided on their own bases.

Q. With reference to the ability of the Crescent Amusement Company and its affiliates to compel or coerce Loews, Incorporated, to discriminate against individual theater owners, may I ask you how important these defendant exhibitors are to Loews, Incorporated, how important their business is as compared to the total business of your concern?

A. Why, the business we secure from all of the Sudekum Theaters is comparatively small in dollars and cents.

Mr. Wright: If your Honor please, that is literally immaterial; the only issue here is how much is the business he gets from Crescent in comparison to the available opposition, because we are not trying the case on the basis of what is available throughout the country. We are limited to the situation in which Mr. Sudekum operates.

The Court: Sustained.

Mr. Waller: Your Honor, I think that is pertinent to show——

[fol. 2414] The Court: Well, this is not a question of Crescent competition with some other circuits.

Mr. Waller: No, I don't think your Honor understood the purport of what I wanted to show; what I wanted to show is that these affiliated circuits are not so important to Loews that Loews, in order to get that amount of busi-

ness, discriminated against individual theater owners in the exercise of——

The Court: The question is whether or not they are larger than what they got from individual theater owners.

Mr. Waller: The policy is, the business policy is, they undertake to select their customers; they have certain criteria that they follow. Now, would they in a situation of this kind depart from its established practices on account of revenue they would get?

The Court: Well, I know the primary purpose of distributor companies is to sell their pictures; otherwise they could not exist.

Mr. Waller: Could we offer that proof, your Honor?

[fol. 2415] The Court: Yes, I will hear it all.

Mr. Waller:

Q. Mr. Connors, will you state whether or not the business of the Crescent Amusement Company and these affiliates is of sufficient importance to Loews, Incorporated, to cause it to depart from the customary business practices?

A. It is not.

Mr. Wright: I object to that.

The Court: I am sustaining the objection; but he is making offers for the record.

Mr. Waller:

Q. What would you have to say as to the importance of the Sudekum business, including the affiliated circuits, as compared with the film rentals throughout the United States and Canada?

Mr. Wright: That is objectionable; it is all immaterial.

Mr. Waller: That is but a part of the offer.

The Court: He has not answered that question.

[fol. 2416] A. Well, the revenue we receive from Sudekum and affiliated circuits is comparatively small, as compared with our national gross, and I would say that it was—Well, they gave us less than a hundred thousand dollars, and we do approximately fifty million dollars a year in film rentals in the United States.

Q. Take, for instance, the Music Hall in New York, how would that compare?

A. Well, we receive from one film rental in the Music Hall in New York City more than we do from all the Sudekum and affiliated theaters for an entire season.

Mr. Waller: That is the end of the offer of proof, your Honor, but I would like to ask one other question:

Q. What is the practice and policy of Loews with reference to second run product in a town where you have an established first run customer; that is to say, is it your practice to sell second run to that customer if he has a second run theater, or to his competitor?

A. Where our first run account operates a second run, we prefer to have our second run pictures shown by the first run account.

Q. For what reason?

[fol. 2417] A. For the reason that he is interested in maintaining a policy that will not affect the first run theater; he is a man that usually has substantial investments in the first run theater, and he will not do anything that will be detrimental to the first run; and the first run is the theater which gives us the great revenue which we want to protect.

(Short recess).

(Resumption after short recess):

Mr. Waller: Your Honor, in putting Mr. Connors on the stand we are not waiving our right to make a motion at the end of the Government's proof in this case.

The Court: All right.

Cross-examination.

By Mr. Wright, for the Plaintiff:

Q. Mr. Connors, I believe you testified on direct examination that you overruled this recommendation to sell this Crescent circuit, and then you later decided to sell them anyway, in March, is that correct?

A. I don't quite understand the question; are you talking about the entire Crescent deal, or the particular situation?

Q. Well, when was it that the Crescent deal for the 1937-[fol. 2418] 1938 product was first brought to your attention?

A. The 1937-1938?

Q. Yes?

A. Well, we probably started negotiating with Mr. Sudekum in the summer of 1937.

Q. In the summer of 1937; and negotiations were continued from then right on up to the time the contract was signed?

A. That is the general practice with every man that you do business with.

Q. Well, I am talking now specifically with reference to your deal with Crescent for the 1937-1938 product?

A. That was started sometime in the summer of 1937, when the negotiations were started.

Q. That is when it first came to your attention?

A. I probably came down here and talked to Mr. Sudekum myself.

Q. And in connection with negotiating the deal, there was something said about including the new town of Gallatin that Mr. Sudekum had just moved into, isn't that a fact?

A. Not at that time.

[fol. 2419] Q. Why not?

A. Well usually in negotiating a deal we agree upon basic principles, and after you agree upon basic principles, you then get down to the individual situation.

Q. Do you remember what the basic principle of this deal was?

A. I believe I do.

Q. What was it?

A. I believe that year our policy called for four pictures at forty percent, eight pictures at thirty-five per cent, or if the situation was on in which we felt we were in better position, we had better play on a flat rental, instead of the percentage, eight pictures, or what we believed would be thirty-five per cent.

Q. Are you referring to a national policy, or the particular deal you negotiated with the Crescent Amusement Company?

A. Our national policy applies to circuits and independents, so that either way we were negotiating, we were negotiating on the basis of our policy.

Q. There are variations, are there not between negotiations you have with one circuit and with another circuit, or with one exhibitor or another exhibtor?

A. As to terms, not a great many, very few.

Q. What I am tryng to get at is the particular negotiations that you had with the Crescent Company for the [fol. 2420] 1937-38 contrac- product?

A. Yes.

Q. You recall whether those—do you recall those?

A. I have a recollection of them, yes.

Q. May be I can refresh your recollection of the basic principles that you went by by calling your attention to a letter that is here, in which Mr. Avey inquires of Mr. Sudekum. This letter is dated November 10, 1937, addressed to Mr. Sudekum. The letter says:

> "Attached to these contracts you will find a list showing the total amount you paid us for the features last year, and you will see the grand total for the 1937-38 product. In other words, the product for the 1937-38 season is set up on exactly the total in dollars and cents that we had last year, with the exception of a few minor pennies where I gave you the benefit of the odd cents.
>
> "Gallatin, of course being added, increases the amount for the total of the sale in Gallatin, and I would appreciate very much your signing the contracts as quickly as possible and returning them to me."

A. It shows in 1937-8 and 1936-7 we had the same basic policy.

Q. Yes, but the deal was set out on the basis of what [fol. 2421] you had received the previous year, plus what you were going to receive after the new theater at Gallatin was in, is that right?

A. That is what you read.

Q. And that deal was brought to your attention on that basis, prior to the time this letter was written, was it not?

A. Yes.

Q. Then you say that, I believe you said this morning that after the contracts for the circuit were submitted by Mr. Kessnich in December of 1937, you decided to disapprove them?

A. I didn't testify this morning.

Q. Beg your pardon, on your direct testimony?

A. I do not recall that.

Q. You recall when the complaint of Mr. Roth had made about your selling away of the 1937-8 product from him,

without giving him a chance to make an offer, was brought to your attention?

A. I do.

Q. When was the first time that was brought to your attention?

A. The exact date I do not remember.

Q. Do you remember about when it was?

A. I believe it was some time in the fall of 1937.

Q. And that it was not until after you received that [fol. 2422] complaint, was it, that you decided that it might be advisable to hold up the Sudekum deal, is that correct?

A. We did not hold up the Sudekum deal.

Q. Well, when was the final approval of the contracts?

A. I understand they went ahead and played the pictures, a little ahead of the approval of the contracts.

Q. Well in any event, he played the pictures for four months before the contracts were approved?; you are aware of that, are you not?

A. Are you tal-ing about all of the Sudekum towns or what towns?

Q. I am talking about the 1937-38 product in Mr. Sudekum's house in Gallatin.

A. I believe there were some spot pictures in Gallatin.

Q. But Gallatin was negotiated as part of the Sudekum circuit.

A. It was.

Q. Now when did you first learn of the letter which had been received from the department of justice, with reference to the Gallatin sell-way?

A. As soon as the department of justice letter was received by our legal department, it was referred to me.

Q. Did you discuss that letter with the legal department?

A. I did.

[fol. 2423] Q. And then it was after that discussion, wasn't it, that you decided to send Mr. Avey back into Gallatin, to offer a split deal of your 1937-8 product; is that correct?

A. I do not believe that is so. It is our custom to refrain from selling product to a different theater than has enjoyed our product, without the approval of a sales manager, and when a contract is received in our home office for a theatre other than the one that has been our regular account, the contract is specifically called to the sales manager's atten-

tion, and we investigate it and learn why the contract is not signed by somebody to the old account. Our product is the most valuable on the market and we believe that it is good business policy for us to continue to do business with existing accounts, if this is possible.

Q. At the time you were negotiating the deal for the Crescent Circuit, in the summer and fall of 1937, you knew, didn't you, that you had not received any offer from Mr. Roth at that time?

A. I did not know that.

Q. Isn't it your business as salesmanager, if you are going to carry out this policy of offering pictures to old customers to know who they are and know whether the product is being offered to them or not?

(Question read.)

A. Yes, and I supervise the distribution of product to [fol. 2424] about seven thousand theatres, probably seventy-five hundred, and I can not have at my finger tips an intimate knowledge of every one of those theatres, that is why I stated when a contract was submitted for a theatre that is in opposition to an old account, it is called to my attention.

Q. You seem to be very familiar with the deal that was made with respect to Brownsville, a much smaller town than Gallatin, about three years difference, just what was the information that you had of the difference at Brownsville, with respect to Brownsville?

Q. As to the principle?

A. Yes, what information did you have?

A. I read in one of the trade papers about your proceedings down here, and when Brownsville was mentioned, and Mr. Willingham's letter was published, in that, I checked back on our record.

Q. You decided in the Gallatin situation that you had done the wrong thing in not offering your product to Mr. Roth, before you had offered it to Mr. Sudekum, isn't that right?

A. That is true.

[fol. 2425] Q. Insofar as any custom you had is concerned, you also violated it when you refrained from offering the product in Brownsville before making a deal with Mr. Sudekum, isn't that correct?

A. I don't believe so.

Q. Explain the difference between the two situations?

A. The difference is this, that if a man can't keep abreast of the time and develop his theatre so that it is modern and offers us either the best outlet for our product, or one that is comparable, we cannot continue to supply our product to an inferior theatre. A theatre with 183 seats is an inferior theatre.

Q. Mr. Roth's theatre was also inferior to Mr. Sudekum's theatre in Gallatin, isn't that a fact?

A. I am not as familiar with the difference in the theatres in Gallatin as in Brownsville. However, we did offer Mr. Roth our product. Mr. Roth stated that he couldn't use all of our product and offered to use a part of it. And because he offered to use a part of the product he was offered a split of the product. In fact a contract or an application was submitted to him at the price he offered and he refused to sign the contract.

Q. Just one moment. All these statements you have just been making are based on what somebody else said, it is in the record?

[fol. 2426] A. It is in the record, yes, it came to me as Sales Manager.

Q. You, yourself, never offered Mr. Roth anything, did you?

A. No. I instructed the Branch to offer it.

Q. Now, I believe that you testified here to the size of amount of business that Crescent gives you each year?

A. I did.

Q. Do you recall about how the amount of the Crescent business that you got for the 1937-1938 feature product compares with what Mr. Roth was offering at Gallatin?

A. Oh, approximately 2 per cent, I would say.

Q. That was the amount Mr. Roth was offering, you say, about 2 per cent of the Sudekum deal?

A. That is approximately it, that is, for the whole Sudekum circuit.

Q. What are you referring to as the whole Sudekum circuit?

A. The total amount of revenue we secure from the Sudekum circuit and what we term affiliated circuits. You are not comparing Sudekum's amount from Gallatin as against Mr. Roth's revenue from Gallatin, as I understood your question?

Q. That is right.

Mr. Waller: That would be a matter of computation I think, about two per cent; it may be right, it may be wrong.

The Court: It may be, I don't know. He is just giving [fol. 2427] his best estimate.

Mr. Wright:

Q. These negotiations that you have with Mr. Sudekum for his circuit and affiliates go on every year and last anywhere from six months to a year and a half, or more, don't they?

A. No, our season runs just for a year.

Q. Yes, but your negotiations for the 1939-1940 season product for example, continued on into the 1940-1941 season, isn't that right?

A. No, that is not right. Our negotiations for the 1939-1940 product continued for many months and when we couldn't get a meeting of the minds, the negotiations terminated.

Q. Then they were renewed again?

A. Yes, then when we were negotiating for the 1940-1941 product, then we attempted to salvage as much as we could from the 1939-1940 product.

Q. Why do you speak of that as salvage?

A. Well, as long as a picture isn't played in a situation, there is still a possibility of securing revenue from that picture, from that situation.

Q. But you hadn't offered those pictures to Mr. Sudekum's opposition, had you?

A. When we couldn't do business with Sudekum, we offered those pictures to every place that we thought we could sell them.

[fol. 2428] Q. Did you offer them to the Exhibitor at Gadsden, Alabama, East Gadsden?

A. If you are going to ask me about specific towns, I don't believe I can tell you, but I can tell you that my instructions were to sell every possible outlet.

Q. Have you got any copies of those instructions?

A. I imagine there must be some in our files somewhere.

Q. Do you suppose you could find them for us?

A. We could look.

Q. They were written instructions?

A. Well, I am not sure whether they were written or not, because, as I recall, I came to Nashville for the final attempt to conclude a deal with Mr. Sudekum. We were unable to have a meeting of the minds at that time and it was determined that we were going to do everything possible to sell our product. I believe I, personally, issued instructions to our Branch Managers and to our salesmen, because upon leaving Mr. Sudekum's office we made plans to try to sell our product and went over the territory.

Q. Just when was this that you had the final failure of meeting of the minds on the 1938-1939 product?

A. The axact date I do not recall.

Q. It was well along into the year 1939?

A. It was probably in the winter, say.

Q. It was later than that, wasn't it?

[fol. 2429] A. I don't recall that it was any later than that.

Q. Well, in any event, you don't offer any of your pictures to anyone else while you are negotiating with Sudekum, is that right.

A. I don't believe it is a fair trade practice.

Q. No matter how long the negotiations may take?

A. If we believe we are going to make a deal.

Q. You always believe you are going to make a deal with Mr. Sudekum some time in the future?

A. Not by past experience we don't. Mr. Sudekum was a man who bought our product, but not every season.

Q. Well, you also had some negotiations with reference to a five-year deal, did you not, in connection with the 1938-1939 and 1940-1941 product?

A. We did.

Q. Those were carried at the same time?

A. They were carried on towards the end of the negotiations.

Q. Are they still going on?

A. I didn't understand the question?

Q. Are they still going on?

A. I still don't understand you?

Q. Have you terminated those negotiations for the five-year deal?

A. We have a consent decree.

[fol. 2430] Q. Just answer the question?

A. Certainly not.

Q. You have not?

A. We have not continued.

Q. Are you sure you understand the question? The question was, have you terminated the negotiations?

A. If I understand the meaning of the word, you are asking me, did we stop negotiating a five-year deal?

Q. Yes.

A. We did and refused to give Mr. Sudekum a five-year deal.

Q. When did you finally reach that result?

A. I believe early in 1940?

Q. I think you testified on your direct examination that ordinarily you liked to have your first run customers play any second run that you might license so that the first run revenue would be protected, is that right?

A. That is right.

Q. I believe you limited that to the situation where the customers was operating both the first and second run theatre?

A. That is right.

Q. Did you have any discussion with Mr. Sudekum at the time you were having negotiations for a franchise, with respect to a second run option?

A. Where?

Q. In his circuit?

[fol. 2431] A. We never grant options. If you are talking about Nashville we have consistently refused to sell Sudekum second or subsequent run in the City of Nashville.

Q. I am not talking about Nashville, I am talking about the circuit?

A. If we were negotiating a deal with Sudekum, we would negotiate for every run that we thought we could sell him.

Q. Why is it that you never grant options?

A. Because that has been our policy. What do you mean by options? Maybe I misunderstand your question?

Q. Playing second run if the exhibitor so desires?

A. To my knowledge we have never made any such deal.

Q. Do you know why that is?

A. Well, first, I would, as Sales Manager, wouldn't see that it would be good business to give options. We want to make direct sales.

Q. I think you testified on direct examination that your decisions as to whether or not to license films to a particular

account was not influenced by the size of a circuit that might be involved?

A. That is true.

Q. In every situation where you have a small account in opposition to a circuit, it is a fact, is it not, that you [fol. 2432] consider what the effect of licensing that small account would be upon your deal with the circuit?

A. That is not so.

Q. So that, if it appeared that by licensing an account which paid you a thousand dollars, you would lose twenty thousand dollars worth of revenue, you would go ahead and license the one thousand dollar account, anyway?

A. If we felt that that account should play our pictures, yes, we would.

Q. What would give you that feeling?

A. Well, the fact that we distribute Metro-Goldwyn-Mayer pictures, the best pictures on the market.

The Court: I sustain the objection.

Mr. Wright:

Q. Metro-Goldwyn-Mayer Pictures is not a charitable institution, is it?

A. It is not.

Q. It is run——

A. To make money.

Q. To make money?

A. Yes, sir.

Q. I take it, in licensing films, your decisions are guided by what decisions will make you the most money?

A. That is true.

[fol. 2433] Q. And that would apply to any deal you made in Brownsville or Gallatin, Tennessee, as well as anywhere else in the country, is that right?

A. It would. The quickest way I know not to make a profit is to permit dictation.

Q. I didn't hear the last sentence?

A. I say, the quickest way I know not to make profitable deals, is to permit dictation.

Q. That depends on how profitable it is to be dictated to, doesn't it?

A. It may be profitable for one season, and then you pay the penalty for many seasons after.

[fol. 2434] Redirect examination.

By Mr. Waller:

Q. Mr. Connors, in other words, you do business for the long pull rather than the short pull?

A. Absolutely.

Q. You say precedents in your business are very important?

A. Very important.

Q. In other words, if you sell Mr. Sudekum at bargain prices one year he would hold it against you the next year?

A. He definitely would, or attempt to.

Q. Mr. Wright asked you about the time when the Gallatin deal arose, when the Crescent deal involving Gallatin was first called to your attention. I will show you one of the Government's exhibits, which is a letter from Mr. Postman to Mr. Kessnich, dated December 21, 1937, written at your suggestion, as the letter states, and in which reference is made to the Gallatin situation. Will you read what is stated there about the time when the Gallatin situation was called to your attention?

A. This letter is dated December 21, 1937 and it is addressed to Mr. Kessnich.

"Dear Mr. Kessnich:

We received the Sudekum contracts yesterday and approved all of them with the exception of the Roxy Theatre at Gallatin, Tenn. According to our records, we have sold the New Palace Theatre in this situation [fol. 2435] for many years and neither Mr. Connors nor the writer recall your having mentioned this when we discussed the Sudekum deal generally."

Q. Now, that is enough. Is that correct, that you didn't recall prior to receiving his contracts the day before that letter was written that the Gallatin theatre was included in the deal?

A. That is true.

Cross-examination.

By Mr. Frolich:

Q. Mr. Connors, how long have you been in the motion picture business?

A. About twenty six or seven years.

Q. And you are fairly familiar with the product of the various picture companies?

A. I am.

Q. Now, are you familiar with the pictures that have been put out for the last fifteen or sixteen years by the Columbia Pictures Corporation?

A. I am. Fifteen or sixteen years? I don't know about the fifteen or sixteen years, but I am generally familiar with the Columbia.

Q. Didn't you know Columbia has been in business since 1924?

A. Well, I wouldn't remember when they came into business.

[fol. 2436] Q. But you are familiar generally with the product?

A. I am.

Q. You know that Columbia's product is more or less a program picture product, isn't it.

A. No, they have some very fine pictures.

Q. You would not say that of the fifty pictures that we make a year there are more than three or four that rank with Metro's A pictures?

A. That is true.

Q. About three or four of Columbia would be equivalent to eight pictures of Metro?

A. Yes, sir.

Q. So that Columbia, in selling its pictures to the exhibitors, from your experience would — in somewhat a different position then to Metro in selling pictures?

A. Yes, that is true.

Q. Columbia would probably find it more difficult to sell an exhibitor than Metro would find it?

A. I believe that would be true.

Further this witness saith not.

[fol. 2437] Oscar Morgan, Being Recalled for further Cross-Examination by Defendants, he having been previously duly sworn, testified as follows:

By Mr. Waller, for Defendants:

Q. Mr. Morgan, you have previously testified pursuant to a subpoena of the Government in this case, have you not?

A. Yes, sir, I have.

Q. When did you go to Atlanta as District Manager for Paramount?

A. I went down there in November of 1932, and then returned to New York and took over active control of the district January 1, 1933.

Q. At the time you took over that office, what is your information as to the history of Paramount's dealings with the Crescent Amusement Company?

A. Well, we had been dealing with Crescent——

Mr. Wright: If the Court please, I don't quite see what a recital of the history here by Mr. Morgan would be proper. I think the history should be shown by whoever made it. May I ask what you are attempting to show?

Mr. Waller: Well, I will develop it another way. I am [fol. 2438] trying to show the information he had when he came there, whether Crescent and Paramount were dealing with each other for many years and the reasons for it.

The Court: Let him answer.

Mr. Waller:

Q. Will you answer the question?

A. As I say, we had been dealing with Crescent for a good many years, I think since they were in business; and when I came to Atlanta I found the Paramount pictures were not being shown in the Crescent circuit; and, naturally, in my position, I wanted to find out why.

Q. Well, did you undertake to make the deals with the Crescent Company after you became District Manager?

A. Yes, sir, I did.

Q. Did you have success in that?

A. No, I didn't. Crescent offered us propositions which were entirely too low and which we couldn't accept.

Q. Did that happen for one season, or more than one season?

A. Well, it happened, I think for that one season; as I say, we were already out and the season was over half gone, that particular season. So I started negotiations on the next year's product.

[fol. 2439] Q. What year's product was that?

A. That was 1933-34, and we just couldn't make a deal.

The Court: Well, the first season was?

A. 1932-33.

Q. 1932-33?

A. Yes, sir, that starts in August or September, as a rule—the season.

Mr. Waller:

Q. Now, what about the next year's product, Mr. Morgan?

A. 1933-34, you mean?

Q. Well, you said you didn't make a deal for 1933-34?

A. No, we couldn't make a deal. We couldn't make a deal for 1934-35, that following year.

Q. Now, did you make any inquiry from Mr. Sudekum as to why he was offering such low rentals, as you regarded them?

A. Yes, I did. I had several talks with Mr. Sudekum, and having known him for a good many years, felt there was something wrong; and I don't remember the exact date but he finally told me he had a grievance against the company; and that he didn't feel that he was going to try very hard to get together with us until those grievances were removed.

Q. Did you inquire of him as to what those grievances were?

A. Yes, sir, I did.

[fol. 2440] Q. Did it have reference to the position of the Paramount Theater in Nashville?

A. Yes, sir.

Q. Well, what did he say about that?

A. He said Paramount came into Nashville and built a theater, which was all right as far as he was concerned, and we operated it ourselves, and that he had gone to New York and talked to the people in our department, and they told him that as long as we operated it ourselves that it was their policy, and that they were doing it all over the country; but that if they ever gave up the theater to some one else they would first negotiate with him. When he made that trip to New York, Paramount had turned the theater over to one of Paramount's partners in the South.

Q. Was that a man by the name of Wilby?

A. Wilby, yes, sir.

Q. Well, when you got that information, did you tell Mr. Sudekum you were trying to work it out?

A. Well, I told him I knew nothing about it. And he was very emphatic that they had made this promise.

Q. Did you try to make a deal?

A. Yes, I tried to make a deal; he was willing to buy the pictures at his terms, but those terms were entirely too low for us to deal.

[fol. 2441] Q. Now were you able to make a deal for the 1935-36 product?

A. I will have to refer to those seasons again, if you don't mind. (Refers to memorandum). Yes, I was able to make a deal with him on S-7, that was 1935-36, that was the season.

Q. Was that the occasion or the season which followed this conversation you had had with Mr. Sudekum?

A. No, there was one season before that I believe, we still could not get together, he just took the attitude that until such time as something was done by us to do something about the promise regarding the theatre that he was not going to trade with us, getting along on a deal, he always offered prices to us that were entirely out of reason.

Q. About the 1935-36 deal you made, how did that come about?

A. For about two years I believe I had been corresponding with New York, about a year and a half I believe it was, trying to get some action on this theatre proposition, and all the people that had been in the theatre department at the time Mr. Sudekum had proposed that, had left the company and it was very difficult for any one in New York to give me a decision. Mr. Frank Freeman had come in and was acting as the new head of the theatre department, and he knew nothing about it, and they were making an investi-

[fol. 2442] gation to see what they could find out regarding these promises, and in all that period of time they stated they were giving consideration to this matter, that was the answer I would get from them, and finally I told Mr. Sudekum that it would help matters a little more if he would make a deal with us, of course on terms that were fair, and I did make out a three year deal with him, eventually for three years, and finally Mr. Sudekum said he would make a deal but he would only agree to make a one year deal, because he wanted this other proposition settled.

Q. Was it in your proposition for Paramount to make a deal for more than one year? Was that unusual?

A. No, it was not a bit unusual.

Q. You did try to make a three year deal at that time, but were not successful?

A. Yes, I did.

Q. You made a one year deal?

A. Yes.

Q. Did you thereupon enter into a one year deal, when was that one year deal negotiated?

A. The deal was negotiated in the spring, early in the spring.

Q. Of 1935?

A. In 1935, that is right, in 1935, and I think the con- [fol. 2443] tracts were eventually signed, sealed and delivered in August of 1935.

Q. By the time that season was concluded, had the Paramount theatre matter been worked out?

A. No, it had not.

Q. Did you make a deal for the next year with Mr. Sudekum?

A. No, the home office still advised me they were considering the matter, a great deal of correspondence passed back and forth on it and when we got towards the end of the S-7 the 1935-36 season, Mr. Sudekum stated that he just would not negotiate on the following year's product until this matter was definitely settled.

Q. Then you did not have a deal for 1936-37?

A. No, we did not have a deal for the 1936-37 season.

Q. Now during that season, or toward the end of that season, was this Paramount theatre matter worked out?

A. Yes, that Paramount theatre matter was worked, I don't know the exact date, but it was worked out prior to the 1936-1937 season—no, during that season. Some time during that season.

Q. That was on the basis of leasing of the theatre?

A. Yes, sir.

Q. A lease by Paramount to Crescent?

A. That is right.

[fol. 2444] Q. And when those negotiations for the lease were going on, did you also negotiate then for the product?

A. Yes, I negotiated—I understood they were willing to negotiate for the theatre on a three year lease.

Q. You mean Paramount?

A. Paramount, with Mr. Sudekum, and we started negotiations with him on a three year film contract, which was to start with the season of 1936-37, S-8, which was supposed to start with that season, but Mr. Sudekum and the theatre

department just could not get together on terms for the theatre and he would not conclude a film deal until the theatre proposition was signed up and settled.

Q. Why was it you were trying to negotiate a three year deal?

A. Well in the first place it was natural for me, representing the Company to want the film deal to run the same length of time or the same terms as the theatre lease, because otherwise we would be in this position, that he would have to play the theatre in Nashville as first run, a first run theatre, and a contract for the pictures, and we would be out of the rest of his circuit for the remaining two years.

Q. What finally happened about the term of the leasing of the theatre?

[fol. 2445] A. After we had pretty well settled our terms on the three year deal, I discovered that they were negotiating on a five year lease for the theatre, and I immediately advised New York that I wanted the opportunity of changing the Sudekum deal to a five year deal.

Q. Just a moment there, did you get that adjusted?

A. After considerable correspondence they finally said that they were going to get together and negotiate on the five year business, and advised Mr. Sudekum, and he finally agreed.

Q. Did you finally negotiate the deal for a five year term?

A. Yes, sir.

Q. Was it an easy, short matter, or did it require some time and trouble to consummate it?

A. Well I have made a lot of deals for this company, but I think that was the most difficult one that I ever had to make.

Q. You mean the terms?

A. Terms and bickering months and months that were used up in the negotiations, fighting over every word of the way, every paragraph and every dollar.

Q. Mr. Morgan, you stated it was not an unusual thing for your company to make deals for more than one year; will you state some of the advantages to a distributor, of course I mean, from your standpoint in your connection with the [fol. 2446] Paramount, in long term deals or deals for more than one year?

A. Well this business, as has probably been brought out in this case, is a horse-trading business. There are no

set prices like there are for other commodities, and it is strictly a competitive business. Theatres usually make two or three changes a week, as many of them do, and fewer changes, they can easily afford if they want to deal with one distributor, and many are distributed in any one season, and it causes the distributor to have a continuous flow of the product in those towns, and a continuing revenue and an outlet through the length of the contract, and for the product, of course.

Q. Is the production of pictures and the marketing of pictures a risky business?

A. Yes, it is, it is an extremely highly perishable business.

Q. Can you tell when you make the picture whether the picture is going to be a box office attraction or not?

A. We feel we can some, but the man does not like that, and the making of the contract, we feel we can sell to a man, and the making and coming out of the pictures, and we know what our investments are, the pictures have cost us so much.

Q. In addition to the security that a distributor gets, [fol. 2447] or partial security that he gets from knowing he has a deal made for his pictures over a period of years, what do you say about the advantage of not having to negotiate annually for deals; is that an advantage or not?

A. Oh yes, it is a distinct advantage during the selling season, as a general rule prior to this decree, was a fairly short period of time, about three months, and in that three months the men are required to sell a great number of contracts, and to use the vernacular, to be up to their eyes, and naturally it is better for the man not to be going through those negotiations every year, and it saves a lot of expense.

Q. You said there was a good deal of negotiation in regard to this five year franchise; I will ask you, Mr. Morgan, whether Mr. Sudekum got the terms that he first offered on that franchise?

A. No, sir, he did not, by no manner of means.

Q. He did not coerce you to take your proposition?

A. No, sir.

Mr. Wright: I object to that, he might ask leading questions all right, but when it comes down to the issues in the case, I think the witness should be permitted to testify.

[fol. 2448] Mr. Waller: Well that was just a little side remark of mine.

The Court: Yes.

Mr. Waller:

Q. Well what about the figures and how much was the film rental that was actually called for in the franchises as compared with what Mr. Sudekum offered?

A. Well I will use percentages, the deal for the first year was about fifty per cent more than Mr. Sudekum offered for the franchise, it provided for an annual step up of rentals.

Q. This franchise provided for annual step up of film rentals?

A. Yes, sir, and that provided for a percentage of increase, cumulative for each of the remaining four years, the first year of course being already set.

Q. Aside from the normal advantages of having a long term deal, which you have already mentioned, would you say there was an additional advantage to the film man, where there is a step up?

A. Yes, sir, it is for this is for the cumulative step-up, there would be an advantage in increased revenue of course in making a franchise, or what many people call a franchise, [fol. 2449] for one, two or three or four or five years, a one, two, three, four, or five year deal. Each year this annual thing of horse trading business, like ours, and ask for higher terms, better terms, because we feel that we learn more about the business, we are able to make better pictures, fit the public taste better, and play to more people, and naturally that is the ambition of every producer and at that you are involved in a greatly increased cost each year in addition to the normal increase in cost of star players, prices of plays and books, etc., that is set up each year. You asked me about this increase; that increase serves to protect you from these other things that we have to contend with, and have been happening year in and year out, in business increased costs.

Q. Is that a business that is affected by the business changes, that is the booms and depressions or other economic conditions, generally?

A. Oh yes, sir, it is decidedly so.

Q. If a depression should occur during a long term deal like this, suppose a long term deal like this is made, would

that mean or not you had passed on a considerable part of that risk to the exhibitor?

[fol. 2450] A. Yes, sir.

The Court: What if a boom should occur?

Mr. Waller: The five per cent takes care of that.

A. And the percentage pictures you have.

[fol. 2451] Q. Now, you said that you got considerably more than Mr. Sudekum offered for each of the years for film rentals of this franchise. How did you go about figuring up what you thought you were entitled to?

A. Of course, I had had a lot of experience in the South and we have our own records back over a period of many years, as I stated before, in making a deal, you take into consideration all of those factors, your own personal knowledge, the advantage of the knowledge of your own men and the records that you have over a period of years and we approach it——

Q. What I mean is, did you do it town by town?

A. As I was going to say, that is the only way you could approach a problem like that, you would have to pick out each town and figure it on what you thought your pictures were worth in that town and that is the way that was figured.

Q. You would add those up?

A. You always, it is customary to take the total to see how it compares with the total you have gotten out of them before.

Q. Is it one of the purposes of a franchise of this character, Mr. Morgan, to prevent the so-called independent exhibitors from getting pictures?

A. No, decidedly no.

Mr. Wright: That is objected to; that is what the Court has to decide.

[fol. 2452] The Court: Yes.

Mr. Waller: I asked, from his standpoint; that is one of the issues and I am entitled to ask it as a representative of Paramount.

The Court: Well, I sustain the objection.

Mr. Waller:

Q. Mr. Morgan, you were asked when you were on the stand before about this clause 8-e in the franchise, the re-

peat run clause, and about the modification of that clause. What were the reasons for the modification, from the standpoint of Paramount?

A. Well, I gave the reasons the last time I was on the stand, that the reason for the modification was because Mr. Unger had discovered that there was no time limitation in that clause and it came about through a letter or correspondence that passed regarding the Tim Smith matter, and Mr. Unger wrote back, and I think that letter was stipulated, that the clause was not a good clause for us and should be modified, limiting the time within which he could select those pictures and play them.

Q. Now, regardless of any correspondence that might have taken place, what I am asking you is whether or not you, and the other representatives of Paramount, thought that there would be some advantage to Paramount from a modification of that clause, and state what the advantage was?

A. Definitely so. The advantage to us was that we would [fol. 2453] know they would have to select those repeats within a limited time and they would be in position to supply our prints. Otherwise, he would have an unlimited time in which to select the pictures and place us in a position that we would have to keep prints in the exchanges for those pictures an unlimited time, or forever.

Q. Was that the reason for the modification?

A. The reason for the modification was that it definitely protects us and puts the exhibitor in the position where he had to make his selection definite so that we would not, so that we would be able to supply all those pictures, and also the fact, if he did not make the selection, we would not be under any obligation to supply them.

Q. Did this modification, which was made, free the Paramount from any restriction in selling other deals of second run to independents?

A. No.

Mr. Wright: That is a pure conclusion; he can't testify what the conclusion was.

The Court: That is a question of the construction of the contract. Of course, it would free them in selling second run deals as to any pictures which had been refused by the exhibitors.

Mr. Waller: That is what I am trying to get at. The Government has listed this clause——

[fol. 2454] Mr. Wright: This question is not only a question to construe it, but he is asking him to contradict the clause itself. Obviously, on its face, it prevents any other exhibitor from buying the repeat pictures until Sudekum has decided whether he wants to run it again.

The Court: That is not the question. The question was, would it free any of those films for second run? It seems to me, from a construction of the contract, that it would free those films which Sudekum had decided he was not going to play.

Mr. Waller: Your Honor has got that impression from statements of Counsel for the Government. In other words, I don't think the clause has anything to do with allowing second run deals, as originally drawn or as modified; Paramount was perfectly free to sell second run pictures to anybody that wanted them, regardless of whether Crescent wanted the pictures or didn't want them.

The Court: If it is a question of construction of the contract, it is not for this witness to say.

Mr. Waller: They have introduced letters as trying to [fol. 2455] construe and as putting that construction on it.

The Court: That is just their construction, their idea of the construction that could be placed on it. You have got your idea, a different idea of the construction.

Mr. Wright: Mr. Morgan is apparently being asked to testify that it should have operated in some other way.

Mr. Waller: Let me rephrase the question.

The Court: All right.

Mr. Waller:

Q. Mr. Morgan was one of the purposes or reasons for modifying the clause, that was in the mind of the officers of the Company, of Paramount, including your own, to free Paramount from any restriction as to selling second run deals?

Mr. Wright: That is certainly objectionable, so far as any other officials are concerned.

The Court: It is a leading question, in the first place.

Mr. Wright: It is a pure conclusion, so far as this witness is concerned. He should say what was said and done

with reference to the modification, and from that the Court can conclude what the purpose of it was.

The Court: As I recall, there was a time limit placed of [fol. 2456] thirty days in which notice should be given and ninety days in which the picture should be played.

Mr. Wright: No, it finally wound up—That was the way Paramount originally drew it, but Sudekum and Stengel insisted on a longer period. Now, in the record, he has thirty days to say whether he wants to play the picture or not, then if he does, he has a hundred and twenty days within which to show it.

The Court: A hundred and twenty days within which to show it. Well, of course, if he doesn't give the thirty days notice, decide within thirty days after playing any picture, under his contract that naturally frees that picture.

Mr. Waller: The point I am making is, he can go ahead and sell it at any time in the same town. This only authorizes the Crescent to show a picture in the town where it has been shown, it doesn't prevent the Paramount from selling the picture to somebody else, if it has an available print.

The Court: That is a question. So far, from all the evidence in the case, it has prevented it.

[fol. 2457] Mr. Waller: I disagree with your Honor; your Honor has been listening to Government Counsel——

The Court: You haven't introduced any proof that it was done in any place.

Mr. Waller: They haven't introduced a single witness that it was not done.

Mr. Wright: It was proven by witnesses in three places: Mr. Henry, at Hickman, and Anderson at Hopkinsville and Tim Smith at Harriman. In each case, the clause was construed so as to prevent them from negotiating for second run of Paramount pictures in the towns where Crescent was operating first run houses. The reason given was, that the franchise gave them this repeat run.

Mr. Waller: The reason was given by Mr. Wright in each case, your Honor.

Mr. Wright: It was not.

The Court: All right, go ahead.

Mr. Waller:

Mr. Morgan I am asking you as to the purposes and reasons for the modification of the repeat run clause. Have you stated what those reasons and purposes were?

A. Am I supposed to answer your last question?

Q. Yes, in other words, was there anything you wanted [fol. 2458] to add to the reasons and purposes you have already recounted in your testimony for the modification?

A. I think things are a little confused for the minute. You asked a question and Mr. Wright objected and I was wondering if I was to answer that question?

The Court: No.

Mr. Waller:

Q. I think the Court sustained the objection. I am trying to get at it in a different way; are there any other purposes that you have not expressed for modifying that clause?

A. No, I don't think I can think of any.

Q. Is a repeat run clause a usual or unusual thing in a film contract?

A. It is very usual.

The Court: Very usual?

A. Yes, sir.

The Court: Let me ask you a question: If it is very usual I assume that you had quite a number of contracts with a repeat run clause in them?

A. I imagine there are, I know I have had a few in the South.

The Court: Is it ever customary, where you have an exhibitor in one town that has competition and this exhibitor has a contract with you for first run with an option to [fol. 2459] repeat, is it ever customary, or has it ever been customary for you to sell his opposition second run of that picture before he gives notice of his option, of the exercise of his option to make a repeat run?

A. Not generally, Judge, on that single picture. That is the reason this clause has been, I think, misunderstood here. But we could and would sell an opposition theatre, if you want to call it that, regular second run for the entire year's product, but it is not customary nor do we think it is good business to take a picture away, a repeat picture or one, two or three pictures away from an old customer, and sell it to the opposition, without first offering it to your regular customer.

The Court: Before the regular customer has had a chance to make a repeat run if he wants it?

A. Or makes a repeat run, if he wants it, because there are certain big pictures that might have been played in bad weather, or there might have been a soft ball game in town the night that it was played and in our business we try to get exhibitors to repeat pictures to get additional revenue out of them, especially in these small towns where they don't have an established second run; we go back and try to get them to buy pictures over again at a reduced price to get the additional revenue from another run of that picture.

[fol. 2460] That is with reference to repeat runs. That is my understanding. We have always felt that we had the right to sell an established second run, provided that theatre has a second run policy and doesn't simply try to buy the picture to keep it away from the regular account.

Mr. Wright: I don't think Mr. Morgan's last answer here is responsive. If he wants to argue the case as a lawyer, let him do it, but this is testimony and I think it ought to be stricken.

A. I was just answering the Judge, Mr. Wright, as to my operation, my understanding of a repeat run.

By Mr. Waller:

Q. Let me ask you this question, Mr. Morgan. Does that policy which you have just stated apply regardless of whether or not there is a repeat run clause in your deal or your contract for the particular situation?

A. I don't follow that.

Q. In other words, suppose you have got a deal with an exhibitor and you have got no specific repeat run clause in your contract, do you nevertheless try to get that exhibitor to repeat the top pictures?

A. Decidedly so. Our salesmen solicit on that basis always.

Q. And do you make it a practice to solicit that customer for these repeat runs before you would offer them to a competitor of that customer?

A. That is correct.

[fol. 2461] Q. Sir?

A. Yes sir.

Q. And that, regardless of whether or not there is a repeat run clause in the contract?

A. Yes sir.

Q. Now, Mr. Wright awhile ago mentioned the Union City, Tim Smith and Hopkinsville situations. Did it come to your attention in any of those situations that the competitor Smith or Henry or Anderson wanted to buy a full second deal contract?

A. No. I don't remember the Hopkinsville situation very much because I wasn't in that but in the other two situations I know they wanted to buy a short deal, only a few pictures, and the top ones naturally, the best ones.

Q. How soon after the first run of a picture is it advisable from the standpoint of the distributor to have a repeat run played?

A. Well, it is best to keep it back as far as you can in order not to damage the first run because if the public finds out or gets the idea that pictures are repeated, back again, they might not go out to the first engagement.

By the Court:

Q. Wait until the second run and see it cheaper?

A. That is right, Judge.

By Mr. Waller:

Q. Mr. Morgan, with reference to the number of prints of a particular picture that are available, can you give us any idea of how many prints of your pictures your Atlanta [fol. 2462] exchange generally has available as compared with the number of situations that must be served? I mean during the time you were district manager.

A. Well, I can remember pretty well all them. I think on the top pictures we had around seventeen to twenty prints on the top pictures, the big ones.

Q. Have you any idea how many theatres would have to be served with those prints?

A. The number of theatres?

Q. Yes.

A. Well, there are six hundred and forty two what we call possibilities in the Atlanta exchange territory alone.

Q. Now, without regard to possibilities.

A. Those are possibilities, what we call theatres that could run your pictures, if you sold them.

Q. Well, do you generally have contracts with a large proportion of those theatres?

A. Yes sir, we do. We sell over six hundred of them.

Q. Now, does the number of prints that you have available have anything to do with the operation of your repeat run policy, that is, with your efforts to get pictures repeated and the time when you want them repeated?

A. I don't follow that.

Q. What I mean is this: You stated that it was advisable to play the repeat run a considerable length of time after the first run. Now, does the small number of prints as compared with the total number of situations to be served also affect that situation?

[fol. 2463] A. Oh yes, decidedly so, because when you have made first run deals with over six hundred exhibitors there is always a continual demand for early play dates from the whole six hundred and as a rule you can figure on an average of about two bookings at the most a week on a print, maybe a little less than that because of the length of playing time and the shipping facilities in the territory, so you can pretty well figure on seventeen to twenty prints, how long it would take to serve, give service to over six hundred first run exhibitors, and naturally it would impair your future dealings if you allowed a lot of repeat runs to be booked in the time when these pictures should be available for first run accounts.

Q. Then what is your policy with reference to serving your first run, your regular accounts and booking pictures for your regular accounts as compared with the time when you will book pictures for a repeat run?

A. Well, we determine ourselves in our negotiations with the exhibitor and from our knowledge of the town as to when the repeat run ought to be played or when we will serve it in order to protect our prints.

Q. You were asked when you were on the witness stand before whether or not this modifying clause that was dated May 25, 1939 was actually signed on the date it bears, and you were unable to give a definite answer to that question. Have you subsequently investigated that?

A. Well, I have not as thoroughly as I wanted to because [fol. 2464] I haven't been in New York very much but I can give a better picture of it now than I could before, yes sir.

Q. Well, will you do that?

A. Well, right after Mr. Unger wrote the letter, shortly after that, I advised the legal department to go ahead and draw the rider, and then I don't think it was more than thirty days that I was then transferred into the home office as division salesmanager, and I found when I got in there that the rider had not yet been prepared. I got after the legal department and they finally drew a rider, and they had drawn it on the basis of, if I recall, that they would have thirty days in which to select the picture and forty-five days in which to play it, and I called the legal department's attention to it immediately then, to the fact that we couldn't serve prints on that basis to all those towns, and I said that I would have to find out the time that had been agreed upon definitely and that they had been advised. They cut it then, the Legal Department. So they then drew another rider, which is for the present length of time, thirty and I think, one hundred and twenty days. That was sent to the district manager in Atlanta, who, in turn, sent it to, I think, Mr. Stengel, to have them signed. I think there were more than one of them, and I recall there were a lot of letters passed back and forth, follow-up letters, in order to get that back, that particular rider back, and we didn't get it back until along in the first part of the summer, close to the first part of the summer, and it was signed, and I sent it on into the legal department and they caught a clause in there to [fol. 2465] the effect that Paramount would guarantee to deliver prints in every case within one hundred and twenty days, and the legal department advised me that Paramount would not commit itself in any such manner; that we might be placed in the position of violating the contract. We then had some correspondence back and forth again with Mr. Sudekum and Mr. Stengel and the legal department had drawn a new rider, not using the one that Crescent had signed, and that was mailed to the Crescent people again. There was a little delay on that and that finally came back signed, I believe, towards the end of the summer.

Q. Well, I really wasn't calling for all of that detail, but let me ask you this question. Was the rider actually signed on or about May 25, 1939, the date that it now bears, with a slight change made in the rider, which was re-copied?

A. Yes, that was the rider actually signed by the necessary parties, exhibitor parties, and that was returned to us with this particular paragraph in it that was objectionable to the legal department. And that rider was re-drawn with

the same date on it, and that was the one that signed, and, incidentally, Mr. Waller, I believe that the correspondence will show that somewhere that rider was lost and had to be re-drawn again and finally it was signed and sent in.

Q. In any event, you understand, do you not, that the correspondence relating to that has been turned over to the Government's attorneys since you were last on the stand?
[fol. 2466] A. Yes, I understand that.

Q. I would like to ask you, Mr. Morgan, as to the advantage to the distributor of a franchise in particular reference to small towns of the kind that are included in this Rockwood chain and its affiliates, towns of two thousand population and less. Have situations of that kind in the past been a source of any substantial amount of revenue for the companies like Paramount?

A. They have been a source of——

Q. In other words, what has been the experience generally with theatres in small towns of two thousand and less?

A. Well, those towns are a continual source of worry because it is usually those towns that are opened and closed and changing hands, exhibitor hands.

Q. What about the play-off of contracts by operators of theatres in small towns of that character? What has been the experience of Paramount?

A. Well, the great majority of the distributors' difficulties in the play-off of the pictures is in small towns.

Q. Will you compare the situation from the standpoint of Paramount as to the small towns in Tennessee before and after your franchise with Rockwood and its affiliates, and I am referring to such towns as Manchester, Tennessee and Tracy City, Tennessee?

Mr. Wright: Well, if the Court please, now, what is the issue we are on now?
[fol. 2467] The Court: I don't know.

Mr. Waller: We are on the issue, your Honor, that a franchise is a perfectly legal business document and not an instrument in restraint of trade.

Mr. Wright: What has this comparison got to do with that, that issue?

Mr. Waller: Well, it has this to do with it. It is good business for Paramount to sew up good revenue in towns of that kind where they previously had been having great

difficulty in getting revenue and great difficulty in handling accounts.

Mr. Wright: We are not making any contention that this might not have been good business for both Paramount and Crescent. Our contention is simply that the effect of it was to sew up a Rockwood monopoly in those towns and a Crescent monopoly in the towns in which it operated and prevent any independents from coming in and competing with Crescent or the other exhibitors in those towns in the licensing of Paramount pictures. Nothing he is asking here has any relevancy whatsoever to that question.

Mr. Waller: I also want to show, Your Honor, that in a [fol. 2468] number of those towns there were never any theatres before.

Mr. Wright: Well, what of it?

Mr. Waller: The Government seems to lose sight entirely, it seems to me, your Honor, of whether or not a violation of the Sherman Act in a particular situation depends upon the competitor's intent, as one of the facts, and also upon the public interest, as one. I don't mean to say that a violation of the Sherman Act would be excused on the theory that it is in the public interest but in determining whether the Sherman Act has been violated the public interest is an important criterion.

Mr. Wright: There is no question evidently here. The parties are conclusively presumed to have intended what they accomplished and that was a complete suppression of competition for the five year period in those towns.

Mr. Armistead: Well, he is testifying now.

The Court: I overrule the objection. Go ahead.

(Question read by the reporter)

Q. And others of that size?

[fol. 2469] A. Well, in some of those towns there were no theaters, and prior to the time of the franchise no theaters operating, and in some cases theaters had been closed for a long time; in other cases, there were theaters that were opened and closed spasmodically; there were different ones; a couple of towns in North Carolina; and Spruce Pine, and Guthrie, Kentucky,

Q. Guthrie, Kentucky?

A. Kentucky. You are taxing my memory to remember those small towns; but I would say there were several that

we had either not been getting revenue from or getting a very spasmodic revenue from, over a period of years, until we made this deal.

Q. There has been testimony, Mr. Morgan, in regard to the character of the Crescent theaters and the appearance of the Crescent theaters and the appointments and furnishings of those theaters; will you state whether or not it is of any advantage to a distributor such as Paramount to have its pictures shown in theaters of that type rather than in theaters of a different type?

A. Well, it would be destructive to Paramount or any other company to show its pictures in inferior theaters; and, naturally, it is Paramount's policy to show its pictures in the best theaters and the best operated theaters, to show its pictures.

[fol. 2470] Q. To show its pictures?

A. Yes.

Q. Do you have particular reference to situations where there are may be two theaters in the same town?

A. Oh, certainly, in the same town.

Q. When you were on the stand before, Mr. Morgan, Mr. Wright referred to a letter addressed to you by Mr. Cecil House, dated November 4, 1938, and I find that that letter has not been marked as an exhibit. I will ask you if you received that letter from Mr. House?

A. Yes, sir.

Q. Will you mark that as Defendants Exhibit No. 102?

Mr. Wright: May I ask for what purpose that letter is being offered?

Mr. Waller: The letter was referred to in the examination of Mr. Wright of Mr. Morgan, and I want the whole of the letter in evidence.

Mr. Wright: The letter, if the Court please, contains a quotation from a letter signed by a Mr. Pickett, and I assume you are not offering it to prove anything that is stated in there with respect to what Mr. Pickett has [fol. 2471] said?

Mr. Waller: I think letters that were introduced would have the same probative value as the letters introduced by the Government.

Mr. Wright: I agree with you. This is not a letter from Mr. Pickett; this is a letter from House to Mr. Morgan with

something Mr. Pickett said; it is not being offered to prove anything Mr. Pickett relates there?

Mr. Waller: You don't think that the best evidence of what it contains?

Mr. Wright: I think the best evidence of what Mr. Pickett said would be in Mr. Pickett's letter that he wrote.

Mr. Waller: I will ask counsel if they would be willing to stipulate that Mr. Pickett did write the letter in the ordinary course of business?

Mr. Wright: He didn't write that letter at all. I would have to see the letter first and know the circumstances under which it was written. The only relevancy the letter has in the case, if the Court please, and the only reason I [fol. 2472] asked Mr. Morgan about it, is to show there had been a complaint to the Department of Justice at the time the letters were offered by Mr. Smith; it was perfectly competent for that purpose.

Mr. Waller: I think Mr. Simon has the original letter from Mr. Pickett to Mr. House, and I ask counsel if they will stipulate that he wrote that letter pursuant to his duties with Paramount?

Mr. Armistead: They have introduced letters from dead men.

Mr. Wright: How is that?

Mr. Armistead: I say, you have introduced letters from dead men.

Mr. Wright: We didn't have to introduce letters from dead men; we produced every man that wrote a letter which we offered, and I think we want the same offer as to Mr. Pickett before we stipulate on that.

Mr. Waller: I will formally state that Mr. Pickett has been in an institution for the mentally deficient, or something of that kind, and is just out.

[fol. 2473] The Court: You offer the letter in evidence?

Mr. Waller: Yes, sir.

Q. Mr. Morgan, I also hand you a photostatic of a letter taken by the Government from Paramount files, being addressed by Mr. House to Mr. Phillips, with a copy to you, dated November 25, 1938, relating to the Tim Smith affair, and enclosing a copy of a letter from Mr. L. C. Loew to Mr. House, dated May 10, 1937, in regard to Tim Smith; I will

ask you if you received that letter, and the enclosure with it?

A. Yes, I remember that.

Mr. Waller: I offer that and the attachment as Defendants Exhibit No. 103.

Q. Did your receive that letter and the enclosure in the progress of your investigation of the Tim Smith complaint to the Department of Justice?

A. Yes, sir.

Mr. Wright: Now, here is a letter, if the Court please, written by L. C. Loew attached here and one written by Cecil E. House; I think we ought to have the same oppor- [fol. 2474] tunity that was given the defendants, to examine these people, if those letters are being offered to prove any facts in there; if they are simply offered to show Mr. Morgan got knowledge out of those letters at or about those dates, then it would be thoroughly competent to show that.

The Court: This letter is not to Mr. Morgan?

Mr. Waller: A copy to Mr. Morgan.

[fol. 2475] The Court: Well, if that is introduced for the purpose of showing that Paramount offered to sell Tim Smith the S-8 contract, of course it is incompetent.

Mr. Waller: I want to refresh his recollection, Mr. Wright introduced proof that they did not undertake to deal in the pictures with Mr. Smith, until after this complaint to the Department of Justice.

Mr. Wright: The testimony that Mr. Morgan gave before related to an offer that he directed they should make to Mr. Smith in November, 1938 he had with him, and identified a list here of projected pictures of Paramount, then he said he took a lease so that there were offers and that they instructed his salesman to go on and offer the pictures to Smith and he first testified that he told hi— had knowledge of the Department of Justice complaint, then his attention was called to the other letter that Mr. Waller showed him that he had received from the Justice Department, and with reference to the complaint, and I believe the salesman made an offer, He offered a deal. That is the status of the record, and this has nothing to do with it.

[fol. 2476] The Court: This is prior to that time, this is in May, 1937.

Mr. Wright: Yes, this refers to the previous year's deal with a salesman before there was any complaint to the Department of Justice, at the time the salesman of his own volition went in to try to sell Smith the 1936-37 deal, that was the year that Crescent bought Paramount in 1935-36, Crescent had that and the salesman went in and talked to Smith about the 1936-37 deal, that is what that letter relates to, and that has no basis of that complaint to the Department of Justice, and it has nothing whatever to do with Mr. Morgan's testimony of the offer rejected in his office.

Mr. Waller: In view of the fact that Government counsel took that photostat out of Paramount's file, I will ask you if your will make a stipulation under the same terms that we did.

Mr. Wright: We will make a stipulation, the same stipulation we made with you, if you give us an opportunity to interview the man who wrote it, without that opportunity I do not see why we should stipulate.

[fol. 2477] Mr. Waller: Mr. Morgan, I have offered the exhibit to be marked——

The Court: Let it be marked, and the objection sustained.

Mr. Waller:

Q. Mr. Morgan, can you state whether Paramount offered any pictures, or whether they came to your knowledge that Paramount in your capacity as district manager of Paramount in Atlanta, that pictures had been offered to Tim Smith at Morristown, before the Department of Justice complaint?

A. Repeat that question?

Q. Did it come to your attention or to your knowledge as district manager of Paramount in Atlanta that before the Tim Smith Complaint to the Department of Justice, an effort had been made by Paramount to make a deal with Tim Smith at Morristown, Tennessee, for the next or previous year's product?

A. Yes, sir, I made that statement when I was on the stand before, and I say now my impression is that we had offered pictures to Mr. Smith, and I will say yes to that question.

Mr. Waller: Your Honor I think that is about all, and I think that will be all, but I might want to ask one or two [fol. 2478] more questions.

The Court: Al- right, adjourn court.

Afternoon Session. Oscar Morgan, continued.

Mr. Waller:

Mr. Morgan, I have been reminded that when you were on the stand before and questioned by Mr. Wright, you were asked to furnish a list of some of the other circuits of theatres for the purpose of comparison with the Crescent Circuit; have you complied with that request and have you compiled that information?

A. Yes, I have. I have in my pocket a memorandum.

Q. Will you give the information?

A. These may not be the corporate names of the circuits, but as we call them, as we know them and call them. The E. M. Loew, in New England. Walter Reade, mostly in New Jersey, has some theatres in New York state. McCealle and Henfe. The Brandt, New York City and surrounding towns. Century Circuit in New York City. Cocalis, New Jersey and New York. Co-operative, Detroit. Evergreen, Northwest. R. E. Griffith, Texas. L. C. Griffith, Oklahoma. Griffith and Dickinson, Kansas and Missouri. Harris Amusement Company, Martin Theatres, Georgia, [fol. 2479] Alabama and Florida: Prudential Circuit, New York. Randforce, New York. Bobb and Rowley, Texas, Oklahoma and Arkansas. Schine Circuit. Shea theatres, New England. George Skouras, New York City and surrounding cities. Wilmer & Vincent, in Pen-sylvania and Virginia. Affiliated, Louisiana.

Q. Is that all?

A. I just took off what I thought was a sufficient number.

Q. What is the basis of comparison?

A. The basis of comparison is in revenue. I would say that those circuits run anywhere from twenty to a hundred theatres, but the basis that we took them off in my office was on a basis of film rental as compared with the Crescent Amusement Company.

Q. Do you mean by that that those circuits or chains you have mentioned are circuits or chains from which Paramount derives a greater annual film rent?

A. Yes, sir, annual film rental.

Q. Than from the Crescent Amusement Company?

A. Yes, sir.

Cross-examination.

By Mr. Wright:

Q. Mr. Morgan, the circuit that we were talking about [fol. 2480] when you testified before, you were referring to independent circuits, do you remember that?

A. Yes, sir, that is right.

Q. And I asked you to name some of the other independent circuits that you thought were larger, you have a lot on this list here that are not independent at all, is that right?

A. If they are I don't know it.

Q. How about Evergreen?

A. Who?

Q. Evergreen, isn't it a Fox or Fox Coast affiliate?

A. A Fox and Fox Coast affiliate? Possibly I am not as familiar with them, I knew them from Mr. Frank Newman.

Q. You do not know whether it is affiliated or not?

A. No, sir. I told you how I got these, Mr. Wright, had my boys in the office, I told them what I wanted and told them to go and check the records and take off the independent circuits, and that is the way we got it.

[fol. 2481] Q. You know that Skouras in New York City is affiliated with RKO?

A. No sir, I don't know that, not George Skouras, I never knew that.

Q. Do you know that he is not?

A. No, I don't know that he is not but in my dealings with him I deal with him as an independent.

Q. Wilmer & Vincent is affiliated with Loew?

A. Now, that I don't know, I am not familiar with that.

Q. You don't know whether it is or not?

A. No.

Q. You haven't attempted to determine whether the theatres you were listing were or were not independent circuits?

A. No. I have been dealing with a lot of those circuits for years and I never had any knowledge of it.

Q. "No" is enough for the answer. Now, I would like to call your attention to a question, to an Exhibit that you testified with respect to when you were here before, that

is, a letter from you to Mr. Unger, dated November 14, 1938, marked Government Exhibit No. 152. In that lettter, with reference to the Crescent Circuit, this paragraph appears:

"In any event, the only way we could sell second run, even if we wanted to, in this particular town"——

[fol. 2482] You are referring to Morristown there and Newport—(Reading)

—"would be after Sudekum had taken the refusal because paragraph E of Article 8 of the Crescent Amusement Company franchise provides that he can repeat any picture at a certain given price."

A. Uh-huh.

Q. The statement I have just read you was correct at the time you made it, wasn't it?

A. What do you mean by the statement I made being correct, Mr. Wright? I don't understand you.

Q. I don't know how I can put it any plainer.

The Court: Well, that is a construction that you placed upon that paragraph at that time?

A. No. If your question is, that my understanding then was that we could not sell Tim Smith a regular second run for all our product, I would say no, that I did not put that construction on that letter when I wrote it.

The Court: You say the construction set down in the letter would only apply to less than an entire contract, to spot booking or a number of pictures for second run, instead of an express contract for the entire season's product; is that the difference that you make?

A. Yes. There is a difference that has not been thoroughly brought out, to my point of view, yet, for me. That is this: [fol. 2483] Take an exhibitor who will ask for a limited number of pictures, which doesn't have a regular established second run house, it would be, it always is the policy of our Company first to offer those pictures to its regular customer for his refusal, whether he has got it in a contract or he has not; because it would be destructive to allow the other theatre to take the best pictures and run them second run and sign them upon a contract. But where a theatre is operated by a reputable exhibitor as an estab-

lished second run and runs nothing but second run pictures, we would then consider a second run contract. In the case of Tim Smith, what I meant in that letter was, the reason we couldn't sell him if we wanted to, he had asked for ten pictures second run, ten or sixteen pictures, I forget the exact number; that is all he wanted.

Q. Do you recall that you testified and the explanation you made at the time you testified here before was, that that clause prevented you from selling second run to Tim Smith because repeating of the pictures by Crescent would destroy the value of the second run; do you recall that?

A. I don't recall testifying to that fact at all, Mr. Wright.

Q. In any event, it is pretty clear, isn't it, that you could not, that you would not expect somebody to buy a full season's contract second run and not know whether the pictures he bought second run were going to be played for a repeat run in the opposition houses run by Mr. Sudekum [fol. 2484] or not, would you?

A. Ahead of him, you mean, ahead of him, play ahead of him?

Q. Any time?

A. Why, certainly not, because I still say that we have that right, under that clause, to sell second run or any run we want to, to a regular established run.

The Court: What he meant was, if you sold a regular second run contract for any particular season, that the exhibitor that you sold second run contract to, wouldn't know whether he was going to get a second or third run?

A. No, he would get a second run, it would be written on his contract.

Mr. Wright:

Q. You couldn't write a contract with another exhibitor, except subject to the terms that you had already incorporated in your franchise with Sudekum, isn't that right?

A. No, that is not right, that is not my understanding of that clause.

Q. Why did you make a contract, what is the purpose of making a contract and putting the terms in it?

A. At that time, as I explained to you before,——

Q. Just answer the question.

A. I am trying to answer your question.

[fol. 2485] Q. That calls for a yes or no answer.

A. Ask the question again.

The Court: You say it calls for a yes or no answer; he couldn't perhaps answer that yes or no.

Mr. Wright:

Q. I ask you for what purpose you make——

A. I would like to have the question repeated.

Q. I will put it this way; The purpose of making a franchise and writing certain terms into it, is to determine what the respective rights of your Company and the Crescent Amusement Company are, with respect to licensing films in the town where they operate, isn't that right?

A. Certainly, yes sir, that is correct.

Q. And after you have incorporated those terms in the agreement which you both have executed, then whatever else you may do, or other deals that you make in the future, with other exhibitors in those situations, are subject to whatever terms are incorporated in the deal you have made with Crescent Amusement Company, isn't that right?

A. That is elemental, that is right, yes.

Q. Now, I call your attention to your testimony, as to what the effect of this provision would be on a contract you may have sold to Tim Smith, any big pictures; you testified [fol. 2486] at page 1667 in the record, in response to a question by Mr. Armstead, where he says:

"Q. I note in Government Exhibit 152, a letter dated November 14, 1938, where you state this: 'In any event, the only way we could sell second run, even if we wanted to'—That is the one I just quoted from, where you wrote Unger and where you said this: 'In any event, the only way we could sell second run, even if we wanted to, in this particular town, would be after Sudekum had taken refusal—'' etc.

"A. That point is simply this: That Tim Smith simply wanted about ten or twelve second run pictures, it is obvious if Sudekum was going to repeat he would repeat only on the big pictures and he would have a right to repeat 'run, which would destroy the value of those pictures so far as Tim Smith was concerned, if Tim Smith would not buy all the contract."

That is correct?

A. I can't recall I testified exactly that way, but——

Q. That is true, anyway?

A. There is something wrong in that testimony. I didn't [fol. 2487] testify that way.

Q. What is wrong with it?

A. Well, this is wrong about it: what I explained then was, that he only wanted to buy ten pictures, second run and he wouldn't buy those pictures third run after Sudekum, because the repeat run would then have destroyed their value.

Q. And the repeat run would destroy the value if any big picture that Sudekum might repeat, even if Smith, or any other exhibitor that wanted to buy second run, bought a whole season's contract, isn't that right?

A. If he bought them third run, they would destroy it, yes sir.

Q. You didn't say anything about third run?

A. Yes, I did, Mr. Wright, because that is a confused statement there.

Q. As a matter of fact, let me read this to you again?

A. I heard it, I know just how it reads.

Q. And you say you were mistaken, from this?

A. No, I didn't say I was mistaken, I said there is a mistake in there. I don't recall testifying to that, Mr. Wright.

Q. You say there was an error in the transcribing of this testimony?

A. I think there is something either left out or an error, because here is what I meant——

[fol. 2488] Q. Just a minute. Do I understand you correctly now that what you wanted to say was that if Tim Smith wanted to buy big pictures third run, then the repeat run option would have destroyed the value of those pictures; is that correct?

A. No, that is not what I am telling you. You have to get back to the fact that he wants to buy ten pictures, and the statement I made, that we would consider selling a regular established second run house, who ran nothing else but that; but when Tim Smith only wanted to buy ten pictures, we would not, under any conditions, as long as that repeat option was in our franchise, with the right to repeat, and the only house that could take it, and that it would be first given to Sudekum, and the value of those pictures, before he bought them, would be destroyed, he wouldn't buy them third run.

The Court: You don't sell a second run contract then?

A. We would sell a second run contract, we still can under that contract, to a regular second run house. There is confusion about that repeat run. Repeat refers to one picture only. Second run means a whole year's policy in any theatre.

Q. There is no confusion about the clause. The clause doesn't limit Sudekum to any pictures at all, it gives him permission to play any picture that he pleases?

A. That is correct, Mr. Wright, that is correct. But the [fol. 2489] expression, in our business, the use of that refers to one, to each picture. We don't sell a contract and write in it, a full season's contract, and write on that contract "Repeat run".

[fol. 2490] Q. Now, let's see if we can straighten this matter out, how the specification was arrived at.

A. There was a lot of correspondence on that.

Q. Now, I will hand you a letter dated June 9th, 1939 signed by Mr. Stengel, addressed to Mr. Kirby, with copy for Mr. Wilkes and you, and ask you if that letter was received in the Paramount office shortly after that date. (Handing letter to witness).

A. Yes sir. I haven't seen that letter in months.

Q. I will hand you letter of June 19th from you to Mr. Stengel and ask you if that is the reply that you wrote to Mr. Stengel on or about June 19th, 1939. (Handing letter to witness).

A. Yes, that is the answer.

Q. And I will hand you then letter of September 7, 1939 from you to Mr. Wilkes and ask you if that is copy of letter you wrote to Mr. Wilkes on that date.

A. Yes, I signed that.

Mr. Wright: I will ask to have these marked Government Exhibits Nos. 347, 348 and 349.

(Papers so marked).

I would like to read this Government Exhibit No. 347, the letter from Mr. Stengel to Mr. Kirby with copy to Mr. Morgan, dated June 9th, 1939.

"DEAR JOHN:

"We have your letter of June 2, wherein you enclose [fol. 2491] riders for our signatures. These riders are with regard to the playing of repeat run pictures.

"I have carefully read the riders, as well as Mr. Morgan's letter. It is not our intent to be arbitrary in this matter nor do we wish to try and pin Paramount down to one certain booking. As the rider is now written, however, it is very probable that we would be unable to mutually agree on a date within the ninety day period.

"I think you will agree, after careful consideration, that this could easily happen inspite of the fact that your booking department and ours work together 100 per cent. To better illustrate the point in question—supposing one of our theatres played Union Pacific on or about release date and that we wished to repeat within the ninety day period. It seems to us that there would be a natural scarcity of booking time due to hold-overs, etc., which might easily prohibit your office confirming this picture for the repeat run.

"In other words, you would probably want to take care of the first run situations in your Exchange territory before filling our repeat dates.

"Don't you think a qualifying clause should be inserted in the riders to the effect that, if we are unable to mutually agree on a repeat run date within the ninety day period, then in that event we will be permitted to play the picture in question as soon after the ninety day period as dates can be made available.

[fol. 2492] "Please be kind enough to advise us your disposition in this matter at your convenience. • • •"

Q. Now, having read that letter, it is clear to you now, is it not, that at that time the clause which was being referred to provided only for a ninety day period within which to select and play pictures?

A. That is right.

Q. And you didn't want to commit yourself definitely to furnish prints within the ninety day period and Mr. Stengel wanted the agreement modified to provide that if you were not able to furnish the prints within the ninety day period, then he was to be able to exhibit as soon after the ninety day period as you could furnish the print, is that correct?

A. That is right.

Q. This is the reply from Mr. Morgan to Mr. Stengel, dated June 19, 1939, marked Government's Exhibit No. 349:

"Dear Kermit:

"I have read your letter of June 9th to John Kirby about the rider as affected by the 90-day period in which you are to play your repeats. While the Legal Department wanted a shorter space of time, I finally explained the matter to them—but after all, Kermit, there are two sides to everything, and I think maybe you are drawing a line too fine.

"I think it would be advisable for you to agree to [fol. 2493] the rider as we have drawn it, because certainly we can agree on repeat dates within the period mentioned, but while you are so insistent on being protected, we want the same right of being protected. As a matter of fact, Kermit, the new Trade Practice Agreement provides that an exhibitor must agree to select his pictures on repeats or Short sales within 21 days after avaliability—so you can understand that we are being far more liberal than that. I don't feel that you need to worry about the problems you brought out in your letter, as over the last two years, you will find I am sure, that you had no difficulty on the very thing you're talking about.

"Finally, after all, under franchise, we are supposed to be some form of moral partners, and it is to the advantage of both of us to work together. Frankly, I would rather not for many reasons change the rider, and will greatly appreciate it if you will therefore sign and send through to John's office."

Q. Now, isn't it a fact that neither Mr. Stengel nor Mr. Sudekum did sign and send through the riders in that form?

A. That I can't say. I don't recall that.

Q. Well, you can recall——

The Court:

Q. Well, it wasn't finally executed in that form, was it?

A. As a matter of fact, I think in the final rider it was a [fol. 2494] hundred and twenty days. Didn't you call that to my attention?

By Mr. Wright:

Q. That is what I was calling your attention to.

A. Yes sir.

Q. The rider, as finally worked out, dated May 25th, 1939—I take it, the agreement as finally worked out was dated back to this date?

A. No, that is not so; that is not right.

Q. Well, these letters that I have just referred to were dated in June, 1939, were they not?

A. Yes sir, I know that.

Q. And at that time you hadn't reached an agreement upon the wording, the final wording of the clause, that is correct, isn't it?

A. Yes sir, we had reached an agreement, Mr. Wright. At least, they thought they had reached an agreement. They signed that rider and sent it back and they inserted a paragraph in it to protect them, and that caused these letters. The legal deparment told us we couldn't have that paragraph in there, and then later on, because we couldn't have that paragraph in there, we changed it from ninety to one hundred and twenty days.

Q. Well, that was done after the last letter that I showed you was written, was it not?

A. Yes sir, it must have been.

Q. Now, I will read this letter of September 7th, 1939, from Mr. Morgan to Mr. Wilkes, Government's Exhibit No. 348,

[fol. 2495] "Rockwood Amusements Inc.
Crescent Amusement Co.

DEAR MR. WILKES:

We attach approved riders for Sudekum covering repeat runs."

Q. Now, that is the time when the riders, as they now appear in the contract, were finally executed, is that correct?

A. Well, I don't know whether finally executed—I know that was the date they were mailed back to the district office.

Q. It couldn't have been more than a day or two before that?

A. It could easily have been.

Q. Well, you had been attemtping for some time to get the riders in, hadn't you?

A. Yes sir.

Q. And under those circumstances there wouldn't be any occasion for you to delay forwarding them as soon as you got them?

A. Well, Mr. Wright, I am away from New York—it is possible I might be away for a month and get back and send something out.

Q. Well, in any event, these riders that were forwarded with the letter of September 7th contain the same terms that are now found in the rider attached to the franchise marked Government's Exhibit No. P-25, is that not correct?

A. Mr. Wright, can I see that, the last yellow letter?

Q. You had better look at both.

A. No, I know the rider. I have looked at the rider. I don't have to see that. I just wanted to see something in [fol. 2496] that yellow letter. (Letter handed to the witness)

A. Yes, that is the form in which it went back with that letter.

Q. Now, you recall the Judge asked you this morning whether this particular form of rider was usual in your business?

A. No, I didn't understand the Judge to ask if the rider was usual. I understood him to ask if it was usual to have repeat clauses in franchises.

Q. Well, in any event, this particular repeat clause was not the usual form of clause?

A. No, the usual form of clause is to put a limitation. As that rider is drawn is the usual form of repeat clause. In some cases you might pin it down a good deal more where you are dealing with second run exhibitors but that is usual—I will say, not usual but done many times in our business, Mr. Wright, give an exhibitor repeat privilege.

Q. Can you refer me to any other clause that you have got attached to a franchise which has the same terms that this one has?

A. Well, I couldn't do it now from memory, no.

Q. Do you think you could find one for us?

A. I wouldn't want to say whether I could but I am saying that from my experience in selling films for this company for a good many years I have written many contracts giving the exhibitor the right to repeat at a certain given film rental.

Q. Do you recall any of those you have written where the [fol. 2497] exhibitor had a competitor who was trying to get your pictures?

A. No. I can't recall some but I think there are some.

Q. You think you can find any of those?

A. I don't know that I can. I am just recall from memory.

Q. Will you make a search?

(No response.)

Q. Now, I think this morning you undertook to testify about your company's policy with respect to franchises, is that right?

[fol. 2498] A. Its policy?

Q. Uh-huh?

A. Well, I don't know what the exact questions and answers were, but I answered the questions as to what we did and the advantages of franchises.

Q. Well, I got the impression that you testified that the policy of your company was to make franchises wherever you could, because you thought they were advantageous, is that right?

A. Yes, that is right, Mr. Wright.

Q. Now, do you have one policy with respect to circuits and another with respect to independent exhibitors?

A. No, sir.

Q. Well, I will call your attention to a letter that is in evidence here, or two letters; I believe the photostats of these letters are in evidence; one is dated March 2, 1937 from Mr. Barnard to Mr. Dozier, marked Exhibit No. 59, and the other is dated February 11, from Mr. Barnard to Mr. Dozier, which is marked 58, and I show you these originals and ask you to read those.

A. I have read them.

Q. Now, this letter from Mr. Barnard to Mr. Dozier, dated February 11th, says "Replying to your letter of February 8, we should like to advise that the Company does [fol. 2499] not look favorably upon franchises as a matter of policy." You think that was an incorrect statement of the company policy?

A. No, I think it was a very graceful way of getting out of giving that exhibitor a franchise; that is all that letter is.

Q. I would agree with you except as to the graceful part of it.

A. Well, I will agree with you on the graceful part of it.

Q. In this letter of March 2nd, from Mr. Barnard to Mr. Dozier says: "As I had anticipated, the Home Office, as a matter of policy, does not wish to make more than a one year deal in any situation except Earlington."

A. Well, that is not right. They just didn't want to make that deal.

Q. That is another graceful way of not making a franchise, is that right?

A. I will agree with you about the word "graceful"; that is not a good word; but they didn't want to sell the franchise; they just didn't want him to have a franchise.

Q. I believe you have testified heretofore that there were a great many advantages in Paramount making franchises in these small towns, because in that way you made theaters grow there that wouldn't be there before?

A. That is correct.

[fol. 2500] Q. And one of these situations you mentioned specifically was Spruce Pine, North Carolina?

A. That is correct.

Q. I call your attention to a letter dated December 28, 1937 from you to Mr. Stengel, and ask you if you wrote that letter on that date?

A. Yes, I think I did.

Q. I will ask you to have that marked as the next Government Exhibit. (Marked Government Exhibit No. 350 by the Clerk) This is a letter marked Government Exhibit No. 350, from Mr. Morgan to Mr. Stengel, dated December 28, 1937, Spruce Pine, North Carolina: (Reading:)

"DEAR KERMIT:

I am advised by our Charlotte Manager, John Kirby, that Mr. J. A. Taylor has sold the Piedmont Theater, Spruce Pine, N. C., to the Cherokee Amusement Company. We sold 52 features as follows:

10 pictures—2 days $15.00 Against 38%
42 pictures—2 days 9.00 Flat
Score—$3.00 all pictures

We sold 52 shorts in this situation.

I wish you would please advise us whether you are going to assume these contracts; if not, we can go ahead and contract for Spruce Pine on the basis as

[fol. 2501] we have the S-10 deal set up now for Spruce Pine, both features and shorts.

I wish you would please advise me about this as soon as possible."

Q. Now, it appears from this letter, does it not, that you had a customer in Spruce Pine who was already using your S-9 product?

A. That is right.

Q. At the time you negotiated the deal with Mr. Stengel?

A. Yes, we had sold it to that gentleman, that is right.

Q. And then your reference here to the S-10 deal which was set up here which is a deal for the S-10 for the next season, as it has been incorporated in the Rockwood franchise?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. So, so far as the effect of the franchise on Spruce Pine was concerned, it was simply to take the product away from the customer who had been buying it and give it to Mr. Stengel, is that right?

A. That is not so. Mr. Wright, no theater had operated Spruce Pine up to about a year before; I think that name was only in there one year.

Q. Well, at the time he was in there and playing your pic-[fol. 2502] tures was the time that you negotiated——

A. For a one year deal.

Q. —Just a minute: The time that you negotiated the franchise which includes this town with Mr. Stengel, isn't that right?

A. Yes, that is right.

Q. And you put the pictures for the next year—You omitted the S-9 features from the franchise from the Spruce Pine situation because of this contract with this existing exhibitor there; that is right, isn't it?

A. Yes, sir, that is right.

Q. But you did go right ahead and sell the pictures to Stengel for Spruce Pine for the next four seasons, beginning with S-10?

A. We did, yes, sir.

Q. And you did that without consultation with or prior offer to your old customer there at all, didn't you?

A. Yes, sir, that is right.

Q. And at the time you made this franchise for the succeeding four seasons with Mr. Stengel, Mr. Stengel didn't even have a theater in Spruce Pine, did he?

A. At the time we—I beg your pardon; at the time we made the franchise with Sudekum, we were advised that Stengel—we were advised that Crescent would have a theater in Spruce Pine.

[fol. 2503] Q. Yes, I understand, but when you made the franchise you knew this man had a theater in Spruce Pine?

A. No, we were negotiating with this man in this theater.

Q. Who was he?

A. I beg your pardon?

Mr. Waller: Now, your Honor, it seems to me like questions are now being asked that are based on a hypothesis that is exactly contrary to the record. The record shows that early in December, or sometime before the date of that letter in 1937, that this man Taylor, who was taking over the theater at Spruce Pine sold out to Cherokee.

Mr. Wright: No, the contract that was made with Mr. Stengel is in evidence here; that is the Rockwood branch.

Q. It was made and negotiated in the fall of 1937, was it not?

A. Yes; but I don't know, Mr. Wright, whether that particular town was included in the original negotiations, as towns were added over these two years as we went along before the franchise was finally concluded.

Mr. Wright: Have you got a copy of the Rockwood franchise there, Mr. Clerk?

[fol. 2504] The Court: Well, the Cherokee did buy out the exhibitor at Spruce Pine who held your 1939 product?

A. Yes, sir, so far as I know we did.

The Court: Does that letter refer, just at that time there, does that refer to taking over the unplayed portion of that conract?

A. Yes, sir, my reference is to the whole contract. My memory is not good enough to remember whether that man ever played any picture, but the letter means that they were asking whether they were to take the then existing unplayed portion of the contract, whatever it was.

Mr. Wright:

Q. When you were negotiating that franchise, instead of naming the theatre, you simply wrote in the word "new"?

A. Yes.

Q. Where they were——

A. Where they were going to have a new theatre.

Q. Just a minute, that referred to a theatre that was not even built, was not then in existence, but one which the exhibitor expected to acquire?

A. That is right.

Q. That is right?

[fol. 2505] A. Yes.

Q. So that, if it appears when you have located the franchise that the word "new" is in there for the theatre, all like product in Spruce Pine, that would indicate at the time you made the deal, the theatre had not been acquired yet, is that correct?

A. No.

Mr. Waller: If Your Honor please, Cherokee built a theatre there.

Mr. Wright: He doesn't need help.

Mr. Armistead: You do, though.

The Court: Let's find the franchises, they ought to be here somewhere.

A. No, Mr. Wright, it could mean a new theatre. Frequently when exhibitors are going to build a theatre, they do not know what they are going to name it, so if you are building we use the word new, that is customary in our business.

Mr. Wright:

Q. I hand you this document and in that column Spruce Pine, in the theatre column, the word "new" appears, doesn't it?

A. That is right.

[fol. 2506] Q. So that for the last four years, at the time you negotiated the franchise for the last four years of the five there, you did not know what the theatre, they were going to use was named, did you?

A. That is correct, I don't know whether they were going to build one or acquire one. But I understood they were going to build one in that town, Spruce Pine.

The Court: What is the date of that franchise?

Mr. Wright: Do you have it there?

The Court: What is the date of the franchise, please.

Mr. Wright: The franchise is dated July 28, 1938, as of November 1, 1937.

Mr. Waller: And that new theatre was opened on December 7, 1937.

Mr. Wright: Now as a matter of fact——

The Court: Well, it appears here they bought it, bought out this theatre at Spruce Pine before he played out his [fol. 2507] 1937-1938 contract.

Mr. Wright: They bought it in December, just about the time that letter was written, that was the letter he wrote right after he sold out the house,—the point is, before he sold the house, Paramount had already sold him the product away from him in that town, to Cherokee for either his house if they decided to buy his, or for a new house if they wanted to build one.

Mr. Waller: The franchise was signed in July, 1938, about seven or eight months after Cherokee had opened their new theatre, but about the same length of time after this man sold out, Your Honor, and included that. Your Honor will recall that there was a man named Taylor at Spruce Pine that was leasing that theatre to Gutschalk, and the owner at about that time was trying to lease it, and when Cherokee came in he sold it to them, and had some conversation with Fred Gorman about the price and equipment.

The Court: This does not refer to the franchise, this refers to the S-10.

[fol. 2508] Mr. Wright:

Q. I asked him whether he referred to the deal, not the franchise, and he said it did?

A. That is right.

The Court: Were you negotiating on this franchise at the time you wrote this letter in December, 1937?

A. Decemebr, 1937?

The Court: Yes, sir.

A. No, the franchise was signed.

The Court: It was not signed until July, 1938.

A. We were negotiating, and negotiated right up to the last minute.

Mr. Wright:

Q. You had been negotiating prior to that time for three or four months, had you not?

A. Yes, we had, but it could be possible we had not been negotiating on Spruce Pine; that was the point I wanted to make. I so understood along during that period, if we wanted to do it we went along if some one wanted to open a new theatre we would negotiate on it.

Q. But you do not recall the particular time he wanted [fol. 2509] to do that in?

A. No, I do not recall that, Mr. Wright, I do know this, that I know that they were furnishing it and were selling the exhibitor at Spruce Pine, because this fellow wanted to lease this theatre, he wanted to sell it or lease it, rent it for him, and that was not a question of taking the service away from him.

Q. Well, in any event, you did not give him an opportunity to buy it for the next succeeding season before you put it into Rockwood?

A. No, we sold it, we consulted with their Charlotte branch manager, and he said it was all right, to go ahead and sell the product in Spruce Pine, because he did not think this man was going to continue to run the theatre, and that town had not had a theater in there for a long time, or had it closed, it had been closed rather for a long time.

Mr. Wallace: I take it the Government does not contend that it is illegal to sell somebody else if the theatre is closed.

Mr. Wright: We certainly do not, the record I think shows that the deal was set up for Spruce Pine at least prior to the time that letter was written.

Q. Now I think you testified to some more advantages [fol. 2510] of this franchise for the rentals you were going to get over — terms for this year, one year?

A. That is correct.

Q. As a matter of fact, the franchise did not give you any protection against full performance of pictures that you might release under it at all, did it?

A. I do not know what you mean, Mr. Wright.

Q. Even where you have a franchise, if you make some bad pictures and they do not do too well, you make an adjustment, is that right?

A. That is possible in some cases, yes.

Q. In this particular case right after the franchise was written and down to the present time, there has been a continuous series of adjustments of rental under the franchise, isn't that correct?

A. Where, Mr. Wright?

Q. I will show you these folders here, one of which contains modifications of the Rockwood franchise, and the other modifications of the Crescent franchise, and ask you to glance through that?

A. That is one of them, I know what they are, all I have to do is to glance at them, these are what you are referring to?

Q. Yes, those folders I have just handed you contain numerous contracts do they not in which the film rentals [fol. 2511] under the franchise were adjusted downward?

A. That is correct, all at the same date, weren't they, Mr. Wright?

Q. No?

A. I think so for each year.

Q. And on July 17, 1940, it appears you made adjustments downward with respect to exhibitions in Guthrie, Kentucky, Hartselle, Alabama, Huntingdon, Tennessee, Lake City, Tennessee, Manchester, Tennessee, Rockwood, Tennessee, Rogersville, Tennessee, Russellville, Alabama, and Tracy City, Tennessee, and on the same date that was apparently evidenced by a letter agreement signed by Mr. Stengel and you of that date, and on the same date adjustments were made downward of rentals for pictures in Alabama City, Alabama, Bowling Green, Kentucky, Brownsville, Tennessee, Clarksville, Tennessee, Cleveland, Tennessee, Columbia, Tennessee, Decatur, Alabama, Dyersburg, Tennessee, Gadsden, Alabama, Gallatin, Tennessee, Greenville, Tennessee, Harriman, Tennessee, Hopkinsville, Kentucky, Maryville, Tennessee, Kingston, Tennessee, Paris Tennessee, Springfield, Tennessee and Union City, Tennessee, evidenced by this letter agreement signed by Mr. Sudekum and by you?

A. That adjustment was all granted on the same date regardless of how the final agreements are written.

Q. Yes, I undersand?

[fol. 2512] A. That is what I meant, Mr. Wright.

Q. That was all represented here, was it?

A. That is what I meant, regardless of the final agreement, regardless of how the final agreements are written.

[fol. 2513] Q. And another series of adjustments were made on both franchises, pursuant to modifications made September 15, 1938?

A. The following year, there was one in each year for two years.

Q. Well, in any event, whatever the adjustments are, they appear in those books here?

A. That is right.

Mr. Wright: The only thing that has been previously identified, I believe, and offered as repeat run options, which are contained in these books, I would like now to offer in evidence each of the folders.

The Court: All right, let them be marked.

The Clerk: Collective Exhibits Nos. P-40 and P-41.

(Recess.)

Mr. Wright:

Q. Mr. Morgan, I believe you testified that this franchise enabled you to get pictures into the other small towns, in addition to Spruce Pine, Rockwood, Manchester and Guthrie, Kentucky?

A. Yes sir.

Q. Were new theatres to be built there?

A. I can't hear you.

The Court: He said, he couldn't hear you.

[fol. 2514] Mr. Wright:

Q. Do you know when, or what theatres were operated in, say, Guthrie, Kentucky, prior to the time you made the franchise?

A. No, I don't recall, Mr. Wright.

Q. You don't know how long they had been there?

A. No, I don't recall.

Q. The same thing is true with respect to Manchester, isn't it?

A. I don't recall the exact dates. I mentioned in my testimony some of those towns as open and closed, some years we were in and out.

Q. You don't have any definite information on that at all, do you?

A. No sir.

Q. You don't know how long Spruce Pine had been there, do you?

A. No. I knew Taylor, the fellow we had sold to.

Q. You knew the theatre had been operated there?

A. My memory there is just that one year, just that contract.

Q. Your recollection is that the theatre was in operation only one year before you——

A. That is right.

Q. Before you made the Rockwood franchise?

A. That is right.

[fol. 2515] Q. I call your attention to the testimony about Tim Smith and the ten or twelve pictures. Where did you get that information that he only wanted ten or twelve pictures?

A. Well, if I recall, we got the information from the salesman.

Q. That was in the letter that Mr. Pickett wrote, that was in the letter that was offered in evidence this afternoon?

A. I don't think so, I think there was some other correspondence on it. I was familiar——

Q. Can you find that correspondence?

A. There may have been some, but I was familiar with the Tim Smith matter because we had become involved with him and not wanting to do business with him and, naturally, those things came to my attention each time that he asked for pictures after that, and whether it was trouble with the salesman or whatever the matter was, it was brought to my attention, and my recollection is, that from the information I had, that he never wanted to buy more than ten or twelve pictures.

Q. You couldn't refer us to any salesman's report or memorandum in which that information was contained?

A. I wouldn't want to guarantee that I could.

Q. We looked at all the memoranda we could find and we couldn't find anything which indicated that fact and I just wondered if something had come to your attenion?

[fol. 2516] Mr. Waller: Well, Mr. Wright is testifying now.

The Court: Objection sustained.

Mr. Wright:

Q. You think somebody has told you that, as I understand it?

A. It is my memory; I can't recall whether it is written or oral. I know that I was very familiar with all the dealings with Tim Smith.

Q. At any rate, the information did not come from Mr. Smith, did it?

A. No, not direct.

Q. Now, the letter that you replied to that was referred to here, which you wrote, that was written by you to Mr. Unger, can you tell us what Mr. Unger's position was then?

A. He was Eastern and Southern Division Sales Manager.

Q. And you were working under him?

A. Yes sir.

Q. The general sales manager of the Company, was then and is now, Mr. Neil Agnew?

A. That is correct.

Q. And the policy of the Company, so far as affects franchises, is set by Mr. Agnew, is it not?

A. Well, I presume it is given out by Mr. Agnew; I don't know who it is set up by, it may be set by the [fol. 2517] Executive Committee, I don't know, but as General Sales Manager, he gives out whatever instructions are given as to sales or our national policy.

Q. If we had any testimony here as to what the policy of the Paramount Company was with respect to franchises, at any particular time in the last three or four years, Mr. Agnew would be the man to give it, is that right?

A. Yes sir, that is right.

Q. One thing more: Since those franchises that are now in existence with Rockwood and Crescent have been in operation, have you sold a second run deal of Paramount product to an exhibitor who was in opposition to the holders of the franchise in any of those towns?

A. No sir, I don't think we have.

Redirect examination.

By Mr. Waller:

Q. Mr. Morgan, you were asked about some adjustments that were granted by Paramount after this franchise was

executed. Was there or not an oral understanding with Crescent at or about the time the franchise was granted, or executed, I mean, in regard to possible adjustments later on?

Mr. Wright: If the Court please, I object to that. He can testify to whatever happened there, and upon which the Court might conclude there was any such *any such* [fol. 2518] understanding, but I don't think Mr. Morgan is in position to say there was or was not some outside understanding, outside of the contract.

The Court: He can relate any circumstances or facts.

Mr. Waller:

Q. Just state what you know about that, Mr. Morgan?

A. Well, here is, here are the facts. I concluded the terms of the franchise, which, as I understood it, was on the basis that New York was satisfied to take it. I am talking about, now, the film rentals. I took those figures into New York and Mr. Agnew said, "Well, we have thought it over again, and we want $5,000.00 more on our deal." I was a little bit upset because I had worked for a long time on the franchise and that meant I would have to go back. No, I telephoned Mr. Sudekum I thought the best thing for him to do was to come on into New York. And he did; he and Mr. Stengel came in and I met them for breakfast and told them about it and, I said, the executives want $5,000.00 more on the deal, and I wanted him to go for it. And he said, "Well, I would like to talk to Agnew." So we went over and saw Mr. Agnew, and Mr. Sudekum told Mr. Agnew he would go for that increase on the deal if we would be agreeable to this: That if he had had a bad year and if he satisfied me that he had had a bad year, [fol. 2519] he felt that that $5,000.00 should be waived and not added in on the deal. Mr. Agnew agreed to that arrangement. He satisfied me the first year and I think it was also the second year.

Mr. Wright: If the Court please, that Mr. Agnew agreed to it, we ought to have whatever was said on it; that is a conclusion.

The Court: Well, that is a refined matter. There isn't much difference in saying he agreed to it, and that he said, "Yes, that is all right." Go ahead.

A. As I say, he satisfied me the first year and the second year and we waived the $5,000.00 increase. But each time I discussed with Mr. Sudekum—We had a special picture each of those years that we were selling separately and that were announced after our complete line had been announced for the year. The first one was "Man with Wings," and the following year it was "Gulliver's Travels." Under the terms of the franchise with Mr. Sudekum, those pictures were in his contract. We had not been able to for-see, when we made the deal for five years, that we were going to have these two special pictures, when we made the sale to Mr. Sudekum. And he voluntarily gave me, on both of those pictures, in lieu of waiving this $5,000.00, a per-
[fol. 2520] centage on both those pictures and they earned for us $2,000.00, at least $2,000.00 more than the waived amount of $5,000.00 for both years. I think that most of that is, or a lot of that is supported in some correspondence.

Q. Have you ever had any difficulty with Crescent Amusement Company, or any of these other defendant Exhibitors, about complying with the terms of their contracts?

The Court: No, he never had any difficulty about that. It is admitted all through the record.

Mr. Waller:

Q. I will ask you, Mr. Morgan, whether or not it is a fact that Paramount has made franchises with concerns operating one or two or three or a few theatres?

A. Yes sir, I said that to Mr. Wright.

Q. There is nothing unusual about that?

A. No sir, there is not.

Q. Does the financial responsibility of the exhibitor have to be considered, when you decide whether you want to deal for more than one year?

A. Yes, definitely so.

Q. In other words, is that more important in a deal for more than one year than it is in a one-year deal?

A. Yes, it is.

[fol. 2521] Q. Is the stability of the situation an item to be considered?

A. Yes sir, it is.

Q. You were asked to identify some correspondence in regard to the modification of the repeat run clause, namely, clause 8 (e) in the franchise.

A. Yes sir.

Q. In addition to the correspondence that was submitted to you, I would like to show you a letter purporting to be signed by you, dated May 26, 1939 to Mr. J. F. Kirby, Atlanta Exchange, with copy to Mr. Sudekum, and I will ask you to read that letter and say if you wrote that letter.

A. Yes sir.

Mr. Waller: I would like to have that marked as Defendant's Exhibit No. 104.

(Letter so filed and marked.)

Q. I also show you a draft of a modification of this repeat run clause dated May 25, 1939 and will ask you if you recall that this draft was enclosed with your said letter of May 26th.

A. Yes sir, I believe this is the one.

Mr. Waller: I would like to have that identified as Defendant's Exhibit No. 105.

(Letter so filed and marked.)

[fol. 2522] Mr. Waller: Now, I offer them both in evidence and they are as follows:

"New York, May 26th, 1939.

Mr. J. F. Kirby, Atlanta Exchange.

Sudekum Riders

DEAR MR. KIRBY:

"In regard to the two signed riders you sent in from Crescent and Rockwood Circuits, there were some errors in the way these riders had been made up, and therefore, I am herewith attaching 6 copies of both riders rewritten. Will appreciate it if you will forward them to Kermit Stengel and ask that these be signed in place of the ones submitted.

"Kermit inserted a clause in both riders that Paramount would definitely agree to make prints available within the 90 day period. Naturally, we will always

use every effort to have prints available, but we cannot be pinned down to one certain booking date. Therefore, the clause has been rewritten to protect us in case we cannot fill the first dates submitted.

"I am sure these changes will be all right.

Sincerely yours, Oscar A. Morgan.

cc—Miss P. E. McGrau, Messrs. H. F. Wilkes, Tony Sudekum."

[fol. 2523] "May 25, 1939.

Paramount Film Distributing Corporation, 1501 Broadway, New York, N. Y.

GENTLEMEN:

It is hereby agreed that the agreement between us dated July 28th, 1938 as of November 1st, 1937, covering theatres in the States of Alabama, Kentucky and Tennessee, and all riders thereto, be amended by adding to Article EIGHTH, subdivision (e) of said agreement the following as though the same were originally contained therein:

"With respect to each theatre licensed hereunder the Exhibitor shall notify Paramount in writing of its election to exhibit any feature photoplay for repeat exhibition at such theatre not later than thirty (30) days after the conclusion of the initial exhibition of each such feature photoplay at any such theatre, and such repeat exhibition shall be held within ninety (90) days from the conclusion of the initial exhibition of such photoplay. It is agreed that Paramount will endeavor to have prints on each such feature photoplay available for booking by the Exhibitor for such repeat exhibition during the aforesaid ninety (90) day period, provided however, if no such prints are available for such repeat exhibition on the booking dates submitted by the Exhibitor, then the Exhibitor shall submit other booking [fol. 2524] dates during the aforesaid ninety (90) day period for such repeat exhibition when prints shall be available. If the Exhibitor shall fail to so notify Paramount in writing of its election, then and in such event, upon the expiration of thirty (30) days following the conclusion of the initial exhibition of such photoplay the Exhibitor's license to exhibit such photoplay for a

repeat exhibition shall thereupon forthwith terminate and rever- to Paramount and Paramount may license the exhibition of such photoplay when and where desired by it.

'If the Exhibitor shall have elected as aforesaid to exhibit for repeat exhibition any photoplay and shall fail to so exhibit such photoplay within the aforesaid period of ninety (90) days, the license fee for each such photoplay shall thereupon forthwith become due and payable to Paramount and the Exhibitor's license to exhibit such photoplay for repeat exhibition shall forthwith terminate and rever- to Paramount and Paramount may license the exhibition of such photoplay when and where desire- by it without accounting to or crediting the Exhibitor for any sums received therefor.'

As herein modified, the aforesaid agreement and all riders thereto shall be and remain in full force and effect and is hereby ratified and confirmed.

Kindly signify your agreement hereto by signing underneath the words "Agreed to" at the bottom of this letter.

Very truly yours, Crescent Amusement Company,

[fol. 2525] By —— ——.

Agreed to:

Paramount Film Distributing Corporation,
By ——.——".

Q. Now, Mr. Morgan, refreshing your recollection from that letter of May 26th that you wrote, is it true or not that you had on that date received the riders dated May 25th, 1939 properly executed by the Crescent Amusement Company and Rockwood but with a clause in there that you wanted changed?

A. Yes, that is right.

Q. I now show you a memorandum or copy of a memorandum dated July 31, 1939 addressed to Mr. Irving Cohen with copy to Mr. Stengel, among others, and I will ask you if you made that memorandum?

A. Yes sir, I wrote that.

Mr. Waller: I would like to have that identified as Defendant's Exhibit No. 106, and I offer that in evidence.

(Letter so filed and marked)

The letter is as follows:

"Mr. Irving Cohen: Oscar A. Morgan 7/31/39.

Sudekum Rider

Regarding the attched riders that we requested Sudekum to sign and which they did not feel they should sign unless we guaranteed delivering the prints, I have [fol. 2526] discussed this very thoroughly with them, and I believe it can now be settled on this basis:

That they agree to such repeat exhibition within 120 days after conclusion of first run, and we definitely agree to supply the prints.

If this is agreeable and if you will draw the rider along these lines, I will send it to Mr. Wilkes to have it signed.

Oscar A. Morgan.

cc-Messrs. H. F. Wilkes, J. F. Kirby, Kermit Stengel."

Q. I next show you a letter addressed to Mr. H. F. Wilkes, dated August 24, 1939—well, withdraw that. It doesn't show that it went to you, Mr. Morgan.

Now, after the rider was received by you on May 26, 1939 was a re-draft sent back to Crescent but bearing the same date and was it then that you had this correspondence in regard to the obligation of Paramount to furnish the print if Crescent elected to repeat the picture?

A. You mean correspondence with Crescent?

Q. Yes sir.

A. Well, yes sir, correspondence and talks with them. I think I went to Nashville.

Q. Now, was Mr. Stengel contending that if he was obligated to pay for the picture then you ought to be obligated to furnish the print?

A. That is what he contended.

[fol. 2527] Q. Is that what the discussion was about?

A. Yes sir, and that is why he wrote ninety days in the rider that he sent back.

Q. State whether or not, aside from that question, the terms of the rider had been agreed upon prior to May 25th, 1939?

A. Yes sir, they had.

By the Court:

Q. Had been agreed on to play within ninety days or one hundred and twenty days?

A. They had been agreed upon to play within ninety days. As I explained to Mr. Wright this morning, when we advised Crescent that we wouldn't allow that clause to remain in the rider, it was settled by extending the time to a hundred and twenty days.

Mr. Waller: I would like to pass to your Honor this rider as sent to Crescent on May 26th, 1939 and let your Honor compare it with the rider as it actually appears in here so that your Honor can see just what the differences are.

The Court: All right. Let me see them.

What is the significance that is attached by the Government, if any, to the difference in the execution dates on this rider?

Mr. Wright: I don't think there is any particular significance in the dates of execution except to show that a longer period actually elapsed before they made this correction [fol. 2528] than the date which appears on the rider as it is incorporated in the franchise. I think that it is important to show exactly the date on which the agreement was finally made. I don't think there is any significance in the fact that the agreement was made at a later date and given an earlier date.

The Court: Well, I just wanted to know.

By Mr. Waller:

Q. Now, Mr. Morgan, is there anything in the repeat run clause as originally contained in the franchise here, as modified, which says that pictures repeated by Crescent will be booked to Crescent before they will be booked to a competitor of Crescent with whom a second run contract has been made?

By Mr. Wright: Now, if the Court please, the clause speaks for itself. He is just asking what that clause was, and it is obviously improper.

By Mr. Waller:

Q. Well, is there anything in any franchise which means to you or has ever meant to you as district manager at

Atlanta that pictures repeated by Crescent would have to be booked to Crescent before they would be booked to a competitor who might have a definite second run deal?

Mr. Wright: That is objected to.

[fol. 2529] The Court: Yes; sustained.

Mr. Waller: Well, they are contending that the contract was so construed, as I understand it, by the branch manager. I want to ask the district manager if he so construes it, your Honor.

The Court: Well, possibly he don't understand your question. I understand that you are asking him if the contract was ever construed by the company to prevent it from selling any certain year's product to a competitor of Crescent for second run before that repeat run had been booked on that picture by Crescent. Is that correct?

Mr. Waller: I don't know whether your Honor caught exactly what I have in mind or not. What I have in mind is this: Let's take Gadsden, for example. The Crescent Amusement Company at Gadsden has a large downtown theatre, the Princess. Then it has a couple of second run houses in downtown Gadsden. Then there is a neighborhood theatre over in Alabama City and then there is this Dixie Theatre, which is a neighborhood theatre over in East Gadsden. Now, let's say that the Dixie Theatre has a third run contract and the Princess Theatre wants to repeat a picture, is there anything in this repeat run clause that would [fol. 2530] mean that the Princess Theatre could repeat that particular picture before the Dixie over in East Gadsden would play the third run?

The Court: Well, I think the contract speaks for itself. I don't think there is anything to prevent that.

Mr. Waller: Well, I misunderstood——

Mr. Wright: In addition to that, we think, if your Honor please, the testimony in the record is that is precisely the way Paramount pictures played there. You recall first run in the Princess and then another run over in Alabama City, and then the big picture was repeated at the Capitol.

The Court: Well, the East Gadsden theatre, as I recall, interpreted a subsequent run to mean third run.

Mr. Wright: Well, they testified that with respect to Warner and Paramount, which has the second run option. All that they could get was fourth run unless the option was not exercised to repeat in the second run downtown house.

Mr. Waller: There is no such testimony, your Honor. He testified that he treated it as fourth run because Alabama City played before him.

[fol. 2531] Mr. Wright: Well, that is right.

Mr. Waller: There is no testimony that the repeat run clause had anything in the world to do with it. Mr. Wright has objected to that.

Mr. Wright: Well, look at the record then.

Mr. Waller: We will guarantee it came from Mr. Wright and not from the witness. In other words, your Honor——

The Court: Well, if Crescent had first run in Gadsden with the option of re-run or repeat performance, and then they sold second run to Alabama City and a subsequent run to East Gadsden, why wouldn't that be fourth run?

Mr. Waller: It would be; I mean if you treat Alabama City as a part of Gadsden, it would be; we don't deny that.

The Court: Well, it is part of Gadsden, isn't it?

Mr. Waller: Yes.

Mr. Raftery: A repeat run is just exactly what your Honor has stated in the Warner contract, and the Warner contract will confirm what the witness has stated as the in-[fol. 2532] dustry's idea of a repeat run. Now, the Warner franchise is in evidence and it describes a repeat run with a little more accuracy than this report does.

The Court: Well, what I want to know—what is all the argument about anyway?

Mr. Waller: I think the argument is this: Here is a very innocent provision that Crescent shall have the right to repeat a picture. Now, the Government says that if the Crescent repeats a picture that Paramount is precluded from making a second run contract with a competitor, and we say that is not so. We say that Paramount can make a second run contract with a competitor and if it does so it can book these pictures to the second run account before it is required to book them to Crescent. In other words, Crescent plays a picture once, then the second run account plays it and then Crescent repeats it, so Crescent would really be third run.

Mr. Wright: We are perfectly willing to argue that construction of it at the appropriate time.

The Court: Does a construction of the document in the light of the facts show that such instance has ever been recorded so far?

[fol. 2533] Mr. Waller: The contrary has never been recorded. In other words, there have been occasions where Paramount has not sold second run pictures to some competitor but it has not been because of the repeat run clause. It has been for other good and sufficient reasons.

The Court: All right.

Mr. Waller: I don't know whether the question has been answered or the objection sustained or what.

A. I never answered it. I know that.

The Court: Well, I don't think he ever answered it. I don't know whether he knows what the question is now or not, or the reporter or the Court either one.

[fol. 2534] Mr. Waller:

Q. Let me ask you this, Mr. Morgan: has it ever been your construction of the repeat run clause, before or after it was modified, that you would be required under it to permit Crescent to repeat a picture before you could let the second run play the same picture in the same town?

A. That is——

Mr. Wright: Now, if the Court please, that is entirely improper; if the question ever came up in a lawsuit on a contract, as to what they did or did not permit Crescent to do: Mr. Morgan couldn't go on the stand and testify as to what they did or did not permit them to do as evidence of what they did or did not do.

The Court: He can recall his construction of it; as I recall there is a letter in the record from him or some one where he has already construed it; I don't know whether his construction at this time will be at variance to that or not, but we will hear his construction.

Mr. Wright: If your Honor please, we have a contract, and the terms of the contract control.

[fol. 2535] The Court: Well, go ahead and answer it.

A. No, there was never any such construction on the clause that would ever prevent us from selling and delivering pictures on a specified run if we cared to sell it; in fact, that is a fact in East Gadsden, because we were obligated.

Mr. Wright:

Q. Just a minute; that is not responsive to the question here.

A. Well, the Judge asked me to answer.

The Court: Go ahead.

A. The point I want to make, Judge, is that Paramount has a contract in East Gadsden and the contract is marked as a specific run, and we are obligated under that contract and all the parties under it to deliver each picture on that specified run; and Mr. Wright can object to that, if he wants to; but I would like to clarify this other interpretation, apparently, to the repeat question: he could repeat as many times as he wanted to in East Gadsden; and the theater in East Gadsden is certainly positive proof that we can sell a second run regardless of that repeat clause.

The Court: Do you have a contract for second run in East [fol. 2536] Gadsden?

A. No; I don't know how that contract reads; I think it reads third run.

Mr. Waller: I think we have a second run and third run contract and probably there is a fourth; I assume that is true; it doesn't make any difference which it is; if there is a definite run, then the exhibitor can get the picture,——

The Court: Well, whether there is a first run, second run or a third run, all of them are subject to the repeat clause in the contract?

Mr. Waller: No, sir.

The Court: Well, on a definite run, they are subject to repeat pictures, if they want to?

Mr. Waller: Who has priority on a contract of that kind——

Mr. Wright: Wait a minute; this is purely argument on Mr. Waller's part. I am perfectly willing to argue the construction of the clause with him, but I object to Mr. [fols. 2537-2538] Morgan participating in the argument. I think that subject should be alone in the hands of the counsel and not the witness.

Mr. Waller: I think Mr. Wright has testified on that subject so many times, your Honor, that I think your Honor has got an erroneous impression.

The Court: I don't know whether it is from Mr. Wright testifying or from Mr. Morgan arguing.

A. I don't know, either.

Mr. Waller:

Q. Well, let me ask you this, Mr. Morgan: In your letters Mr. Wright is referring to, were you undertaking to give a construction of what would be practical, or what would be legal in a certain situation?

The Court: Well——

Mr. Wright: Well, merely to save argument, if the Court please, I object.

Mr. Waller: That is all.

And further this deponent saith not.

[fol. 2539] BENJAMIN KALMENSON, called as a witness in behalf of the Defendants, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Armistead for Defendants:

Q. Is this Mr. Benjamin Kalmenson?

A. Yes, sir.

Q. Where do you live, Mr. Kalmenson?

A. I live in Mount Vernon, New York.

Q. Have you been in the moving picture business for a number of years?

A. Been in the moving picture business for the last 14 years.

Q. What company, if any, are you now connected with?

A. I am with Vitagraph, Incorporated.

Q. How long have you been with Vitagraph, in your present position?

A. Since December, 1937.

Q. What is your present position?

A. I am Western and Southern Salesmanager.

Q. Now, what territory does that cover, Mr. Kalmenson?

A. It comprises the territory that we designate as everything west and south of Chicago.

Q. Well, do you have occasion from time to time to travel [fol. 2540] that territory?

A. I spent the equivalent of 35 to 40 weeks in that territory last year.

Q. Mr. Kalmenson, in the latter part of 1939, did you make a trip to Nashville, Tennessee, and if so, for what purpose?

A. I believe it was in November, 1939, that I visited Nashville, Tennessee, for the purpose of making a deal with Mr. Sudekum.

Q. Of the Crescent Amusement Company?

A. Yes, sir.

Q. Now, before you came to Nashville, did you know that the Crescent Amusement Company had been buying Vitagraph's Warner product?

A. Yes, sir.

Q. Did you learn whether or not the Crescent had long term deals or were buying the product each year?

A. I knew that Crescent had been operating under a long term basis with Warner Brothers or Vitagraph.

Q. When you came to Nashville, did you contemplate discussing with Crescent a long term deal?

A. Yes, sir.

Q. Now, who was the Branch—Atlanta Branch Manager at that time?

A. Mr. R. L. McCoy.

Q. Who was the Memphis Branch Manager?

[fol. 2541] A. Mr. Ollie Williamson, Jr.

Q. Now, did you ask or instruct Mr. McCoy to meet you here in Nashville?

A. Yes, sir.

Q. Well, when you arrived here, was Mr. McCoy in the city?

A. No, sir.

Q. Did he reach Nashville later on?

A. He was to meet me on a Monday morning, and I arrived here on Sunday evening off of a plane; and when I arrived here I was informed by wire there that night or the next morning that McCoy's train was late from Dallas and he would not arrive in Nashville until late that afternoon.

Q. Now, had you met Mr. Tony Sudekum prior to that time?

A. I had never met Mr. Tony Sudekum prior to that time.

Q. Now, the next morning—I believe it was Sunday afternoon when you arrived in Nashville?

A. Sunday night.

Q. Sunday night. Now, Monday morning did you 'phone Mr. Sudekum for an appointment?

A. When I found that McCoy wouldn't meet me until late in the afternoon, I telephoned Mr. Sudekum and told him McCoy was delayed and I might come to see him myself.

Q. Did you go to see him?

A. Yes, sir.

[fol. 2542] Q. Did you know that the Sudekum long term deal was about to expire?

A. The long term deal under which he was operating was about to expire, I believe, on or about December 30, 1939.

Q. 1939?

A. Yes, sir.

[fol. 2543] Q. 1939?

A. Yes, sir.

Q. Now then when you went down to see Mr. Sudekum, did you discuss and endeavor to get him to purchase Warner's product?

A. Yes, sir.

Q. Did you gentlemen agree on terms?

A. Yes, sir.

Q. Was Mr. Stengel present when you and Mr. Sudekum were discussing the purchase of films by Crescent?

A. Yes, sir.

Q. What kind of a deal was that, Mr. Kalmenson, were you endeavoring to get, a flat rental deal or a percentage deal or what?

A. I was endeavoring to get a deal which I believe it would be the best deal for my company, whether a percentage, where I thought it was the best in my opinion, with the advice that I could get, or a deal for flat rentals where I believed that was the best.

Q. As a result of that interview, state whether or not a deal was made, composed of rentals and percentages in some instances, percentages in some instances and flat rentals in others?

A. Yes, sir.

[fol. 2544] Mr. Wright: Now may it please the Court, I think that deal is in evidence.

The Court: Is there any question about that?

Mr. Wright: It is obvious the best evidence of what the deal was is the contracts, the deal itself.

Mr. Armistead: It has not been introduced, Your Honor, but to save time——

The Court: If there is no question about it, why ask about it, if it did provide for that, provide for both.

What do you say about that, did it provide for both?

A. Yes, sir.

Mr. Armistead:

Q. Getting back to this long term deal, did Mr. Sudekum, when you arrived here, had he at that time purchased the 1939-40 Warner product with the entire season?

A. His long term deal expired mid-stream in that season, our releasing season was about from October first and his deal with us permitted him to apply the contract to our releases to December 20th, I am not sure about the actual date.

[fol. 2545] Q. You did make a deal with Crescent?

A. Yes, sir.

Q. For what period of time?

A. For the balance of 1939 season, plus three years.

Q. In other words, a three and a half year deal?

A. Practically a three and a half year deal, practically yes, sir.

Q. Practically?

A. There had been more product than that.

Q. When you were making that deal with Mr. Sudekum for Crescent, did he at any time state to you that he would not make, he did not want to make the deal for Crescent unless you made a similar deal for Rockwood and its affiliates?

Mr. Wright: Obviously I think we ought to have testimony just what the conversation was, I do not think he ought to be led to that extent, what he stated.

The Court: Did you have any conversation in that respect?

A. No, sir.

Mr. Armistead:

Q. Did you have any conversation in that respect in regard to Muscle Shoals?

A. No, sir.

Q. At that time did you know Louis Rosenbaum?

[fol. 2546] A. I did not.

Q. After you made the deal with Crescent—by the way, how long did it take you—well strike that out; now after you made that deal with Crescent, did you discuss with Stengel a deal with Rockwood?

A. We agreed to the terms that we would follow generally with both Mr. Sudekum and Mr. Stengel at the same time.

Q. Was that for Crescent?

A. For Crescent and Rockwood, the discussion was such that everybody agreed to all the provisions, and we agreed generally and we had to do some detail work to break it down individually afterwards.

Q. Did Mr. McCoy come down?

A. Mr. McCoy came down that afternoon.

Q. Did you ask him to come?

A. Yes, sir, he came in that afternoon, as I said.

Q. And the next Tuesday did you continue to discuss with Mr. Stengel the details of this deal?

A. After I was convinced that we could make a deal, after Mr. Sudekum and Mr. Stengel agreed, and after we generally agreed I telephoned my head office in New York and asked him as to both the terms and the time.

Q. I will ask you if—I will ask you this; was there any agreement made between you representing Warners and [fol. 2547] Mr. Sudekum, representing Crescent, and Stengel representing Rock ood and affiliated companies, was any agreement made that is not contained in the contract between those companies and Warners?

A. No, sir.

Q. Was there any agreement made or attempted to be made by Mr. Sudekum whereby Warner would agree to or would keep product away from the opposition?

A. No, sir.

Mr. Wright: If the Court please, the agreements that were made speak for themselves.

The Court: He says other than that agreement.

Mr. Wright: It is incompetent on its face, and certainly with respect to any agreement.

Mr. Armistead: No—other than contained in this contract.

A. Please ask it again.

Mr. Armistead:

Q. Was there any agreement other than contained in these contracts, to keep product away from any opposition theatre?

[fol. 2548] A. No, sir.

Q. And when I say any agreement, I mean between you and Crescent, or Stengel representing his company, and Warners?

A. No, sir.

The Court: Did you have any kind of understanding to that effect?

A. Never had any discussion.

The Court: No discussion?

A. No discussion whatsoever.

Mr. Armistead:

Q. Now I am just going to pick out at random one of the contracts—by the way there were a number of separate contracts made were there not, that is for each individual situation?

A. Yes, sir.

Q. I notice in one of these contracts it says this:

> "Exhibitor shall have the right to repeat any feature at the lowest allocated rentals, subject to all runs and clearances which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee—this is the Harriman contract—and in such event the [fol. 2549] exhibitor's commitment to exhibit all features in the lowest rental classification shall be reduced accordingly."

Is that in all these contracts where you have the agreement referred to?

A. Yes, sir.

Mr. Armistead: By the way, may it please the Court, the first page of this exhibit has not been put in, I mean under this long term deal has not been put in the record, and there is a whole lot of printed matter on there, Mr. Wright I take it, I took it up with him this morning, and he agrees instead of putting every separate contract, putting this to each contract, we thought the best thing to do would be to

have a photostat made of one of these as a sample and placed with this exhibit.

The Court: All right, referring to each separate contract.

Mr. Armistead: Yes, sir, we will have a photostat made and attach it on to this group exhibit.

Mr. Wright: Certainly.

Mr. Armistead:

[fol. 2550] Q. Now when you made this deal with Crescent and Rockwood, did you have any agreement or understanding with any other distributor as to the disposition or license of your films to them?

A. No, sir.

Mr. Wright: If the Court please, I do not see how that is material.

The Court: There is no charge here that they conspired with any other distributor.

Mr. Armistead: I overlooked the fact that they have withdrawn that.

[fol. 2551] Mr. Armistead:

Q. Now Mr. Kalmenson, that deal that you made with Crescent and Rockwood, did you consider that to be to the best interest of Warner to make that deal?

A. Yes, sir.

Q. When I was questioning you a while ago and asked you did you have any agreement about keeping product from any competitor, I was excepting these contracts you made, you were just selling to Crescent and Rockwood and you had your repeat run in there and you were selling your product, subject to any other——

The Court: I understood the terms about repeat run, that they are subject to any other contracts that were made with any other exhibitor.

Mr. Armistead: That is correct, your Honor, or any future contract they made with any other exhibitor.

Q. Is that correct?

A. Yes, sir.

Q. I will ask you if you left with your Branch Managers, with Crescent and Rockwood, to work out the matter of clearance?

A. I knew nothing about any of the situations involved and, naturally, I had to leave the matter of clearance entirely in the hands of our Branch Managers who knew the situations.

[fol. 2552] Q. I hand you here a letter dated March 18, 1940, which you wrote to Mr. Homer Hisey, Memphis, and asked you to look at that letter and state whether or not you wrote it?

A. Yes, I wrote it.

Mr. Armistead: We offer this in evidence as Defendant's Exhibit No. 109.

Mr. Wright: May I ask the purpose of the offer?

Mr. Armistead: It is charged by the Plaintiff, as I understand, that Crescent can compel Warner to give it terms. This letter deals with that matter of clearance and in the letter Mr. Kalmenson says:

> "I instructed McCoy to make certain that you are with him at that time as regards clearances. It is intended for Sudekum to get only the clearances that he is entitled to and none which, in your opinion, he is not entitled to."

Mr. Wright: I don't see how that letter bears on that issue. The question is, whether Sudekum got clearances he was not entitled to, not what they intended to give him. They may not have intended to give him those at all.

Mr. Armistead: The purpose is to show that Mr. Sudekum cannot make a request of Warner——

[fol. 2553] The Court: It might go to the intent. Go ahead. The question is, what he is entitled to.

Cross-examination.

By Mr. Wright, For the Government:

Q. Mr. Kalmenson, when was it that this repeat run provision was first discussed with you?

A. I believe it was discussed at the time we were working out the details of the deal.

Q. That was one of the things that was worked out at a later date, along with the clearances?

A. No, I believe it was discussed at the time we worked out the actual playing dates for the situations involved.

As near as I can recollect, I left only the matter of Clearances in the hands of the local people.

Q. When was it that the matter of wording of this repeat run option was worked out in the situations in which it was to apply, and decided upon?

A. Will you repeat that?

Q. I say, when was it that the wording of the repeat run option was worked out and the particular situations to which it would apply were designated?

A. If you are referring to the wording as it exists on the contracts now, my only part in the thing is, I take it to New York and whatever the deal is, I turn it over to the Contract Department and the Contract Department in New York decide as to the form they want to put this deal in and the [fol. 2554] wording is probably theirs. I tell them what the deal is.

Q. In any event, the wording of those is, is worked out by the Contract Department?

A. Yes sir. It covers that language. However, I tell them the exact deal we had with Sudekum and Stengel and they put it into the wording they want, whatever form they want.

Q. Mr. Hatch was your Manager of your Contract Department, wasn't he?

A. Yes sir.

Q. I believe you stated that these contracts that you made in this three and a half or four year deal, provided for the playing of a number of pictures on percentage?

A. Yes sir.

Q. When you play a number of pictures on percentage, it is necessary for you to limit the number of later runs of the features that are sold to a given situation to protect percentage revenue, is it not?

A. Will you repeat that question, please, I didn't understand it?

[fol. 2555] Q. Let's take an example here. When you have sold Crescent or Rockwood films in a first run on percentage with repeat run privilege in a town with a population, let's say, of four or five thousand, now, it is a fact, is it not, that in such a situation, in order to protect your revenue on the percentage pictures from the first run you are not going to sell more than one additional run of the feature, is that right?

A. No sir.

Q. Can you give me an example of any town in Tennessee with a population of less than five thousand where you sold first run on percentage and then licensed two more additional runs?

A. I can't give you any example of any town in Tennessee because I don't know the towns in Tennessee.

Q. Well, you aren't familiar then with exactly what the effect of this second run option privilege would be in towns for which it was sold, is that right?

A. I don't know what you mean by the second run option privilege.

Q. Repeat run option?

A. That is the part I don't understand and can't answer your question. The repeat—if you will let me explain the thing, the repeat run, as you term it——

Q. Well, that is the way it is termed here.

A. That clause in there gives, in my opinion, exhibitors the right to repeat a picture on himself in place of one of our—one of our better pictures presumably, in place of something he doesn't want to play, provided there are no [fol. 2556] other conflicting runs to keep him from doing it. It is not an option at all. It is just the privilege. I might give you an instance of where a fellow might play one of our great pictures, The Fighting 69th, and instead of playing The Case of the Black Pirate, he believes it would be more profitable to play The Fighting 69th, which he does, and it is a practice that exists all over the country.

Q. As I understand it then, if you sold second runs in one of these situations where Crescent or Rockwood has a repeat privilege, Crescent or Rockwood would still have the right to play the picture again, subject to whatever clearance terms you might have incorporated in the second run contract; that is correct, isn't it?

A. If you mean there were other runs, they could repeat behind those other runs?

Q. Yes.

A. Yes, I think so.

By the Court:

Q. Let me see if I get that straight, now. Under this contract you sell Crescent, say, The Fighting 69th in a certain town and in that town you had a contract with an independent exhibitor for second runs and that exhibitor wanted to play The Fighting 69th on a second run after

Crescent had played it first, you mean to say then that under that that Crescent couldn't show a repeat run of The Fighting 69th until after the independent had played it on second run?

[fol. 2557] A. Very definitely.

By Mr. Wright:

Q. But if both of them had that privilege, no matter how many runs they might sell, Crescent could always repeat a picture after the other run, is that right?

A. After the other run that they had or might have in accordance with the contract that at any time might exist, they could repeat after that, yes sir.

Q. Now, in small towns where your normal practice is only to sell a couple of runs, the fact that if you sell second run, Crescent could still repeat the picture for a third run in its house would tend to discourage the sale of a second run to Crescent opposition in that town, would it not?

A. It would not.

Q. It would not?

A. No.

Q. You say that your percentage revenue from the first run pictures would not be affected in any way, no matter how many other runs of the film were sold in the town?

A. We see that the set-up of our runs—there is no yardstick that I know of that applies—you are talking specifically—applies to situations generally. If you would ask me some town that had a number of runs and ask whether I believed by selling in a certain manner we would reduce our first run revenue, I might give you that, but I don't understand you.

Q. That is always one of the problems you consider in any [fol. 2558] situation where you reach a determination whether or not to sell second run, as to the effect that that additional run will have on your first run revenue where your first run has opposition, that is correct, isn't it?

A. No, not generally; at least, not with me. I try to get our pictures played first run under conditions that will get the maximum first run and attempt to get as many runs as possible. By doing that we get as much revenue as is possible.

Q. That is what I say; whether you do it or don't depends on whether the increased revenue you get from the addi-

tional runs would offset what you might lose in the way of lower receipts from the first run?

A. I don't quite understand you, Mr. Wright. There is no such thing—with the way I understand it, there is no such thing as any decrease in first run. We attempt to set up our business first run and get the maximum runs, first runs and if there are other runs, we attempt to sell them consistent with what they should produce with the particular picture you run.

Q. Now, I call your attention to a paragraph in a letter that is already in evidence here, the letter from Mr. Hatch to Mr. McCoy, dated March 8th, 1940, with which he enclosed the Stengel contracts containing the repeat run riders, and in that letter he stated that "some of the riders do not include the repeat privilege for the reason that in these towns there is opposition, according to our records." Now, have you any idea why there might have been a dis- [fol. 2559] tinction made in the application of the clause where there was and where there was not opposition?

A. I don't know what Mr. Hatch might have had in mind.

Q. Don't you think it is possible that he might have had in mind the presence of the repeat run clause in a situation where there was opposition might tend to discourage the sale of second runs to the opposition?

A. I made a deal with Mr. Sudekum and Mr. Stengel and I know what the intent of that clause is. I don't know what Mr. Hatch had in mind or what he might have tried to imply.

Q. Are you familiar with the particular competitive situation at Gadsden, Alabama?

A. No sir.

Q. You are not?

By the Court:

Q. Does everyone of the contracts that were signed with Crescent and Rockwood on this occasion that you came to Nashville, do everyone of those contracts contain this same clause relative to repeat runs?

A. I believe that everyone where only one theatre is involved—I am not sure. I would have to check them, your Honor, but I think that where Crescent had first and definite second run, where they had purchased for us first run and a definite commitment for second run, I don't think that

clause was necessary and was left off of those, but I would have to check to make sure.

[fol. 2560] By Mr. Wright:

Q. Well, you think that apparently at the time that Mr. Hatch wrote this letter in March, 1940, enclosing copies of the riders, all of the contracts did not contain the repeat run privilege? You say that is correct?

A. I said, I believe, I would have to check. In those situations where Crescent or Rockwood had contracted for a definite second run, they naturally had the privilege of playing second run, and which provided for that same thing, that clause was unnecesary. I would have to check all those contracts. I haven't seen them for a long time and I don't know what they actually contain as to every situation.

Q. Well, in any event, it is a fact, is it not, that the wording of the clause in the situations to which it was to be applied was to be worked out between the contract department and the legal department, is that right?

A. I told our contract department, and it wasn't Mr. Hatch; I deal with Mr. Sachson in New York, who was ahead of Mr. Hatch,—exactly what agreements we had made with both Mr. Stengel and Mr. Sudekum and they put it in the form that they thought was best.

[fol. 2561] Q. Well, in Mr. Hatch's letter I have just referred to, being March 8, 1941, not March 1: He says "In preparing contracts made * * * prefer not to handle this by letter or agreement rather than on an individual contract basis for each situation." Now, that suggests to you, does it not, that there was a consultation between the contract department and the legal department in the preparation of the final documents?

A. I imagine they were; as a matter of fact, I am sure of it. You mean our legal department?

Q. Yes?

The Court: Let me see that letter—the Hatch letter. (Passed to the Court.)

Mr. Wright: Oh, the Hatch letter, I read out of the record. I can hand you the record.

The Court: Well, give me the number of the Exhibit?

Mr. Wright: The exhibit number is 200.

A. Now, did I understand you to say that the clearances were worked out wholly by Mr. McCoy and Mr. Williamson

with Mr. Sudekum and Mr. Stengel, and were not discussed with you?

[fol. 2562] A. No, sir.

Q. So, you don't know anything about the clearances they got, do you?

A. They were worked out by Mr. McCoy and Mr. Williamson and Mr. Hisey, who succeeded Mr. Williamson, in between us there; they were both there.

Q. You don't know whether they got any clearance that they were entitled to or whether they did not, do you?

A. I only know that I am only charged with handling of the business in their respective territories and do know what any town in their territory should be entitled to.

The Court: How do you figure one town is entitled to clearance over any other; on what basis?

A. On the basis of whether they are in competition with each other, as to the history of the situation, all the circumstances that are involved, the admission prices, and so forth.

Mr. Wright:

Q. Now, Mr. Kalmenson, how do you determine, where you have a first run account that is playing the pictures on a percentage basis, whether you will or will not sell a second run in a town; what factors do you consider?

A. I don't know of—You see, I, naturally, in my duties [fol. 2563] in this far-flung territory that I travel,—and I have nothing but the important spots—the matters of the smaller situations are naturally handled by the local people; I have never run into that myself, and I can tell you I never myself have run into a situation where I could not sell a first and second run.

Q. You went over all the territory, is that right?

A. Yes, sir.

Q. There was a letter that was previously introduced in evidence here from Mr. McCoy to you, dated December 4, 1939, marked Government's Exhibit No. 198, which was entered under a stipulation with Mr. Armistead, that Mr. McCoy would testify that it was written by him and that it was received by you. But I will show you this letter and ask you if you received that on or about that time?

Mr. Mitchell: Is that the letter you spoke to me about?

Mr. Wright: That is the letter I spoke to you about. I will just read it into the stipulation in a moment.

A. I can't recollect having received it.

Q. You don't have any reason to believe you did not receive it?

A. Well, I have reason to believe that McCoy sent it out, [fol. 2564] and it came to New York during my absence and somebody else took care of it; I just don't remember having received it.

Mr. Wright: I spoke to Mr. Mitchell about this letter yesterday, and you will remember this was a letter at the time it was introduced in a stipulation; it refers to Muscle Shoals and Mr. Mitchell was not a party to the stipulation that was made with Mr. Armistead. Now, I again spoke to him yesterday and he has now agreed to stipulate, in so far as he is concerned, that on December 4, 1939, at the time this letter was written, Mr. McCoy was Branch Manager of Vitagraph at Atlanta, and that he wrote the letter to Mr. Kalmenson, in the course of performing his duties as such Branch Manager. That is correct, is it not, Mr. Mitchell?

Mr. Mitchell: That is correct. May it please the Court, that is done to save calling Mr. McCoy over here. He did write the letter. I admit that fact. But I don't admit the competency of the evidence.

The Court: Admitted subject to your objection for competency?

Mr. Mitchell: Yes, sir.

[fol. 2565] Mr. Wright:

Q. Now, I call your attention to the third paragraph of the letter which says: "I took up the question of the Muscle Shoals Theaters before Mr. Stengel and Mr. Sudekum and they advised me at the time that they were working out our deal, and I mentioned these towns, but Mr. Sudekum stated he did not want to include the Muscle Shoals Theaters with his franchise on account of the pending lawsuit but that he did want to work out a separate franchise the same with the other towns as with Mr. Louis Rosenbaum, to which I replied that would be O. K."

Now, you did later advise Mr. McCoy, did you not, that he should O. K. the deal worked out in accordance with Mr. Sudekum's suggestions?

A. In reply to that letter which you showed me?

Q. I say, in any event, you did authorize Mr. McCoy to work out the deal?

A. I either did, or somebody for me.

Q. To work out the deal?

A. Yes, sir.

Q. And the deal that was worked out was for the Muscle Shoals Theaters as represented by the contracts that are in evidence here, dated March 14, 1940; that is correct, isn't it?

[fol. 2566] A. Yes, sir.

Q. This Exhibit is No. 198. Now, Mr. Kalmenson, in the course of performing your duties, don't any of your Branch Managers sometimes refer to you the question of whether or not they should sell an exhibitor a second run in a town where you have a first run account; that is, in a small town?

A. The judgment of whether anything could be sold in any of the respective territory, solely rests on the part of the Branch Manager.

Q. And that question is never referred to you?

A. If it is referred to me at any time, I refer it back to him.

Q. Now, this repeat run privilege was one that was contained in a prior franchise you were operating under, was it?

A. I don't know.

Q. Do you remember any conversation you had with Mr. Sudekum and Mr. Stengel about it?

A. I knew nothing about the provisions contained in any previous deal with Mr. Sudekum.

Q. Well, can you remember what was said by Mr. Sudekum or Mr. Stengel to you in connection with this repeat run clause?

A. I can't remember exactly what the conversation was; [fol. 2567] but if they requested such a clause, and I saw no harm in it, I agreed to it.

Q. Did they ever tell you why they wanted it?

A. Well, I don't remember the actual conversation——

Q. I am asking you now, did they tell you why they wanted it?

The Court: Did they tell you why they wanted it?

A. I don't remember the actual conversation, but I suspected that that was what they wanted the clause for.

Mr. Wright:

Q. For what?

A. For the purpose of repeating a better picture in place of one they didn't want to play, provided we had nothing to spot on.

Q. I don't see any limitation in here confined to any particular class of pictures?

A. Naturally, you wouldn't expect a fellow to repeat, I mean in the general practice, in his business, that I know of, I wouldn't expect a fellow to repeat a picture that he hadn't done well on the first time.

[fol. 2568] Q. But where the privilege was granted he could have run anything he wanted, that is right?

A. He could have run anything he wanted, that is right, I am just telling you what the truth was as I know it.

Q. Is that all you can remember about what was said by them as to why they wanted the clause?

A. Yes, sir.

Q. That is all.

Redirect examination.

By Mr. Armistead:

Q. Mr. Kalmanson, you were questioned about a letter of March 8, 1940, of Mr. Hatch to Mr. McCoy, in which mention was made of riders to some of those contracts which did not contain the repeat privilege; I will ask you if these contracts do not bear date of March 14, 1940, do you know that?

A. Do I know.

Q. There is no dispute about that.

Mr. Wright: None at all.

Mr. Armistead: There is no dispute about that.

Q. I will ask you if contracts which involve an appreciable [fol. 2569] amount of business, where the applications are for films which involve an appreciable amount of rentals, if the contracts are not referred to the legal department to be drawn up?

A. I refer them to the contract department, to take such steps as are necessary.

Q. Was it customary for the contract department to refer them to the legal department?

A. Yes, sir.

Q. You were asked by His Honor relative to clearance, what elements entered into it; I understood you to say admission prices, the opposition, whether there is any opposition in the vicinity, does the matter of the appearance of the house have anything to do with the theatre, whether it is a modern, up to date theatre?

A. I said the admission prices especially whether there is any competition, we have a situation where there is competition with each other, and film rentals of course the price, the appearance of the house is conducive to better business, and naturally the film rental is involved.

Q. You were asked about Government exhibit 198, that is a letter from Mr. McCoy under date of December 4, 1939, in which the question of making a deal with Muscle Shoals is mentioned; I understood you to say you authorized some one in your department to make a deal with Muscle Shoals, [fol. 2570] is that correct?

A. I do not remember saying that, I do not recollect that, ever having received that letter, but I expect our branch to make a deal for Muscle Shoals, as well as any other town.

Q. Was the deal made with Warner, was that a deal with Sudekum or Rockwood——

Mr. Wright: Your Honor please, I think that is a conclusion asked for on that question, that is to be drawn from all the evidence in the case. I do not think this witness could state that.

The Court: Sustained.

Mr. Armistead: I will put it this way:

Q. Was there any understanding between you and Crescent and Rockwood, that the deal made between them and Warners would be dependent on a deal made with Rosenbaum; in other words, did the question of making a deal with Rosenbaum have anything to do at all with the deal made between Warners and Crescent and Rockwood?

Mr. Wright: May it please the Court, again I think it should be determined here as to what took place.

[fol. 2571] The Court: Was there any discussion in that connection, at the time you were making the deal with Crescent?

A. Not at all, no discussion, Your Honor.

The Court: Did Mr. Sudekum ever tell you if you did not make a deal with Rosenbaum or Muscle Shoals——

A. I didn't understand.

The Court; Did Mr. Sudekum ever state to you during his discussions that if you did not make a deal with Crescent you couldn't make a deal with Muscle Shoals?

A. No such conversation at all.

Mr. Armistead:

Q. Now in regard to this repeat clause, was it unusual for an exhibitor to have a clause like that in his contract?

A. I do not think I have seen many clauses just like that.

Q. Was that clause prepared by the legal department of Warners?

A. The language that appears in thos- contracts was prepared by some one other than me. I turned my information over to the contract department.

Further deponent saith not.

[fol. 2572] The Court: Call your next witness.

Stipulation

By Mr. Armistead: Now, may it please the Court, we have a stipulation here in regard to two situations that we would like to get into the record at this time. One is at Brownsville, Tennessee. Your Honor will recall that Vitagraph sold Lawing all the 1933-34 product for the Southland theatre at Brownsville. It is stipulated and agreed that Mr. Byron Adams was Branch Manager of Vitagraph or Warners, on the Memphis Exchange, and on August 20, 1935, he was acting in that capacity, and in the usual course of his business he wrote the following letter to Mr. C. G. Lawing.

"Mr. C. G. Lawing, Southland Theatre, Brownsville, Tennessee. Dear Mr. Lawing. We are still requesting box office statements on subjects which you have played and on which we can not close our records until we receive same. It would take only a few mo-

ments of your time and eliminate a lot of work for us if you would let us have statements as soon as you finish [fol. 2573] an engagement. Will you kindly let us have statements on the following. Whiteville, Gold Diggers 6/6/7.

Whiteville, Into Your Dance	7/11-12.
Alamo, " " "	7/25-26.
Brownsville, in Caliente	6/25-26.

"We would most certainly appreciate your co-operation in the above, very truly yours,

Vitagraph, Inc., Byron Adams, Branch Manager."

We offer that in evidence as defendants' exhibit number 110.

Mr. Wright: We object to that as being wholly irrelevant to any issue in the lawsuit.

The Court: It is introduced for the purpose of showing that the relations with Lawing were not satisfactory, as they could not get him to co-operate in box office statements of receipts.

Mr. Wright: It does not show whether they could get them or not. It shows his request, a request for box office statements are being sent our every day, if we are going to try the case on box office statements, then we will cer- [fol. 2574] tainly offer some testimony to the effect that Mr. Sudekum might have been asked for admission price statements that were not forthcoming. I do not see if we get down to an issue like that, we can go out and get testimony—but it will not help the progress of the lawsuit at all.

Mr. Armistead: I just want to show it was a troublesome account.

The Court: Overrule the objection.

Mr. Armistead: On August 13, 1933, the same Mr. Adams wrote the following letter to the Southland Theatre at Brownsville, Tennessee.

"Southland Theatre at Brownsville, Tennessee; Dear Sir; We have previously written asking you to forward box office statement on the following engagement but to date have not received it.

In Caliente 7/25-26 17.50-35%

"We would appreciate your favoring us with this report by return mail.

Yours very truly, Byron Adams, Branch Manager."

I offer that in evidence as defendants exhibit 111.

[fol. 2575] Mr. Wright: Same objection.

Mr. Armistead: We understand that the same objection is made to all of this.

August 25, 1933, David Hunt, booking department, Vitagraph, wrote Lawing the following letter:

"Dear C. G. In going over your cut-off sheets, features and shorts I notice there are quite a number of pictures we have made available for you but for which you have not submitted dates.

In this list of pictures, we find such pictures as Goodbyr Agsain, Mary Stevens, etc. I do not know how you feel about it but if I were running a theatre, I would worry the Warner bookers to death until I got a date on pictures of this type.

"You do not have any shorts dated. This is strictly against our Home Office instructions since we must have short subjects dated in proportion to features. Can we count on your cooperation in submitting these dates to us on your next visit to Memphis?

Very truly yours, David Hunt, Booking Dept."

We offer this in evidence as Defendants Exhibit No. 112.

[fol. 2576] On June 19, 1935, there is an interoffice communication relative to the Southland Theatre, Brownsville, Tennessee, in which there is the following:

"In view of the fact that we have not received box office statements on the above engagements, we have estimated the overage and this amount will be added to your next shipments, C. O. D."

Said interoffice communication, a communication sent by Vitagraph or Warners to Southland Theatre at Brownsville.

We offer that as defendants Exhibit 113.

On July 3, 1933, F. Wilkerson, Branch Cashier of Vitagraph or Warners, wrote Lawing the following letter, and

when I say these letters I mean in the usual course of the business, these office employes, the branch manager of Vitagraph:

"Now why don't you send me the following box office statements—

"Brownsville, Tenn. 5/23-24 S. Music.
Alamo, Tenn. 5/24-25 D. Dogs
Whiteville, Tenn. 6/6-7 Gold Diggers.

"Do this without fail, without further delay.
Vitagraph Inc., F. Wilkerson, Branch Cashier."

[fol. 2577] Mr. Armistead: On June 4, 1935, Mr. Byron Adams, Branch Manager wrote Mr. Lawing the following letter:

"DEAR MR. LAWING:

We are again requesting box office reports on the following. You have promised numerous times to forward these statements, but to date we have not received them. We would appreciate it if you would kindly cooperate a little more on sending in statements on subjects you use, inasmuch as it necessitates a lot of unnecessary correspondence and we are entitled to this information immediately upon completion of your engagement of a subject.

Whiteville, Tenn.—Devil Dogs—5/10-11
" " —Sweet Music—5/16-17
Alamo, Tenn. —Devil Dogs—5/24-25
Brownsville, Tenn.—Sweet Music—5/23-24
Very truly yours,"

We offer that in evidence as Defendant's Exhibit No. 115.

On April 16, 1935, Adams wrote Lawing the following letter:

"DEAR MR. LAWING:

Under date of April 4-5 you played Flirtation Walk in your theatre at Whiteville, Tenn., however, to date [fol. 2578] we have not received box office report on same. Will you kindly forward this information by return mail.

Also, on Feb. 21-22 you played M. Dubarry in your theatre in Brownsville, Tenn., and so far we have not received box office report on this engagement.

We will appreciate it very much if you will give these items your immediate attention so we may complete our records.

Kind regards,"

I offer that in evidence as Defendant's Exhibit No. 116.

On March 22, 1934, W. B. Fulton, Branch Manager wrote a letter to Fred M. Jack, who at that time was District Manager of Vitagraph, as follows:

"DEAR FRED:

Referring to your letter of March 19 in which you ask me to advise you the results of my visit to Brownsville. When I was in Brownsville, Mr. Lawing had just left a few minutes before for Memphis.

I saw him in the Office and he agreed to buy our next year product for both Brownsville and Alamo provided [fol. 2579] we would let him make one contract for both towns. He only runs one picture per week in Alamo. Two other companies did this last year but I would not do it. If you think it advisable to give him one contract for both towns, I am sure that I can sell him our next year product.

I told him we would take the matter up with you. Please advise.

Very truly yours,"

I offer that in evidence as Defendant's Exhibit No. 117. On May 14, 1934——

Mr. Wright: With respect to this letter, I think it should appear that they did make a contract for both towns. What possible significance there is to this, is beyond me.

The Court: Well, I suppose it is for the purpose of showing there is no more harm in Vitagraph making a contract for two towns with an independent than it would be for Muscle Shoals to make a contract for four towns.

Mr. Armistead: If they want it out, I will withdraw it. He had been bicycling pictures between Alamo and Brownsville.

[fol. 2580] Mr. Wright: That isn't in evidence here at all. He sold the product for two towns and he played off two

towns pursuant to the contract. This is merely attempting to confuse the Court and get something into the record that doesn't belong there.

Mr. Armistead: I am not trying to confuse the Court, I never have tried to.

The Court: It is too much trouble.

Mr. Wright: Is there any evidence to that effect in the record.

Mr. Armistead: He testified to it.

On May 14, 1934, Mr. H. J. Ochs, Branch Manager, wrote the following letter *of* Mr. Jack:

"DEAR MR. JACK:

Under date of March 19 you wrote to Mr. Fulton in regard to Brownsville. He replied to same March 22 and on the 26th of the same month you stated that you would discuss this matter with him when you came to Memphis.

As I understand it, this exhibitor wants to buy one contract for Brownsville and have each picture he plays in Alamo to automatically cancel one in the former city. [fol. 258] Brownsville is running full time of four changes per week while Alamo makes only one change.

I have been given to understand he has this arrangement with other distributors. I am advised that on account of our not allowing him to do this we are experiencing difficulty in securing play dates from him in Brownsville, and that before he will sign his next year contract, we must grant this concession.

Ordinarily, I would go ahead and agree to this concession but since seeing the file on same, throught it best to consult you inasmuch as the matter has been previously brought up and there might be some special circumstances surrounding the case.

Incidentally, we are doing this for Mr. Washmon in giving him a cut-back in Trenton or Dyer for each picture played in Van Buren.

Very truly yours,"

Mr. Armistead: I offer that in evidence as Defendant's Exhibit No. 118.

On June 23, 1934, there is an interoffice communication [fol. 2582] by Byron Adams, relative to C. G. Lawing, in which it was said:

"This account had cancelled all short dates because we refused to grant a reduction. I got all dates reinstated; was unable to work out a deal for next season's product."

I offer that in evidence as Defendant's Exhibit No. 119.

Mr. Wright: What was the date of that letter?
Mr. Armistead: June 23, 1934.

I have here an interoffice communication from Byron Adams, Salesman dated August 2, 1933, relative to C. W. Lawing, Southland Theatre, Brownsville in which he says:

"You are familiar with this situation. Mr. Lawing has suspended all service. Would suggest that you endeavor to get this back as an active account on our books. He has only about five or six delinquent pictures and as these are all outstanding releases, we can see no reason why he should not be anxious to date each and every one. Secure dates on Central Airport, Elmer Great, Lilly Turner, Little Giant, Heroes For Sale, Ex Lady, Picture Snatcher, Working Man, Jimmy Dolan, Silk Express, Private Detective, Mayor Of Hell, Baby Face."

[fol. 2583] I offer that in evidence as Defendant's Exhibit No. 120.

On March 2, 1933, David Hunt, of the Booking Department of Warner's at Memphis, wrote Mr. Lawing a letter, in which he says this:

"Dear C. G.:

We have just received a letter from Mr. Moray, our General Sales Manager for Short Subjects, wherein he severely criticized us for allowing delinquencies in the dating of shorts, especially in view of specific instructions not to allow any exhibitor to pass up certain proportion of their contracted obligations and selecting the other. Frankly, this practice, we are sure you will agree, is a one-sided affair and one in which we are asking for your cooperation in correcting.

As per your commitment, you are, as of February 25th, 1933, twenty-eight (28) reels of shorts delinquent and we ask that in appreciation of our splendid product we are delivering and also as a personal favor to me that you arrange to send these dates to us in addition to the other dates to prevent any delinquencies when "42nd Street" becomes available to you.

C. G., as you know, all bookers, having been one your-[fol. 2584] self, have a hard time getting exhibitors to date their short subject service, in proportion with their feature service. This practice, as stated above, is in no way news to you, however, we received a letter this morning from Mr. Jack, our General Sales Manager, stating that before we should be able to accept a date on "42nd Street" that all prior releases on features, trailers and shorts had to be dated.

It so happens that he didn't state that we had to have these played and dated before "42nd Street" so if you will submit to me all the short subjects dates that you can possibly spare in addition to your regular arrangement—two reels each Monday—I will greatly appreciate it.

Sincerely yours,

I offer that letter in evidence as Defendant's Exhibit No. 421.

On October 15, 1935, there is an interoffice communication, from Arthur Saxson, from the Home Office, to Memphis, in which it is said, referring to the Brownsville situation—No, referring to the Alamo situation:

"Dear Mr. Adams:

[fol. 2585] "Our records indicate that during W. E. 8/10/35 the item listed below represent sharing engagement for which daily receipts and a supplementary contract has not been received:

Alamo—Alamo, Tenn.
In Caliente—8/7-8

Please enter your explanation at the side of one copy retaining the other for your files. If a letter has been written to the exhibitor please attach a copy of your last communication hereto and return.

Very truly yours, Arthur Sachson, Contract Department.

P. S.: This account is the worst in the territory for sending in box office reports. We are trying another way now to secure same, by writing direct to his Theatre Manager. We are hoping it will work and as soon as we receive same will forward."

I offer that in evidence as Defendant's Exhibit No. 122.

(Recess.)

Mr. Armistead: I next offer in evidence as Defendant's Exhibit No. 123, a comparison of the film rental revenue [fol. 2586] derived by Vitagraph from Lawing and Crescent, for the years 1933-34, 1934-35, 1935-36, 1936-37. I see no necessity for copying all of this in the record, I can just give a summary of the figures, which will be subject, of course, to the Government's checking to see whether it is correct or not.

For the years 1933-34, Mr. Lawing paid to Vitagraph $1091.72 for Brownsville.

. . . . . .

Mr. Armistead: For the year 1934-35, he paid $764.95 or for those two seasons a total of $1856.67.

Your Honor will recall that Crescent had the product for the year 1935-36 and 1936-37, and Crescent paid Warner for the 1935-36 season $1078.75, and for the 1936-37 season $929.00, making a total of $2007.75, or $151.08 more than Lawing had paid Warner.

I don't want to withhold anything at all; That does not [fol. 2587] include the revenue that Lawing paid Warner from Alamo or from Whiteville. If you add the revenue for those two places to the revenues Lawing paid in Brownsville, Warner from those three situations did receive more than it did from Crescent.

Now, as to the Rogersville, Tennessee situation, your Honor will recall that Mr. Miller testified that he had the Warner product for his theatre for the season 1932-33 and that no sale was made for 1933-34, 1934-35 or 1935-36, that is to Miller. It was the only theatre in the town during that period. We will offer in evidence as Defendant's Exhibit No. 124, a comparison of the revenue paid by Miller to Vitagraph and that paid by Cumberland, for 1936-37. Miller had the product and he paid to Warners, or Vitagraph $1188.34. The next year Cumberland Amuse-

ment Company had the product, that is the product of that season, 1937-1938, and it paid to Vitagraph $1550.50. Of course, the Government reserves the right to check those figures to see whether they are accurate or not.

On July 20, 1935, Mr. H. J. Ochs, Branch Manager of Warner's wrote to Randall Bryan, as follows:—I under- [fol. 2588] stand the same objection is being made by the Government.

"DEAR RANDALL:

I note from your report of Wednesday July 17th, that Mr. W. T. Miller of the Palace Theatre, Rogersville, refuses to buy any product with percentage pictures.

There is a new deal on and after all we can choose our customers. Any exhibitor who doesn't want to play ball along the policies we have set for this coming year will just simply have to try to get along without us. It will be his loss.

Very truly yours,"

I offer that in evidence as Defendant's exhibit No. 125.

Mr. Wright: The effect of this exhibit, as I understand it, is this: It is in evidence that he did make a deal for 1935-36, did buy Warner's pictures. Is that right?

[fol. 2589] This relates to a period prior to the time that Hill came in, isn't it,—July, 1935? He bought one number and then it shows another number.

By the Court: Maybe he changed his mind.

Mr. Wright: I was just wondering what the significance of the letter here is in view of the fact he did change his mind.

Mr. Armistead: I wanted to give a picture of the situation there. Mr. Miller had the product for the 1932-1933 season. No sale was made for the season of 1933-1934 or for the 1934-1935 season.

The next offer in evidence is Defendant's Exhibit No. 126, which is a report from salesman R. R. Bryan, and on this report it says, relative to Rogersville, Tenn.

"This account operates two changes per week and states he does not have any open time until the new season's product is released. However, he states he promises to buy our 1936-36 product, especially if we

can sell same on a flat rental basis as he bought two companies product this season. I informed him that we must have at least ten subjects on a percentage basis and the balance on a flat rental. Requests that I call on him again within the next sixty days."

[fol. 2590] Next there is a daily report from Salesman Bryan dated December 17, 1935, which the Defendant offers in evidence as Defendant's Exhibit No. 127. On this report there is the following relative to W. P. Miller at Rogersville.

"Mr. Miller states he has been forced to reduce his show to two changes per week and will not increase to three changes before March or April and states he has all service he can possibly use until that time. This exhibitor early in the season offered to buy the 1935-1936 product on a flat rental basis but would not agree to buy any subjects on a percentage rental, therefore was unable to trade with him. He states he will offer me a split deal sometime in March."

We next offer in evidence as Defendant's Exhibit No. 128 letter from R. T. Hill to Vitagraph, Inc. at Atlanta, Georgia.

"GENTLEMEN:

"This will advise that we have started building in Rogersville, Tenn. and we will probably need your product for next year. We will appreciate it if you will see us before making contracts for this town."

And on June 23, 1936 Mr. Ochs, Branch Manager, replied as follows:

"This acknowledges your communication of the 22nd inst. advising us that you have started building a [fol. 2591] theatre in Rogersville, Tenn., and would like to discuss our product for this situation.

"We will gladly comply with your wishes and our Tennessee representative, Mr. Randall Bryan, will be in to see you the latter part of this week.

"Thanking you for the above interest shown in our product and sincerely trusting your health is daily improving, I am with kindest regards,

Very truly yours, H. J. Ochs, Branch Manager."

On September 15th, 1936 H. J. Ochs, Branch Manager, wrote Mr. Sears at the home office of Vitagraph as follows:

"In reply to your letter of the 11th inst. regarding the above circuit (That is the Hill Circuit), this is to advise that up to the present writing we have been unable to negotiate a satisfactory deal for our product.

"Both our Tennessee representatives, Mr. Randall Bryan and the writer have each made two separate solicitations, but Mr. Hill and his partners are sitting tight in regard to percentage pictures.

"Mr. Sudekum of Nashville is a 50% stock-holder of this circuit, and it is his definite instructions that no pictures are to play on percentage. Up to the present, they have been successful in negotiating flat rental contracts with Paramount, Fox and R.K.O., [fol. 2592] with the result that their immediate needs for product have been taken care of.

"At this time I wish to advise you that I am going to make a determined effort to get our product sold, if not in all the towns of this circuit, at least in those where we can."

That is Defendant's Exhibit No. 130.

On April 19th, 1937 there is a daily report from Salesman Bryan relative to W. P. Miller at Rogersville:

"Mr. Miller was in office and wanted to buy the 1937-1938 product. I advised him we would not be in a position to sell any new product until we have had our convention in May and after that time would call on him. Mr. Miller operates in competition to the Hill Circuit which we did not sell this seasons product."

That is Defendant's Exhibit No. 131.

On May 29th, 1937 there is a daily report from Salesman Bryan as follows:

"Exhibitor W. P. Miller.

"So this account 60 WF-7 features, 60 trailers and 89 V-7 Shorts with an increase of $169.50 over last seasons deal. This situation has a population of 1600 with no factories or payrolls and box office receipts

indicate that he is paying about all he can stand with an opposition theatre operated by the Hill circuit. [fol. 2593] After agreeing on deal Miller advised he would have to go Knoxville and requested I meet him there when he would sign contracts."

That is Defendant's Exhibit No. 132.

Now then, there is already in evidence Miller's application for the product, and on July 30th, 1937 there is an inter-office communication from Arthur Sachson of the contract department to Mr. Vergesslich, which is as follows:

"We are returning to you herewith without approval all copies of Contracts #9066 and 9067 covering the 1937-38 Product for the above theatre for the reason that this product has already been sold to the opposition in this town."

The theatre referred to is the Palace Theatre at Rogersville, Tenn.

We offer that in evidence as Defendant's Exhibit No. 133.

I think both of these letters are already in evidence. In any event, not to delay it any longer, on September —, 1937, Miller wrote to Vergesslich and wanted to know why he hadn't heard from him relative to his applications, and on September 6th, 1937 Mr. Miller received a letter stating that the product had been sold to the Sudekum Circuit. Both of these letters last referred to are [fol. 2594] already in evidence.

The next witness, W. J. KUPPER, being first duly sworn, testified on behalf of Defendants as follows:

Direct examination.

By Mr. Waller:

Q. Mr. Kupper, are you connected with the Twentieth Century Fox Film Corporation?

A. Yes sir.

Q. Where is your office and in what capacity are you connected with that corporation?

A. Office at 444 West 56th Street and I am western divisional salesmanager.

Q. I take it you mean New York City?

A. New York City.

Q. What is your territory?

A. The western division, which comprises three districts, the southern, midwestern and the coast districts.

Q. That includes what is known as the Atlanta district?

A. Yes sir.

Q. And that includes the State of Tennessee?

A. Yes sir.

Q. What is your responsibility and what are your duties with reference to film deals made in the Atlanta district?

[fol. 2595] A. They are submitted to me for approval or rejection.

Q. From Atlanta?

A. From Atlanta.

Q. Does your branch manager and district manager, or either of them, at Atlanta have any authority with respect to rejection or approval of film deals?

A. No, they don't. They may exercise it sometimes in individual cases but they are sent to us for final approval.

Q. Well, do they have authority to reject?

A. Yes.

Q. But not to approve?

A. That is right.

Q. How long have you held the position which you now hold?

A. I can give you the exact date, I thought you might ask that and I put it down—since August 10, 1932.

Q. Was the corporation re-organized about that time?

A. A few months prior to that.

Q. Who became the president at that time?

A. Mr. Sidney R. Kent.

Q. Had he been formerly connected with another film company?

A. I believe he was general manager, vice president and general manager of the Paramount Pictures Company.

Q. Did the two franchises with the Crescent Amusement Company, which have been referred to in this case, the current three year franchise, and the three year franchise [fol. 2596] which immediately preceded it, did they come before you for approval?

A. Yes sir.

[fol. 2597] Q. Did you approve them?

A. Yes, sir.

Q. Does your corporation have any particular policy for or against franchise with exhibitors, and by a franchise I mean a deal for more than one year?

A. I would say we have no definite policy; we will do it if we think it is economically sound and good business.

Q. Well, what elements would you consider in making that determination?

A. Well, in the long run of things, so we would get the most revenue out of any and all given situations.

Q. Well, do you consider the financial responsibility of the particular exhibitor?

A. That would have some bearing on it, and a lot, perhaps for them to fulfill that contract.

Q. Has your company made a relatively large number of franchises in this Atlanta District territory? I will confine my questions to that district.

A. We have made quite a number of them, yes, sir.

Q. Now, have those franchises been made only with circuits?

A. No, sir, they have been made with individuals, independent situations, large towns, small towns, circuits.

Q. Can you give any idea of the approximate number of franchises in this Atlanta District during the same period [fol. 2598] covered by these Crescent franchises?

A. I think we have about 400 out of a possible 2200 accounts.

Q. Are you confining yourself to the Atlanta District?

A. No, I am confining myself to Mr. Ballance's district, which is the Southern District, and which includes this particular territory.

Q. I see. Is it to the pecuniary interest of your corporation to have competition among the exhibitors or not?

A. Well, I didn't get the second word, and I would like to hear it again. What was that word?

Q. I asked whether or not it was to the pecuniary interest of your corporation to have competition among exhibitors?

A. Well, it is distinctly to our advantage to have competition in all situations.

Q. I pass you a photostat of a telegram which bears your signature, dated April 18, 1934, addressed to H. G. Ballance, Atlanta, and ask you if you sent that telegram?

A. I did.

Q. I offer that as Defendants Exhibit what?

The Clerk: 134

Mr. Waller: I will read it and then have it marked, your Honor.

[fol. 2599] (Reading:)

"Regarding Sudekum proposition irrespective of what it means to the drive if you feel that its the best thing for this company to accept proposition this year and that you cannot offset respectable amount with the opposition we will accept your judgment stop however if you feel you can promote sufficient opposition go ahead we will stand behind you advise what you intend doing unquote signed W. J. Kupper"

Q. Was that telegram sent in line with what you have stated to be to the pecuniary advantage of your corporation, namely, to have competition?

A. Yes, sir.

Mr. Wright: If the Court please, that is purely argument. I don't see how it affects the question. The telegram speaks for itself; so does his statement about the policy.

The Court: Well, it is just his idea of the situation.

Mr. Waller:

Q. Now, with reference to coercion of your corporation by the defendant exhibitors in this case to do something which is against the pecuniary interests of your corpora-[fol. 2600] tion, will you state what the relative revenue that your corporation obtains from the Crescent Amusement Company, exclusive of Nashville, and its affiliates, as compared with the total revenue of your corporation?

Mr. Wright: If the Court please, that is entirely irrelevant to any issue here.

The Court: I don't think it is relevant to any issue; as I see it, a comparison would not be the amount of revenue obtained from the Crescent but the revenue from all his contracts, whether it would be the amount he obtains from Crescent as compared to the amount he obtains from the Independents.

Mr. Waller: You mean the Atlanta District, as an example, your Honor?

The Court: Yes. I don't think that would be very definite about the situation.

Mr. Raftery: As a matter of fact, your Honor, we object to any interrogation along that line, on the proposition that there is no evidence that there is any such thing as compara- [fol. 2601] tive revenue. The witnesses have testified that all contracts are made by "horse-trading". How can you set up any formula of comparison that will help the Court in this situation where everything is so nebulous and there is nothing to compare?

Mr. Waller: Your Honor, in order that my offer may be clear, I am merely trying to show that this revenue is nothing but a drop in the bucket——

The Court: It may be but a drop in the bucket, but I think they are all anxious to get the drop.

Mr. Waller: I think so, too, your Honor. I guess the objection is sustained.

The Court: Yes.

Mr. Waller:

Q. Does your corporation derive any advantages from the franchises over and above what it derives from a one year deal in these situations where a franchise is made?

A. Well, we derive nothing more than the actual dollars and what the contract represents, but we do have a situation where we know that that contract is set up for a considerable course of years and we save considerable in the costs [fol. 2602] of selling, and things of that nature.

Q. Where you have an added step-up in revenue, is that an added advantage?

A. It would be; a franchise, I believe, carries a five per cent increase each year and has carried it in these two franchises.

Q. When you approved the franchise I previously referred to was it one of your purposes to enable the Crescent Amusement Company or its affiliates to suppress the competition of independents?

Mr. Wright: If the Court please, that is objected to as pure argument and calls for a conclusion of the witness.

The Court: Well, he can state if he had any such purpose in mind.

A. No, sir, I never did.

Mr. Waller:

Q. Are you the officer of the Twentieth Century Fox Film Corporation in New York who has the responsibility for these franchises and who is the contact man with the men in the field?

A. Yes, sir.

Q. To your knowledge, has there been any agreement or understanding between your corporation and any of these [fol. 2603] individual exhibitors, corporate or individual, to prevent competitors of exhibitors to obtain films, or choice films?

A. Nothing to my knowledge.

Mr. Wright: That is objected to.

The Court: Overruled.

Mr. Waller:

Q. Have you ever had any conversation with any other officers or employes of your corporation along that line?

A. No, sir.

Q. Are you personally acquainted with Mr. Sudekum or Mr. Stengel?

A. To the best of my knowledge, I never met Mr. Sudekum or Mr. Stengel until I walked into this court room this morning—or any of the defendants in this case.

Q. Have you ever had any correspondence with them regarding independent exhibitors?

A. No, sir, I don't believe I have ever had any correspondence with any of the defendants.

Q. In the course of your duties have you ever expressed the intention, or to your knowledge has any agent of your corporation ever approached any of the defendant exhibitors with reference to preventing independents to obtain [fol. 2604] films?

A. No, sir.

Mr. Wright: If the Court please, that is also objected to as irrelevant.

The Court: Overruled.

Mr. Waller:

Q. My attention has been called to Government Exhibit 215, Mr. Kupper, which is a letter dated February 11, 1936, purporting to be signed by you and addressed to Mr. Bal-

lance, in which the following statement is made: "We are also of the opinion that we should have a newsreel in Florence. We cannot hope to build up this unit of service unless we insist upon our newsreel in all situations, particularly in situations where franchises are requested."

Was your attention called to that language before you went on the witness stand?

A. I believe I was shown that letter last night, yes, sir.

Mr. Wright: Is this a letter that is in evidence?

Mr. Waller: Yes, Government Exhibit 215.

Q. Now, where you state or use the phrase, "Where fran-
[fol. 2605] chises are requested," what did you mean?

A. Well, to the best of my knowledge, the first time a franchise was made with that circuit, it was made because of Mr. Ballance's insistence. We had had trouble with Mr. Sudekum's circuit, or the Crescent Amusement Company, let me put it, that they and Mr. Ballance had worn himself out for weeks at a time, and he said he wanted to make it for a period of years; Mr. Ballance insisted on the franchise from Sudekum, and he asked me if I would be agreeable to it.

Cross-examination.

Mr. Wright: For the Plaintiff:

Q. Did I understand you to say that this sentence here that was read to you "We cannot hope to build up this unit of service unles we insist upon our newsreel in all situations, particularly in situations where franchises are requested," with reference to situations where franchises were requested by Mr. Ballance?

A. Well, when we are going to franchise our product, we want to franchise it as a whole; in this particular service, that unit of service was left out, and if we were going to make a franchise for a term of years all credits should be included: Mr. Ballance wanted to make the franchise.

[fol. 2606] Q. You weren't serving Mr. Ballance, he wasn't writing the service?

The Court:

Q. You stated a few minutes ago that Mr. Ballance insisted on this particular franchise himself, and in that letter where you said "where franchises were requested", did you

mean or did you have reference to the insistence of Mr. Ballance that this franchise should be made, or did you mean in the ordinary course, where a franchise would be requested of any of the parties?

A. No, sir; in this particular instance—I was close to it at that time—and in my mind, while I was writing about it, I was trying to impress upon him to get the units sold when we made the franchise.

The Court: I know, but to whom were you referring?

A. I was referring to the attempt of Mr. Ballance to get me to accept the franchise deal he wanted to negotiate with Mr. Sudekum.

[fol. 2607] Q. Now you gave some testimony here about policy with respect to franchises; did that policy undergo any changes while you held your office?

A. It definitely did in the last few months, we entered into a consent decree that we only sell five pictures at a time.

Q. Before that, do you recall any change that it underwent at or shortly after the time that the Government entered an anti-trust suit in the New York Court against your company?

A. I do not think so, we still made some contracts right up to the time the consent decree was accepted; and prior to that in some territories we never sold any franchises, it was only a matter of local management in there, whether in their judgment it was a good thing to do.

Q. Isn't it a fact that in the fall of 1938, Mr. Felix Jenkins, head of the legal department, issued instructions you were not to make franchises?

A. I do not know whether that is the date, some time after we got to discussing about a consent decree, the matter was discussed, whether we should continue or whether we should discontinue making any.

Q. This is before that, before 1938?

A. I don't know, I do not believe so, because we made [fol. 2608] some after that date, he may have said he didn't think it was a good policy, he didn't think we ought to do that, I can not recall but we have sold some dated after 1938.

Q. I understand you made them, but there was a discussion with the legal department as to the advisability of continuing the making of them, was there not?

A. I do not recall it, he might have advised that, put it up to the sales department, they formulate their own plans and policy.

Q. Isn't it a fact that just before you went into these negotiations, prior to that date I mean, you began to negotiate the current franchises, that are in effect now?

A. I can not give you the exact date, I believe Mr. Wilson can, because he was down and did the negotiating, and he can give it to you, but I imagine it was about some time, oh, I imagine it was the spring or summer.

Q. You say it is a three year contract?

A. That would carry it—if I look back I can find it. I get my Ks and my dates mixed up here, I would imagine it was some time during 1938, the latter part of 1939, perhaps, well may be the first part of 1939—the latter part of 1938, must have been prior to the finish of the prior franchises, they were talking about a renewal, or further franchises, or new franchises.

Q. And some time late in 1938 or early in 1939, you [fol. 2609] think that some one from your company advised Mr. Wilson, did they not, that the new policy of the company was not to make franchises?

A. No, sir, if we did I don't think he would have made the one he did make, but the franchises, it is a matter of record, and if he did that, I do not see how that could hold.

Q. You say you did not take any part in the negotiations of the franchise at all, is that right?

A. That is true.

Q. When was it that the current franchise was first submitted to you for your approval?

A. I can't recall the exact date, but it must have been around the period that I approved it, around the period of the year that I approved it.

Q. In any event if any of the negotiations were submitted to you, what is your best recollection?

A. Let me see if I can give it to you; that was probably some time during 1939.

Q. You can't fix it any more than the year?

A. I can't fix it, if you have any correspondence as to the acceptance of it, that would give the specific date. It must have been a matter of record.

Q. It was not brought to your attention before it was accepted by you?

[fol. 2610] *Q.* What?

Q. I say your best recollection is that it was not brought to your attention until the time you accepted it, is that right?

A. The last contract, the last franchise?

Q. Yes, by which I mean the one that is now in effect?

A. I knew Mr. Ballance was going to work on a long deal to get another franchise, because he was satisfied with the prior one and that is natural when any one is satisfied with a franchise is to let it run, and our sales organization handled them that way, they wanted renewal contracts, so I knew they were working on it.

Q. I understand that, but I would like to get this, what I am trying to get at is the time, when it was first brought to your attention with reference to the time when it was first submitted to the company, submitted to you for approval, with reference to the time it was actually approved?

A. Well it was actually approved some time before it was actually signed by our company. * * * It was ap-

[fol. 2611] proved and sent down, and I believe passed on by Mr. Sudekum or Crescent Amusement Company, and it came back to me and our general manager's desk for his signature, after some time, and it was approved and accepted by me long prior to the final signature of both parties.

Q. You are referring to Mr. Wobber?

A. Mr. Herman Wobber.

Q. It is a fact that he has the approval, that he is the man that has the final say on any franchise of the company, that the company makes?

A. Well Mr. Wobber's signature must go on all contracts, but he takes our approval or rejection, naturally I discuss it with him, and he has given a great deal of attention to our opinions, not only on discussing franchises, but other matters. We offer it and he can take it if he wants to and he can reject it. If I had a contract that I didn't think was a good one, I would probably talk to him before I even passed on it.

Q. Even if he thought it was a good one, and you recommended it to him, he would have the power to reject it?

A. He could overrule me, yes, sir.

Mr. Wright: If the Court please, we had some corre-

[fol. 2612] spondence here about this Fox franchise which

I have not been able to locate, and I would appreciate an opportunity to examine that before excusing this witness.

The Court: All right, take an adjournment until one fifteen.

Afternoon Session

Mr. Kupper, Continued.

Mr. Wright:

A. Mr. Kupper, I want to hand you a letter, copy of a letter, dated July 13, 1939, from Mr. Wilson to you, and I will ask you to read it and tell me if you received the original?

A. You mean read it out loud?

The Court: No, read it to yourself.

Mr. Wright: No, just read it. (Passed to the witness.) Just the one letter, a two page letter?

A. I am reading the second page.

Q. Beg your pardon.

A. I have read it.

[fol. 2613] Q. Did you receive it?

A. I probably did, I do not recall it at this time.

Q. I will ask to have that marked as next government exhibit. There are two pages that will have to be clipped together.

The Clerk: Government's exhibit 351.

Mr. Wright:

Q. Now after you have read it, does that refresh your recollection about the franchise instructions?

A. No, it does not, because if those instructions, they may have gone out, I do not recall them, and again I must say the franchise was written and submitted after that time and we approved it; if there were any definite instructions I would not have taken a franchise.

Q. I understand that; now you say the instructions that are referred to in the letter there did not come from you?

A. I do not know, the letter does not state where the instructions come from or from whom.

Q. That is right, I am asking you.

A. I do not recall ever sending such instructions. I may have, but I do not recall it.

Q. You may have, but do not remember it?

A. That is right.

[fol. 2614] Q. Now, I show you another letter from Mr. Wilson to you, a copy dated January 11, 1940, and ask you if you received that?

A. Well, again, I can only say that I undoubtedly received it and we probably acted favorably on it, but right now, I can't recall the time of receiving it.

Q. I will ask you to have that marked with the next Government number, as an Exhibit.

The Clerk: Exhibit No. 352.

(Said letter is dated Jan. 11, 1940 and — as follows:)

"DEAR MR. KUPPER:

In the past three years we have time and time again endeavored to secure a second run deal from Sudekum in a few of his better towns but always without success because he refused to pay more than $12.50 per picture for second run. In the last year we have secured second run booking on a picture like Jesse James but our second revenue was practically nil over the circuit as a whole.

After many solicitations we were finally able to work something out that we feel gives us a considerable amount of additional revenue that we have heretofore never enjoyed which is definitely covered for each situ-
[fol. 2615] ation on attached deal sheets at prices which we feel are in line.

This was only secured after several months of negotiations and covers second run in the following situations: Columbia, Union City, Cleveland, Greenville, Dyersburg, Morristown; Maryville, Tenn. Paris, and Murfreesboro, Tenn., Hopkinsville, Bowling Green, and Madisonville, Ky., Decatur and Huntsville, Ala.

In these particular situations, when we first went into this deal, Mr. Sudekum demanded a second run deal on a basis of ten or fifteen pictures which we refused and finally secured a commitment covering twenty-six pictures second run at prices stipulated on attached deal sheets.

Mr. Sudekum requested, in view of this commitment, that we allow him a ten percent elimination privilege in those situations where he has purchased fifty-two pictures because with this second run commitment, one that he did not have previously, it may be necessary for him to eliminate a few pictures in order to take care of this obligation.

You will recall that at the time the deal was approved, Mr. Ballance and Mr. Sudekum agreed that in [fol. 2616] those situations where he had a fifty-two picture commitment he would play fifty-two pictures and not exercise any elimination privilege even through under the terms of a general contract he would be entitled to a twenty percent elimination, so we feel that we are considerably better off in handling it in this way insofar as this circuit is concerned.

The clause that should be inserted into the body of the franchise should read something like this in the above towns:

'With the exception of Madisonville, Ky., Murfreesboro and Paris, Tenn. it is agreed that the exhibitor shall have a ten percent (10%) elimination privilege on first run contracts. Said eliminations to come from the lowest allocation.'

These deals for second run give us an additional film rental for K-7 of $6342.50 then K-8 to carry a five percent (5%) increase over K-7 and K-9 a five percent (5%) increase over K-8.

This adds a considerable amount of revenue to our deal and represents this amount of additional revenue that we have not heretofore enjoyed.

Have gone over this with Mr. Ballance and we feel [fol. 2617] that it is decidedly to our advantage to accept.

Yours very truly,"

Q. That letter does remind you, does it not, that the deal had not been finally completed until, apparently, some time in 1940?

A. No, I don't say that at all. I say that was a supplemental agreement to the original contract, which was something they asked me to consider.

Q. The original deal was then supplemented by this second run deal that was made in 1940?

A. Yes—I don't think that letter states that. That letter states, as to the franchise that was accepted some time back, I guess the 1939 deal of June or July, somewhere along there.

Q. I understand that.

A. Yes, but I would like to get it clear.

Q. There was a franchise deal that was agreed on some time in the summer or fall of 1939?

A. Yes sir, that is right.

Q. After that was agreed on, the clearance terms were later negotiated by the Branch Manager, by Wilson or Williamson?

A. Yes sir.

Q. Then, in addition, this deal for second run was also negotiated?

A. That was offered, yes sir.

[fol. 2618] Q. That was finally——

A. Agreed to.

Q. When the deal was finally put in one document, that deal was in it, is that right?

A. (No reply.)

Q. In between the time that you made the deal there in the summer or fall of 1939, and the time that this additional second run arrangement was negotiated, there were some negotiations or discussions about a repeat run option clause for the franchise, wasn't there.

A. I don't remember that. After we accepted the original terms that were submitted, I turned the mechanics of the franchise over to my assistant and to our Legal Department, to draft up a franchise. Now, there may have been, as you say, things about clearance that were corresponded upon. I know this other matter of some second run and the change of, possibly, commitments in a few towns, which that other exhibit mentions, I didn't follow through, in detail, all of those.

Q. You don't remember this matter of a repeat run option, it was not taken up with you at all?

A. It may have been, but I don't recall it. A repeat run option?

Q. Yes, option?

A. Is it a part of my contract?

Q. Repeat features to be incorporated in the franchise? [fol. 2619] A. I don't recall whether it is a part of my franchise or not.

Q. What?

A. I don't recall whether it is a part of my franchise or not.

Q. I don't think it is. As I understand it, your franchise doesn't provide it, but I wanted to find out whether negotiations for such an inclusion of such a clause in the franchise had been carried on with you?

A. I don't recall it, only there might have been through this letter, where they wanted some second runs of those releases.

Q. This letter refers to a deal?

A. That is all I know; I still don't recall receiving that letter.

Mr. Wright: I will offer these letters in evidence.

(Letters marked Plaintiff's Exhibits, respectively 351 and 352.)

Exhibit 351 is dated 7-13-1939 and reads as follows:

"Dear Mr. Kupper:

Attached hereto is the recap of the Sudekum deal, also comparative totals for each individual town. You will recall, when I discussed this deal with you when you were in Atlanta, that I did not have the comparisons broken down, but these have now been worked out. [fol. 2620] As Mr. Ballance and I explained to you while you were here, this has been a very difficult deal to close, first, because as far back as last October Sudekum wanted to start negotiations on a new deal and our instructions at that time were that we were not to enter into any franchises. We were again approached in December and we advised Mr. Sudekum that the situation had not changed any. He then felt that we did not want his business.

About ninety days ago Mr. Ballance and I talked with Mr. Stengel and Mr. Rosenbaum of the Sudekum Circuit and about two weeks later talked with them again. Immediately following Mr. Ballance talked with Mr. Sudekum and it looked for a long while as though we were going to be out of the circuit, because when we

refused to negotiate back in October and in December he entered into deals with other companies, whose product he had not bought up until that time.

After three months of wrangling, we have secured a deal that does show a decided improvement over K-6 and one that steps forward each year. We have ap- [fol. 2621] proached this deal from every possible angle and it represents the best we have been able to obtain.

In some cases where Sudekum had taken over theatres last year in one theatre town we forced the sale of 56 pictures. The sale was made somewhat late in the season and for that reason the comparison between K-6 and K-7 does not look so good insofar as those particular towns are concerned. Our commitment is worked out on a basis of 40 pictures in towns where one theatre operates. If there happens to be a second house in that town that operates only on Friday and Saturday with a western, that is not counted as a second house. In towns where two theatres operate the contract the contract is set up on a 52 picture commitment. When you take into consideration the possibilities of the Fair Trade Practice Agreement going into effect, we feel that we have a deal comparable in every way with what we have received in the past.

We will also note on the attached sheet certain towns in which Sudekum is interested or that he has recently taken over and assumed the contracts where previous deals were sold on percentage. In those particular [fol. 2622] situations heretofore, irrespective of what pictures earned, when he assumed a contract he demanded that prices be set up for that town in keeping with another situation of equal size. The big argument that we won on this deal was that, in those situations where they were completing contracts previously made, our returns on percentage pictures were taken into consideration in setting the prices for the K-7 pictures.

You will also note on the attached schedules special notations under remarks, where a theatre situation has changed, of where previously we sold 56 pictures or 52 pictures, to the effect that if they are operating only one house that is noted, or where on the previous franchise we sold 40 pictures and two houses are operating that on K-7 the set-up is on a basis of 52.

I sincerely trust that you can see your way clear to approve this franchise and will appreciate your acting on it as soon as possible, because Sudekum is holding up buying other product pending the approval or rejection of this deal. The total contract for three years represents a little better then $300,000.00. The deal [fol. 2623] means a lot to us and securing an early approval will help materially.

If acceptable we will have deal sheets prepared and forwarded to you.

Yours very truly, —— ——."

Mr. Waller: We object to that on the ground that it goes outside the scope of the direct examination.

The Court: Overruled.

Redirect examination.

By Mr. Waller:

Q. Mr. Kupper, you were questioned about the phrase contained in Government Exhibit No. 215, being a letter of February 11, 1936, to Ballance, from you, the phrase being "situations where franchises are requested". I notice that your letter of February 11, 1936 does not refer to any letter to which it is in reply. I want to hand you a letter dated January 20, 1936, from Mr. Ballance to Mr. M. B. Finkler, and ask you if you can identify that letter?

A. Of course, I don't remember the letter, but I remember some of the substance of the letter, it all ties in with the original negotiations that started from the first franchise.

Q. Who is Mr. Finkler?

[fol. 2624] A. Mr. Finkler was Manager of our Contract Department and all the contracts and the correspondence leading up to them, are submitted to him and he, through his Department, builds up the data and information for the division Managers to check over.

[fol. 2625] Q. Now, after looking at your letter of January 20th, 1936, addressed to Mr. Finkler and your letter of February 11th, 1936, addressed to Mr. Ballance, would you or not say that your letter was a reply to the letter addressed to Mr. Finkler?

A. I think pretty positively—well, I won't say positively, but I think in my own mind it must have been as I wouldn't

have taken that angle perhaps if I didn't have something to call it to my attention.

Mr. Waller: I offer this letter as Defendant's Exhibit No. 135.

The letter is dated 10-18-1934 and reads as follows:

"I would like to get the atttached deal approved as quickly as possible, as there is a political angle in it that might make it difficult for me.

"Paul Wilson recently sent in a deal for the Louis Rosenbaum towns of Florence, Sheffield, Tuscumbia and Athens, Alabama, and I wired you to reject the deal as some other elements had entered into the matter that I wanted to get clarified first.

"The towns of Tuscumbia and Sheffield are more or less the same situation as pictures that play in one town do not play in the other, as a general thing. The deal that was submitted was a fairly good one, considering the lateness in the season, but I would like to [fol. 2626] give you a picture of this situation.

"As you know, we have had a great deal of difficulty in getting the Sudekum Circuit set, and as a matter of fact, we do not yet have it set. This, in itself, does not amount to so much as I can replace this revenue pretty well in some of his towns where he has opposition, but Sudekum has stalled indefinitely owing to the fact that he bought Paramount product this year and actually does not need another major product, as he has a franchise with Warner and some kind of a working arrangement with R. K. O. The Sudekum situation is quite complicated, as we do not sell him in the town of Nashville (we sell Paramount) and all of the other distributors do sell him, with the exception of Paramount. It goes back quite a way and Sudekum feels that he was given a bad deal by Fox many years ago when we took our product away from him.

"I am not particularly worried about the Sudekum Circuit proper, but fifty per cent of the Rosenbaum Circuit is owned by Sudekum as well as fifty per cent of the Hill Circuit, and I am afraid if I start selling against him, he might influence Rosenbaum and Hill against us. I have not definitely had a break with him as yet, as we were working with him last week and have

a date to see him again the first of February, but he presents a big problem to me and I had just as soon sell away from him. When I held up the K-3 deal with [fol. 2627] Rosenbaum, I felt that I could force him into a deal for two additional years, and I am submitting herewith proposed franchise for K-4 and K-5 product. Comparing the total of the K-3 deal, which is $5,000.00 with the total of the K-4 and K-5 deals, which is $6,250.00, for each season, the deal for the two additional years represents a very nice increase.

"I would like to get an immediate approval of this. There is no chance of our securing percentage as he has never played pictures on percentage, and if a battle comes up with Sudekum and I can replace his revenue with the Sudekum Circuit proper, I want to be protected with Rosenbaum. We stand very well with the Hill Circuit and I do not think I would lose this business, but I do want to get this part of the circuit "in the bag." Please give me an answer on this as soon as possible.

Best wishes, H. G. Ballance, Sincerely yours."

Mr. Wright: I don't have any objection to it going in except I don't think he has got the attachment. I understand there was an attachment to it, a statement regarding the two year proposition. I think it all ought to go in if anything is going in.

Mr. Waller: I don't object to this copy. I haven't got the [fol. 2628] attachment. I am offering this as it is.

The Court: All right.

Mr. Waller: I call your Honor's attention to the following language in the letter: "When I held up the K-3 deal with Rosenbaum I felt that I could force him into a deal for two additional years, and I am submitting herewith proposed franchise for K-4 and K-5 product."

Q. Mr. Kupper, you were asked about Mr. Wobber's authority, I believe, in regard to contracts, and you stated that he could overrule you on the approval of a franchise, is that correct?

A. I said he could overrule me but he has never overruled me on an approved contract as yet.

Q. On what kind of contract?

A. Any contract that I approved. On some contracts—now, let's get this so we will all understand it. On some

contracts that I might want some further advise on I advise with higher people in my company and I would discuss it with him and maybe he would give me his opinion and it might change my mind and I might reject it, so that is the extent to which I would discuss contracts with Mr. Wobber that were submitted to me for my division. I might have an idea that I would like to accept and he might think otherwise and I might be governed by his greater wisdom and better judgment.

[fol. 2629] Q. Do I understand that you have never approved a contract and then been overruled by Mr. Wobber?

A. No.

Q. That never happened?

A. No. And I might add one more thing, on approved contracts—as a matter of fact, right today we give power to our salesmen, if they get the proper type of contract that we have outlined, that they can approve them right on the spot.

By Mr. Waller: Your Honor, with reference to the attachment on that letter, I don't know whether there was an attachment on the letter or not, or how it got on there. I am only offering the letter on Mr. Wright's statement—he wants the attachment to go along with the letter.

Mr. Wright: We certainly don't want it in there if there is any dispute about it not having been attached. That is the way the letter was given to us, with the attachment, by the company.

Mr. Waller: Well, I don't know anything about it, if the Court please.

The Court: Well, he doesn't dispute it. He just doesn't know.

By Mr. Wright: (To the Bailiff) Will you hand this letter to him from Mr. Finkler to Mr. Ballance, dated January 24, [fol. 2630] 1936, and ask him to read it. (Witness reads letter)

Q. I will ask you to compare that with this letter from Balance to Finkler, which has been identified as Defendant's Exhibit No. 135, dated January 20th, 1936, and ask you if this letter of January 24th from Mr. Finkler to Mr. Ballance is not the reply to the letter that you have in your hand there, Government's Exhibit No. ——

A. This is the same letter I just read.

Q. Yes sir, and you have also read the letter of January 24th from Mr. Finkler to Mr. Ballance?

A. That is right.

Q. Now, on comparison of the two, it is apparent to you, is it not, that the letter of January 24th from Mr. Finkler to Mr. Ballance is in reply to Mr. Ballance's letter of the 20th to Mr. Finkler?

A. That might possibly be but I would like to see the date of the other letter, of my letter to Mr. Ballance. If I can get that I can probably tell you.

Q. Your letter is dated February 11th.

A. Well, you can see, even Mr. Finkler states I was out of town. I was probably traveling around through the west coast for weeks at a time and Mr. Clarke at that time was even out. He was a pretty sick man at that time and sometime thereafter he died. As a matter of fact, at this time [fol. 2631] Mr. Clarke was almost out of the picture as far as carrying on the details of the work. Now, I answered this letter after I returned and reviewed probably both of these letters in all probability. I am not positive but I assume that.

Q. What probably happened was that Finkler first replied to the letter?

A. That is right.

Q. And then it was called to your attention when you came back and you wrote the other reply?

A. That is correct, in all probability.

Q. Now, in that letter of Finkler's referring—Mr. Clarke, what was his job then?

A. He was general salesmanager.

Q. The position that Mr. Wobber now holds?

A. Holds today, yes sir.

Q. And there is a reference in there to Mr. Clarke's instructions not to approve long term deals until he had been consulted?

A. That is right.

Q. And the practice is the same today, is it not, between you and Mr. Wobber as far as approval of franchises and long term deals is concerned?

A. Yes sir, and I think I so stated that on franchises or any important contract I would probably discuss it with the general salesmanager before I approve it.

Q. This Sudekum Circuit deal was discussed by you with Mr. Wobber?

[fol. 2632] A. I imagine it was unless the second franchise was taken at a time right after Mr. Clarke's death and Mr. Wobber could have not been familiar with the mechanics that had been going on. I might have discussed it with him at that.

Q. You refer to the second franchise made, the old one made in 1936?

A. Yes, sir.

Q. I am talking about the current one—that was unquestionably discussed with Mr. Wobber?

A. It probably was.

Q. By you?

A. By me.

Q. And the final approval of the deal rested with Mr. Wobber, is that correct?

A. I wouldn't say that. It was my inclination to accept that deal and I told Mr. Wobber I wanted it taken, so he probably said, go ahead or something to that nature. I don't know whether I went to him for a definite rejection. It was an important contract and I would naturally want to discuss it with him and if he had some objections I might have sustained his objections and gone back to Mr. Ballance and tried to clear them up.

Mr. Wright: I will ask to have the letter from Mr. Finkle to Mr. Ballance marked Government's Exhibit No. 353, the letter dated January 24th, 1936.

[fol. 2633] (Letter so filed and marked and reads as follows)

"Dear Mr. Ballance:

"I wish to acknowledge your letter of January 20th, accompanied by a proposed franchise for the Louis Rosenbaum Circuit.

"In view of Mr. Clark's strict instructions, we are not permitted to accept any long term contracts unless he personally approves them, therefore, I am afraid I will have to keep this matter in abeyance until he returns.

"Bill Kupper is also out of the city at the present time, but is expected back Monday, at which time I will take this matter up with him and if he deems advisable, he may communicate with Mr. Clark for the necessary approval.

"I am sorry that I cannot give you the quick action that you require in this instance and I hope you will appreciate my position in the matter."

Further this witness saith not.

[fol. 2634] The next witness, PAUL S. WILSON, being first duly sworn, testified on behalf of Defendants as follows:

Direct examination.

By Mr. Waller:

Q. Mr. Wilson, you have previously testified in this case under subpoena of the Government, have you not?

A. That is correct.

Q. You are branch manager for Twentieth Century Fox at Atlanta, Georgia?

A. That is correct.

Q. And have held that position for how long?

A. Since 1934.

Q. Are you familiar or were you familiar with and did you take part in the negotiation of the two franchises with the Crescent Amusement Company, namely, the current three year franchise and the former three year franchise?

A. That is right.

Q. Have you made a memorandum from your records in Atlanta in regard to the number of franchises that have been made through the Atlanta office with various exhibitors and listing those situations?

A. Yes, sir.

Q. Do you have that with you?

A. Yes, sir.

Mr. Waller: I offer that as Defendant's Exhibit No.

[fol. 2635] By the Court: What period of time does it cover?

Mr. Waller: That is 1936-1937 through 1942-1943, is that correct?

A. I think there are some in there that are before that.

Mr. Wright: The exhibit on its face doesn't purport to show when any of these franchises were made. It lists the

periods covered. I am not aware of the significance of the offer. It doesn't make any difference.

[fol. 2636] Mr. Waller: Well, it is offered for that purpose.

The Court: I take it it is offered for the purpose of showing that to make a franchise is not an unusual thing.

The Clerk: Being Defendant Exhibit 136.

Mr. Waller:

Q. How many franchises were made out of that office?

A. Well, over thirty with independent towns, and then different numbers with circuits that have more than two or three theaters.

Q. By independent accounts, what do you mean?

A. An exhibitor that has one theater in one town.

Q. Anything over that you would call a circuit?

A. Yes, sir.

Q. When the current franchise was negotiated, Mr. Wilson, did you come to Nashville in that connection?

A. Yes, sir.

Q. With whom did you negotiate the Crescent franchise, I mean the franchise with the Crescent Amusement Company?

A. With Mr. Sudekum.

Q. Was Mr. Stengel present?

A. Mr. Stengel was present; yes sir.

[fol. 2637] Q. And did you also negotiate a franchise with the Rockwood Amusement Company and its affiliates?

A. Yes, sir.

Q. With whom did you negotiate that franchise or franchises?

A. With Mr. Stengel.

Q. With Mr. Stengel?

A. Yes, sir.

Q. Was Mr. Sudekum present?

A. He was present at the general discussion, but the working out of the terms was separate and distinct.

Q. Are you familiar with the location of Mr. Stengel's office?

A. Yes, sir.

Q. Where is it with respect to Mr. Sudekum's office?

A. It is on the upper floor.

Q. Now, in what office did you work out the terms for the Rockwood towns?

A. Well, let me explain it this way?

Q. Yes?

A. That in the towns that were previously included in the previous franchise we agreed on the percentage of increase on those particular towns for the first year of the new franchise.

[fol. 2638] Q. Now, how many of those towns were there?

A. I don't know offhand; they are all listed in a memorandum that I made.

Q. Well, go ahead, and then I will show you the memorandum.

A. And then, after that was handled, I had to go on to Memphis. I returned the following week, and worked out with Mr. Stengel individual deals for individual towns that had not been included in the previous franchise.

Q. Now then, I will show you a three-page typewritten document, apparently a carbon copy, dated June 27, 1939, Nashville, Tennessee, filed as Government Exhibit No. 286 and ask you if you prepared that document?

A. Yes, sir, I prepared it.

Q. Under what circumstances, and for what purpose?

A. Well, it was simply a memorandum from which I was to make up deal sheets when I returned to Atlanta, because I didn't have a supply of deal sheets with me to make up the individual deal on each situation, and a tabulation of the different percentages of increase in that first year had to be figured out, and, rather than to stay in Nashville and having a supply of deal sheets sent up here, I preferred to make this memorandum for my own use to prepare them when I got back to Atlanta.

[fol. 2639] Q. Do you know how many duplicates you made of that memorandum?

A. The original and four copies.

Q. What was done with the various counterparts, do you recall?

A. One copy was given to Mr. Sudekum, one to Mr. Stengel, and I believe I took two back to Atlanta with me.

Q. Now, you will notice that the copy you have in your hand is signed on the last page?

A. Yes, sir.

Q. How is that signed?

A. Crescent Amusement Company, By Tony Sudekum.

Q. How were the others signed, if they were signed?

A. I believe the other one was signed By Mr. Stengel, and I in turn signed the two that were left with Mr. Sudekum and Mr. Stengel.

Mr. Wright: I think the memorandum itself would be the best evidence, unless it is lost and cannot be located.

Mr. Waller:

Q. Do you know where that document came from that you have in your hand?

A. I am sure it came out of our files.

Q. It was turned over to the Government out of your files?

[fol. 2640] A. Yes, sir.

Q. Do you know where the other copies are?

A. I imagine Mr. Sudekum and Mr. Stengel have them.

Q. Did you have more than one of them that was signed by anybody?

A. I believe I had two copies. Now, I may have another copy in Atlanta; I will have to check my records to be sure.

Q. In any event, do you recall that there was one signed by Mr. Sudekum and one by Mr. Stengel?

A. As well as I remember, yes, sir.

Q. Now, what was the purpose of having the two counterparts signed by the two different individuals?

A. Because the negotiations were entirely separate; first of all, we agreed first——

Mr. Wright: Just a minute, if the Court please. That is a pure conclusion.

The Court: Sustained.

Mr. Waller: I don't understand the grounds of the objection. I was trying to show that——

The Court: It is a conclusion of the witness. He can state [fol. 2641] the facts.

Mr. Waller:

Q. Well, state the facts; state what was done with regard to the negotiations and in regard to the preparation of the document and the design of the document.

A. I don't quite understand the question, Mr. Waller.

Q. After you prepared this document, did you submit it separately to Mr. Sudekum and to Mr. Stengel, and if so, why?

A. Well, again: First, in the matter of the towns that were specified with a percentage increase over the first year; they were separated first in the agreement; they were all agreed to; then the following week I worked out the individual deals with Mr. Stengel with the individual towns as they are listed on the three pages.

Q. Now, why did you include the Crescent towns and the Rockwood towns and the Rosenbaum towns in the same memorandum?

A. Because it was just simply a memorandum for me to use to prepare contracts or deal sheets that were to be different parts of the franchises.

Q. Where did you prepare the memorandum?

A. In an office right off of Mr. Stengel's office. I typed this memorandum myself.

[fol. 2642] Q. Now, were the actual agreements as executed by the parties subsequently prepared and executed?

A. Yes, sir.

Q. Mr. Wilson, is Gadsden, Alabama in your territory?

A. Yes, sir.

Q. What was the first agreement or deal between Fox and the Dixie Theater in East Gadsden?

A. The first deal was in——

Mr. Wright: The contract is in evidence, I believe.

Mr. Waller: What is the number?

Mr. Wright: I didn't get the number of it.

Mr. Waller:

Q. Well, then, to refresh your recollection, was it dated October 17, 1939, a very short while after the theater opened?

A. Yes.

Q. Who was the manager at that time?

A. When the house first opened, Jack Crawford.

Q. Did the Dixie Theater play off the pictures pursuant to that contract?

Mr. Wright: Now, if the Court please, this contract they [fol. 2643] are talking about here now isn't in evidence. We didn't offer any contract that Crawford made. I don't know what the purpose of this testimony is or what the competency of this witness is to testify about this contract, when we even haven't had a contract identified here and offered it——

Mr. Waller: I misunderstood you, Mr. Wright; I thought you said the contract was in evidence.

Mr. Wright: I thought he was referring to the one put in by Currey, I believe.

Mr. Waller:

Q. Mr. Wilson, do you have here with you a contract that was made with the Dixie Theater at the time Mr. Crawford was manager?

A. Mr. Johnson has it.

The Court:

Q. Was Mr. Rosenbaum present at the time you made this deal and prepared your memorandum there of three pages of typewritten matter?

A. Yes, sir—Not at the time the memorandum was prepared but at the time we agreed on the percentage of in-[fol. 2644] crease for each town.

Q. All right.

Mr. Waller:

Q. Now, do you have that contract, Mr. Wilson?

A. Yes, sir.

Q. Can you detach it from the folder you have it in?

A. Yes, sir. (Produces it).

Mr. Waller: I offer that contract in evidence as Exhibit F, whatever the number is.

The Court: All right; let it be marked.

The Clerk: F.15.

Mr. Waller:

Q. That contract was for your 1939-40 product, was it not?

A. Yes, sir.

The Court: 19—what, Mr. Waller?

Mr. Waller:

Q. 1939-40 product, dated October 17, 1939?

A. That is right.

Q. Second run; is that correct?

A. That is right.

[fol. 2645] Q. The arrangement being second run, Gadsden, Alabama, is available following first run at Princess Theater at Gadsden, Alabama, and 90 days in between the words "available" and "following"?

A. That is right.

Q. Did the Dixie Theater comply with that contract to play off the pictures?

A. No, sir.

Q. None of them?

A. No pictures; none whatever.

Q. And consequently, after Mr. Currey became manager did you make a new deal with him with the same theater?

A. Yes, sir; that was some time later.

Q. I take it the contract will speak for itself; but do you you recall whether if was in the summer of 1940?

A. Yes, sir, along somewhere between May—No, it was along in June or July.

Q. Is it anything unusual for theater pictures to be played after ninety days after release date?

A. No, sir. We couldn't possibly serve all the accounts only at the then 90 days release date.

Q. About how many prints of pictures do you have, on pictures you have in your exchange?

A. Thirteen prints.

[fol. 2646] Q. The others other than the best, how do they vary?

A. They vary from 6 to 8.

Q. Now, with 13 prints for the best pictures, approximately how many situations must be served?

A. We have 695 accounts with whom we are supposed to do business.

[fol. 2647] Q. Have you prepared a memorandum covering the play dates as compared with the release dates of four of your recent top-notch pictures for the purpose of showing the situation with reference to these pictures played?

A. Yes, sir.

Q. Played more than ninety days after release?

A. Yes, sir.

Q. Do you have that with you?

A. Yes, sir.

Q. Did you prepare that from your records in your Atlanta office?

A. Yes, sir.

Q. Will you produce that memorandum?

A. Yes, sir.

Mr. Waller: I offer that in evidence as defendants' general exhibit.

The Clerk: 137.

Mr. Wright: What issue is this supposed to be relevant to?

Mr. Waller: To show the fact that the Dixie Theatre in East Gadsden and other theatres play pictures more than [fol. 2648] ninety days after release date, the theatre is not being treated as badly as the Government contends.

The Court: Some second runs.

Mr. Waller: Yes, sir, and some of the first runs playing before and I understand that is second and third.

Mr. Wright: There is no contention whatever that the Dixie is being treated badly, because it is played behind East Gadsden, the only thing is holding the Dixie with East Gadsden, not because an inferior theatre, but behind the Crescent in Alabama City, this has nothing whatsoever to do with the question.

Mr. Waller: This shows that a number of first run theatres play pictures, they play first run more than ninety days after release, and I understood the Government contended there was something in that was bad for East Gadsden on the ground that it was a fourth run.

Mr. Wright: This tabulation is of no value for the purposes that it is offered, whether a picture is played a hundred and twenty days after, that may depend on when it was bought.

[fol. 2649] The Court: Yes, sir, that is a question of argument going to the weight of the evidence, isn't it, Mr. Wright?

Mr. Wright: It is a little more than that, I do not see how it is material at all, when the Woodland theatre in Nashville played a picture with reference to national release date, the only notice is with reference to a playing of a particular picture with reference to National Release date, it may have been played within ten days or may be a hundred days from release date, and it is not different as to whether it played one time or another. There — a number of factors that might determine that.

The Court: No, as far as the Gadsden situation with reference to when they play the pictures, with reference to release date, but that they were required to play behind Alabama City, regardless of release date.

Mr. Waller: Your Honor please, I would like to offer this in evidence.

The Court: All right, let it be introduced.

[fol. 2650] The Clerk: Defendants' exhibit 137.

Mr. Waller:

Q. Now, Mr. Wilson, are a number of these situations first run?

Mr. Wright: Do I understand the objection is overruled?

The Court: Yes, sir, I do not see that it is very material.

Mr. Wright: Neither do I.

The Court: I will sort the sheep from the goats in the final run.

Mr. Waller:

Q. Did you answer the last question I asked you, if a number of these situations were first run situations?

A. Yes, sir.

Q. You also have a number of others?

A. Yes, sir, in Nashville.

Q. Treatres operated by Crescent Amusement Company?

A. Yes, sir.

Q. Does Fox sell Crescent second run in Nashville?

A. Yes, sir.

[fol. 2651] Q. Do you have any time limit between the playing of a first run picture and a second run?

A. Sixty days.

Q. Why do you insist on that?

A. It is a matter of not having the second run house play pictures so close to your first run.

Q. Why?

A. To protect our revenue on the first run.

Q. You were asked a question by His Honor with reference to that three page typewritten memorandum; state whether or not the Crescent deal was negotiated downstairs in Mr. Sudekum's office, and the other one upstairs in Mr. Stengel's office?

Mr. Wright: Oh; if the Court please.

The Court: He has already stated that, that the Crescent deal was negotiated in Mr. Sudekum's office and with Mr. Sudekum and Mr. Stengel present, and at the time the deal on Rockwood was agreed upon at a later time that Mr. Stengel worked out the details with him in Mr. Stengel's office, as I recall.

Mr. Waller:

[fol. 2652] A. Is that correct?

A. Yes, sir.

Q. How many Rockwood towns were there in that old franchise? Were there just two, Tracy City and Rockwood?

A. Yes, sir.

Q. They were the only two, Rockood towns?

A. Yes, sir.

Q. Were they at that time?

A. Yes, sir.

Cross-examination.

By Mr. Mitchell:

Q. Mr. Wilson, at the time of this 1939 negotiation of this franchise, why was Mr. Rosenbaum in Nashville, was he there at your request?

A. I called him and asked him to come up.

Q. To meet you there for the purpose of discussing franchise for his company?

A. Yes, sir, and helping me again to make a franchise for Cresent Amusement Company, because he had been very helpful on the previous date.

Q. What do you mean by helpful, his friendship?

A. Yes, sir.

Q. Was it a tedious negotiation?

[fol. 2653] A. Very.

Q. Difficult?

A. Yes, sir, very difficult.

Q. Did you work a whole time, a whole day, without making any headway, without coming to any terms with Mr. Sudekum?

A. The first day, yes, sir.

Q. The whole first day?

A. Yes, sir.

Q. At the end of that day from your standpoint was the trade broken, the deal was fallen down?

A. I could see no possible chance of making a deal.

Q. That night at dinner did you in Nashville find Mr. Rosenbaum here and his family in Kleeman's restaurant?

A. Yes, sir.

Q. Did you and he discuss the matter then?

A. Yes, sir, at considerable length and after dinner he asked me if I would come up to his hotel room and talk about the matter and to pick up some loose ends.

Q. He encouraged you to continue the negotiations?

A. Sir?

Q. He encouraged you to continue the negotiations?

A. Yes, sir.

Q. Was he in the Crescent building the next morning when you went back up there for a further talk?

[fol. 2654] A. Yes, sir.

Q. After you and Rosenbaum came to terms during that session, could you come to terms during that session here in Nashville?

A. Yes, sir.

Q. Rosenbaum left town and went back to Florence, Alabama before you had completed with Sudekum?

A. Yes, sir, we had completed so far as Rosenbaum was concerned.

Q. You were completed with Rosenbaum?

A. Yes, sir.

Q. And he went on back?

A. Yes, sir.

Q. And at the time he left, he left you there still negotiating with Sudekum and Stengel?

A. Yes, sir.

Q. Rosenbaum was not even in Nashville, when you wrote up this memorandum with the three theatres on it?

A. No, sir.

Q. Those were the items, these three items, Musele Shoals, Rockwood and Crescent all on one piece of paper, did not mean he was there at the time you wrote that, that they were one deal?

Mr. Wright: Your Honor please, that is objectionable, it is argument, he has gone into details of how the paper was [fol. 2655] prepared, but it is for the Court to say what it means.

(Question read.)

Mr. Wright: It is purely leading.

The Court: I guess he is cross-examining him.

Mr. Mitchell: I am cross-examining him.

The Court: Well, overrule the objection.

Mr. Mitchell:

Q. Did you understand the question?

A. No, sir.

Q. Did you after you typed that three items there, one for Crescent, one for Muscle Shoals and one for Rockwood, on one piece of paper, did that mean to you they were one deal, or were they wholly separate deals?

A. They were wholly separate, because I had agreed with Mr. Rosenbaum on all the records to be used for the first year of the franchise.

Q. The items on there were for your convenience when you got back to Atlanta?

A. Yes, sir.

[fol. 2656] Q. You did not present that to him?

A. No, sir.

Q. You didn't ask Sudekum to sign it?

A. No, sir.

Mr. Waller:

Q. I asked you if Rockwood only had two towns, Rockwood and Tracy City, you said there were only the two cities, I will ask you if there were any other towns other than Rockwood and Tracy were mentioned downstairs in Mr. Sudekum's office?

A. No, sir, the negotiations were carried on upstairs.

Q. In other words all other towns were covered upstairs?

A. As a matter of fact they were covered a week later when I ran over to Memphis.

[fol. 2657] Cross-examination.

By Mr. Wright: For the Government:

Q. Do you know when these franchises that were listed here on Defendant's Exhibit No. 136 were negotiated?

A. No sir. It has my initials though on it.

Q. Well, those which started with the 1936-37 season were negotiated not later than 1936, that is correct, isn't it?

A. Yes, sir.

Q. Those that started with the 1937-38 season were negotiated not later than 1937?

A. So far as I remember, I would say so, yes sir.

Q. Now, may I have that letter of Mr. Wilson's to Mr. Kupper that was identified here a few minutes ago. Well,

while he is looking for that, I will ask you, Mr. Wilson, to look at the franchises in this tabulation. And you note that there are very few of those that were negotiated, beginning with the 1938-39 season, is that right?

A. Most of them included the 1938-39 season.

Q. Yes, I know, but I say, there were very few of those which were negotiated in 1938, is that right?

A. That is right.

Q. Did you receive any instructions in October, 1938 with reference to the negotiations of franchises?

A. Not that I recall.

[fol. 2658] Mr. Waller: I haven't objected to this line of inquiries but I am going to object to it now as immaterial.

Mr. Wright: He offered the tabulation of the franchises and they are here.

The Court: Overrule the objection.

Mr. Wright:

Q. I will hand you this Government Exhibit No. 351, a copy of a letter from you to Mr. Kupper, dated July 13, 1939, and ask you to read it and state if you wrote that letter on that date?

A. I don't remember the letter but if it is a copy of a letter I wrote to Mr. Kupper, then I wrote it. My initials are on the bottom of it. It is a copy, it isn't the original.

Q. Yes, that was produced by Counsel for Fox. You have no reason to believe that is not a correct copy of the letter you wrote?

A. No sir, I have no reason to believe it, no sir.

Q. Now, I will ask you to look at the paragraph there which refers to instructions received by you with respect to not selling franchises. See if that helps you to recall who gave you those instructions?

A. I don't see anything in here, Mr. Wright, in regard to instructions in regard to franchises.

[fol. 2659] Q. Read the second paragraph?

A. I don't remember those instructions.

Q. Do you remember where they came from?

A. No sir.

Q. Your memory was better at that time you wrote the letter than it is now, wasn't it?

A. Evidently there is another letter somewhere about it. If there is such a letter, or if there were such instructions issued.

Q. Well, reading that letter which you wrote at that time, you know that there were some instructions that you got with reference to not selling franchises, isn't that a fact?

A. From that second paragraph, there must have been. Now, who issued them, I don't know.

Mr. Wright: May I have the memorandum of the agreement that was made, which I think is Government's Exhibit 281, isn't it, signed by Mr. Sudekum?

The Court: No. 286.

Mr. Wright: I have it; No. 286.

Q. Now, when you prepared this memorandum, you stated that you made an original and how many copies?

A. An original and either two or three copies, I don't know which.

Q. What was done with the original?

A. I believe it was given to Mr. Sudekum or Mr. Stengel.

[fol. 2660] Q. That was signed by you?

A. Yes, sir.

Q. What was done with that copy?

A. One copy was then given to either Mr. Sudekum or Mr. Stengel and I took either one or two copies back to Atlanta with me.

Q. At any rate, you took this one back that Mr. Sudekum signed?

A. Yes, sir.

Q. At the time this was produced, there was a search made, was there not, to see whether there was another copy there signed by anybody else?

A. Not in our office, to my knowledge.

Q. If another one had been signed and brought back to Atlanta by with this one, they both would have been put in the same place, wouldn't they?

A. Yes, sir.

Q. Kept together?

A. Or, might have been filed right in the franchise file, I don't know whether—Or, if might have been destroyed after we finished making up the contract.

Q. There wouldn't be any occasion for you to destroy one and not the other, would there?

A. Not necessarily, no sir. It is just a possibility.

Q. You don't have any recollection now, as to whether the original was signed by Stengel or not?

[fol. 2661] A. No sir, I do not.

Q. And you say you did not deliver a copy of this, or you didn't have Mr. Rosenbaum sign a copy of this, either, is that right?

A. That is right.

Q. The reason that you and Mr. Sudekum exchanged the signed memorandum at the time this was prepared and given to you, was so that you would each have evidence as to what the deal was, which was reflected there, was it not?

A. What do you mean by a side memorandum?

The Court: He said, "Signed" memorandum.

A. Oh, signed. Just confirmation of the meeting of the minds on the deal.

Q. That is why you confirmed the deal that was made, you confirmed the deal to him and he confirmed it to you?

A. I didn't confirm the deal, that was just a memorandum for me to prepare the contract. I had no right to approve a contract.

Q. At any rate, you signed a copy of it and gave it to them to show that this was your agreement and your version of what the deal was, as well as his, isn't that right?

A. I wouldn't like to say. He would naturally want to have a copy of the terms.

The Court: If they were just memoranda for your personal use to prepare the deal sheets, later, why was it neces-

[fol. 2662] sary for either one of you to sign them?

A. Well, I don't know. It has just been a practice that we have always had when we made up a memorandum of a deal to have the contract made up at a later date, that we would each sign the copy that the other party took.

The Court: All right.

[fol. 2663] By Mr. Wright:

Q. I will show you copy of letter dated September 5th, 1939 from you to Mr. Jack Bloom of the Fox Film Company in New York, and ask you if you wrote that letter on that date.

A. That is right.

Q. Now, I would like to have that marked Government's Exhibit No. 354.

(Letter so marked.)

Q. The letter that I just handed you refers to the franchise and deal sheets that were made up from the memorandum identified as Government's Exhibit No. 286, is that right?

A. That is right.

Q. Then it was not until sometime in 1940, was it, that separate franchises were prepared for the Crescent Amusement Company, Rockwood Companies and the Muscle Shoals Theatres, is that correct?

A. No. They were prepared as soon as the deal sheets went in as separate franchise agreements.

Q. I misunderstood you with respect to this letter. I will read this letter. I will offer this in evidence.

Mr. Mitchell: I object to the introduction, may it please the Court, because it is irrelevant, immaterial and incompetent.

The Court: All right, let's see the letter; Rosenbaum objects.

(Letter handed to the Court.)

[fol. 2664] Mr. Mitchell: My theory is that the letter couldn't be evidence of anything. If the witness knows anything, he can recite it from the witness stand. It is not offered as impeachment because it doesn't impeach.

The Court: Let me see what the letter says first.

(Court continues reading letter.)

What does this relate to, Mr. Wright?

Mr. Wright: Well, I had asked him if that letter referred to the franchise that was made up on the date of the memorandum that was identified as Government's Exhibit No. 286. It is my understanding that the terms that are incorporated in the memorandum were then placed in one franchise. Now, they finally turn up, finally executed as three different franchises for reasons which we expect to develop.

The Court: I don't see how that reflects on that in any way.

Mr. Mitchell: It is certainly true, may it please the Court, that Muscle Shoals didn't write the letter and Sudekum didn't write the letter. It wouldn't be binding on them from any standpoint. Paul Wilson wrote the letter. It is not interested because he is here swearing. If he tes- [fol. 2665] tifies contrary to the terms of the letter the letter might possibly be used to impeach him but on the present showing it is not relevant.

By the Court:

Q. What is the D-46 you refer to?

A. That is a recap that we make to the company on every contract, into the home office. It is a regular form that we use. It is an inter-office form.

By the Court: I see that this just says that on account of the fact that Sudekum's office is working on the lawsuit that they have been unable to get the deal sheets signed and asking Mr. Bloom if he prefers to—wanted to go ahead and make up recaps now or wait until they are signed.

Mr. Wright: It refers though, if the Court please, to "the franchise"; not two franchises or three franchises but "the franchise."

The Court: I don't know whether he is talking about Mr. Sudekum's franchise or Mr. Rosenbaum's franchise or Rockwood's franchise. You might ask him what he refers to.

Mr. Wright: I asked him if he referred to the franchise deal that was contained in the memorandum which was identified as Government's exhibit No. 286 and he said it did.

[fol. 2666] By the Court:

Q. Is that right?

A. No, that is not—I mean it doesn't include all the towns, because there were three franchises made then and there; one was sent Mr. Rosenbaum, one went to Mr. Sudekum and one went to Stengel.

Q. Which one did you refer to when you wrote that letter?

A. I would imagine—I can't answer that for sure, but I would imagine it would be the one that went to the Crescent Amusement Company.

By Mr. Wright:

Q. Now, just a minute. This letter was written on September 5, 1939 and it is a fact, is it not, that one franchise had been prepared for all of the situations that are listed on your memorandum marked as Government's Exhibit No. 286?

A. Positively not.

Q. You are absolutely sure of that?

A. I am absolutely sure and positive.

Q. You are sure that on September 5th, 1939 three separate franchises had been prepared, is that right?

A. Yes sir.

Q. One for Rockwood, one for Crescent and one for Muscle Shoals?

A. Yes sir.

The Court: I overrule the objection. Let it go in for what it is worth on that point.

[fol. 2667] By Mr. Wright:

Q. Now, I will show you, Mr. Wilson, a copy of a letter written by Mr. Kermit Stengel to you, dated May 30, 1940, and ask you if you received that letter, the original of that letter on or about that date?

A. I imagine I received it. Now, what Mr. Stengel referred to, I don't know.

Mr. Wright: I would like to have that marked as Government's Exhibit No. 355.

(Letter so filed and marked.)

I will offer this letter in evidence.

Mr. Mitchell: It doesn't refer to Muscle Shoals but we object to it as hearsay and secondary evidence.

The Court: If it doesn't refer to Muscle Shoals what are you objecting for?

Mr. Mitchell: Because the Government might undertake to show it relates to Muscle Shoals.

The letter is as follows:

"Mr. Paul Wilson, Twentieth Century-Fox Film Corporation, Atlanta, Georgia.

DEAR PAUL:

[fol. 2668] "I am returning herewith, three copies of the franchise which you sent me. I have retained one

copy for my use, inasmuch as there appear to be a number of changes necessary. I also believe, because of present conditions, that two separate franchises should be executed.

"I am also enclosing herewith, two copies of comment with regard to the franchise as it is now written. I believe that you will concur with the contents of this memorandum.

"With best wishes and kindest personal regards, we are

Yours very truly, Rockwood Amusements, Inc.,
By Kermit C. Stengel.

KCS:cs. encl.

P. S. I can keep the deal sheets which are now in the copy of the franchise which I hold or I can mail them on to you. Please advise.

KCS."

[fol. 2669] Mr. Wright:

Q. In the meantime I show you two letters dated October 3rd, 1939, one from you to George Landis, Branch Manager at Indianapolis, and the other from you to Tom Young at Memphis, and ask you if you wrote those letters on the date they bear?

A. Yes sir.

Q. And I will show you letter dated October 11, 1939 from you to Mr. Landis and ask you if you wrote that letter on that date?

A. Yes sir.

[fol. 2670] Mr. Wright: I will ask that the letter be marked with the next exhibit number.

The Court: All right; let them be marked. The objection of counsel of Mr. Rosenbaum to No. 355 is overruled.

Mr. Wright:

Q. Of course, the first paragraph of this letter, about three copies of the franchise which you sent us," that franchise that you sent to Mr. Stengel was the franchise which included both the Rockwood and the Crescent situations, were they not?

A. What was the date of that letter, Mr. Wright?

Q. May 30, 1940.

A. I am sure the deal sheets and the legal document were separate, the same as they always were intended to be——

The Court: He isn't asking you about deal sheets or legal documents; he asked you if the three copies of that franchise that are referred to in that letter, were not, in fact, one franchise which included the franchise with Rockwood and the Crescent?

A. I will say I don't believe so.

Mr. Wright:

[fol. 2671] Q. I will call your attention to the statement which follows immediately after: "I also believe that because of present conditions two separate franchises should be executed." Does that help you?

A. Do I refer to what theater company?—May I see the letter. (Letter handed witness.) Really, Mr. Wright, I don't know whether that refers to Crescent or Cherokee, or what it would cover.

Q. Well, you finally prepared two separate franchises after that letter was received, one for Crescent and one for Rockwood, isn't that right?

A. Now, wait a minute: there were three franchises prepared originally; that was the agreement.

Q. Originally, yes, and one for Muscle Shoals; but that letter there refers, does it not, to splitting the franchise which you sent Mr. Stengel into two franchises—one for Rockwood and one for Crescent?

A. Now, I don't know what it refers to, because there is no——

The Court:

Q. Don't you know what you signed?

A. I sent the franchise up to be signed.

Q. Was that the franchise you sent him?

A. Yes, sir.

[fol. 2672] Q. Well, don't you know what you signed?

A. I say, your Honor, I don't know whether it was just for the Crescent towns or just for the Rockwood towns.

Q. I am asking you; don't you know?

A. No, sir, I do not.

Mr. Wright:

Q. As a matter of fact, it included both Rockwood and Crescent towns, didn't it?

A. I can't tell you, Mr. Wright; I would say, off handedly, no.

Q. Well, may be these other letters that you identified will help you on that score. Have you got those marked?—Do you have any idea what Stengel was referring to when he referred to present conditions?

A. No, sir; you will have to ask Mr. Stengel on that; I don't know.

Q. You were aware of the fact, were you not, at the time you wrote that letter, that there was a lawsuit pending, that this lawsuit was pending?

A. Yes, sir.

Q. Now, this letter you wrote on October 3rd to Mr. Landies, October 3, 1939, which has been identified as Government Exhibit No. 356, says: "Dear George;" By the way, Landis was the Manager of the Fox Exchange at [fol. 2673] Indianapolis?

A. Yes, sir.

Q. (Reading:) "While in Nashville last week working out the matter regarding clearance on the Sudekum circuit, they requested the following service," etc. Now, by "Sudekum Circuit" you referred not only to the Crescent Amusement Company but to the Rockwood Company and all of its affiliates, did you not?

A. May I see the letter, Mr. Wright?

Q. Yes, indeed. (Letter handed the witness.)

A. The towns listed in this letter are towns both of Crescent and Rockwood.

Q. And when you referred to the deal with the Sudekum circuit you were referring to the other deal with both Rockwod and Crescent towns, is that right?

A. Yes, sir.

Q. And that deal you are referring to was the deal for the franchise deal which was finally incorporated in separate agreements for Rockwod and Crescent, isn't that right?

A. Well, the deals I am referring to are the deals for the franchise, yes, sir.

Q. In the letter you wrote on the same date to Mr. Young, you say, "While in Nashville last week working out the matter of clearance on the Sudekum circuit, they requested

[fol. 2674] the following clearance and situations by your office that I would furnish you. Advise me if this is satisfactory and acceptable to you". The deal you are referring to there is for the Rockwood and Crescent towns, isn't that right?

A. Yes, sir, the same condition as in Indianapolis.

Q. That is the letter that refers to clearances for both Rockwood and Crescent towns?

A. Yes, sir.

The Court: All right; we will take a short recess at this time.

(Recess.)

Resumption after Recess:

Mr. Waller: If the Court please, in regard to the correspondence about the franchise, the facts are and we will be glad to stipulate, that the franchise which was received by Mr. Stengel covered both the Crescent and the Rockwood towns, and he requested that they be separated into two franchises. I think the witness is honestly mistaken about it; and I will be glad to make that stipulation.

The Court: All right; let it be so stipulated.

[fol. 2675] Mr. Wright: May I have the other tabulation that was identified by Mr. Wilson? (Handed him by the Clerk).

Q. This tabulation which you prepared, which has been identified as Defendants Exhibit No. 137, shows the dates when certain pictures were played in certain theatres. Will you tell me what the basis of selection of the data that is shown here was?

A. I just took four or five pictures and ran down from the booking book the dates that the pictures played in those towns on the basis of 90 days after release.

Q. You just took this information off the booking book which was in the office there?

A. Yes, sir.

Q. You don't know why any of the pictures that are shown here played on the particular date that they did play, as distinguished from some other date, do you?

A. Well, excepting that that was the date that they were booked.

Q. Yes, but the reason for their playing at this time instead of at some other time, is something you don't know anything about; is that right?

A. No, sir.

Mr. Wright: I move to strike the exhibit No. 137 from [fol. 2676] the record.

The Court: I don't think it sheds any light on the subject.

Mr. Raftery: May it please the Court, if it is going to be stricken, I want to reserve the right of offering evidence of that character, but there will be a different method of putting in in.

The Court: All right.

Mr. Wright:

Q. Do you know why this contract wasn't performed?

A. No, sir, I do not.

Mr. Wright: I move to strike Mr. Wilson's testimony about the performance of the contract.

The Court: Overruled.

Mr. Wright:

Q. Mr. Wilson, in the course of negotiating franchises, there was some—or, after the deal, after the real terms of the deal were agreed upon in the summer of 1939, you had some negotiations with reference to the possible inclusion of a repeat run clause in the franchise, did you not?

[fol. 2677] A. No, sir; that was all as part of the original deal.

Q. Well, can you—And that reference to the last paragraph of this memorandum, dated June 27, 1939——

The Court: Just a minute, Mr. Wright: In connection with your motion to strike that contract:

Q. (To witness) You said you didn't know why no pictures were being played under the contract; were any pictures ever booked by the exhibitor under that contract?

A. They were booked by the exhibitor and then cancelled.

Q. All right.

Mr. Wright:

Q. Do you know why they were cancelled?

A. No, sir, I do not.

The Court: Well, were they cancelled by the Twentieth Century Fox?

A. No, sir, they were cancelled by the exhibitor.

The Court: All right.

Mr. Wright: Q. Well, how do you know they were can-
[fol. 2678] celled by the exhibitor?

A. They were dated in and cancelled. We had no reason to cancel them.

[fol. 2679] Mr. Wright:

Q. You had—these negotiations with reference to the cancellation were carried on with you, were they not?

A. Cancellation of the dates?

Q. Yes?

A. They came into our office.

Q. You do not know whether the exhibitor cancelled because you would not serve those pictures in accordance with that contract or not, do you?

A. I assure you that was not the reason, because I then had the matter in our office.

Q. Well if you don't know the reason, you can just say you do not know?

A. I don't know it.

Mr. Waller: Will Government Counsel stipulate that Jack Crawford was subpoened as a witness and was released and sent home without being put on the stand?

Mr. Wright: Will you stipulate that Mr. Sudekum bought him an automobile just a few months before this?

Mr. Armistead: We will stipulate he let him have a hun-
[fol. 2680] dred dollars, and he bought one, he did not pay for it and they had a warrant out for him.

Mr. Wright: I will stipulate he was of no value to us as a witness.

The Court: All right, I assume that or you would have put him on.

Mr. Wright:

Q. Now this deal you are referring to for repeat runs, that which is circled in red here in the memorandum of June 27, 1939, Government's exhibit 286, which reads as follows:

"Terms for repeat runs are to be paid in addition to fifty percent of the first run, except in a case where the

fifty percent would not represent a film rental equal to the lowest allocation of any payments, the lowest allocation allocated to any picture, from the lower allocation."

That is what you are referring to?

A. All of the legal phraseology of the franchise was prepared by Mr. Ballance, he wouldn't accept that clause, and we inserted in lieu of that additional features in which he wanted to make of the contract, the franchise.

Q. In other words, no repeat clause ever got into the final [fol. 2681] franchise, is that right?

A. Yes, sir.

Q. Can you show me where that is in the final franchise?

A. Yes, sir. (Document passed to the witness.) Under section eight, on page nine.

Q. I would like to read the clause.

The Court: All right.

Mr. Wright:

"In any towns in which only one theatre operates regularly for a definite second run is not sold, the exhibitors may play off any feature picture the repeat run, but will pay therefor a license fee of fifty per cent of the original license term, and which license fee shall in no event be less than the price set forth in the lowest allocation, the exhibitors agreeing, however, that they will notify the distributor within thirty days of the last day of the first run exhibition, of their intention to put in picture as a repeat run, and further agree that they will submit exhibition dates for the showing of the picture within sixty days of the last exhibition of the first run picture on the repeat run, the exhibitors may, however, eliminate a picture from the lowest classifica- [fol. 2682] tion. It is further understood and agreed that if during the term of this franchise, a competitive theatre operates in any village, city or town listed on the attached deal sheet, they shall have a definite schedule, and the exhibitors shall not have the right to exhibit any feature motion pictures as a repeat run."

Now there is no——

The Court: Does that say where a second run is made to an opposition theatre, that the Crescent shall not have the right to have a repeat run?

Mr. Wright: No, that refers to the Franchise. I might say Your Honor, in a number of situations, a definite second run, as well as a first run, is sold to Crescent. This last paragraph here refers to those situations where only one run is sold to Crescent, with the privilege of repeating, and it says with respect to those situations:

> "It is further understood and agreed that if during the term of this franchise a competitive theatre operates in any village, city or town listed on the attached deal sheet, or (where a definite second run is not sold) [fol. 2683] that is in situations not Crescent, the exhibitor shall not have the right to exhibit any feature motion pictures as a repeat run."

Q. The last qualification provided in this does not appear in the deal that was evidenced by the agreement or memorandum of June 27, 1939; do you know it happened to be put in there?

A. Mr. Wright, I will say this, the memorandum of June 27th was a memorandum for me to make up the contract and give that information to Mr. Ballance, for Mr. Ballance might demand that the additional clause be added.

Q. Are you sure that it was not the legal department that demanded it?

Mr. Waller: That is objected to, Your Honor.

The Court: Overruleed, see what he knows about it.

A. No, sir, I really do not know how it all came about.

Mr. Wright:

Q. Well I will show you this letter of November 22, 1939, from you to Mr. Stengel, and ask you if that is a copy of a letter you wrote to him on that date? (Passed to the witness.)

A. Yes, sir.

[fol. 2684] Mr. Wright: I will ask to have this marked as the next Government exhibit.

The Clerk: Government's exhibit No. 359.

Mr. Wright: That exhibit number 359 recalls to your mind the fact that negotiations were then going on with respect to a repeat run clause, does it not?

A. No, sir, as I read the letter, it was with reference to clearance.

Mr. Waller: You offer it in evidence?

Mr. Wright: Yes.

This letter identified as Government's exhibit number 359, this is in the first paragraph:

> "Dear Kermit: This will acknowledge your letter of November 9 to which you attached a letter from Mr. Armistead relative to the clearance clause and repeat-run clause which you want to insert in the franchise. I am answering both of these questions separately.

And then the balance of the letter is devoted entirely to a [fol. 2685] discussion of clearance, and is as follows:

> "As I advised you during our telephone conversation, our attorney from New York was in Atlanta a few weeks ago to secure information to guide him in preparing our defense on the government suit. Upon his return to New York he discussed the matter with our legal department and with Mr. Kupper, and Mr. Kupper wired me, which telegram I read to you over the phone, to the effect that the clearance can not be changed or made any different from what it was in the previous year.
>
> "Then upon receipt of Mr. Armistead's letter yesterday I discussed the matter at length with Mr. Ballance, who stated that it would not be advisable to change any clearance clause in view of the instructions given us which are as follows: Under no circumstances is clearance to be changed from that granted previously. You can readily understand that changing these clauses would only mean our continuously defending lawsuits unnecessarily because any clearance that worked out satisfactorily previously should not necessitate any change.
>
> "During the term of the past deal, if my memory serves me, only once was the matter of clearance [fol. 2686] brought up and that was only because product had not been dated in that particular town in accord-

ance with the agreement that governed that clearance.

"Then, too, this year you have the availability of prints from Atlanta, Memphis, and Indianapolis which you did not have in the years past, and this gives you a freedom of booking to the extent that product can be dated in your situations as you see fit and to your best interests.

"As stated above, Mr. Ballance went over the matter at great length and looked at it from all angles and he feels that our legal department's and Mr. Kupper's position was well taken and that the matter of clearance would of necessity have to be the same as set forth in previous deals."

Q. Did you write another letter with reference to repeat run clauses?

A. I do not recall, Mr. Wright. Do you have another letter of that same date?

Q. We asked Mr. Johnson if there was one, but he was unable to find it. Have you another that he wrote to you or not?

A. No, sir, I do not.

[fol. 2687] Q. Do you recall making any other answer in the way of a telephone conversation or other discussion?

A. No sir. I imagine the letter from Mr. Armistead, the answer, I sent the *cal*use in to the Legal Department to be inserted in the franchise.

Q. You don't know what did happen?

A. No sir.

The Court: I understood you to say, in that letter, you were answering the questions separately.

A. That is what the letter says. I don't know. I must have gotten off on some other thought. I don't know.

Mr. Waller: This is objected to as outside of the scope of the direct examination. If it is a part of the Government's case in chief, it should have been put in, in chief.

The Court: Overruled.

Mr. Wright:

Q. In this matter of serving prints to exhibitors, that you testified about, Mr. Wilson, it is a fact, isn't it, that you were not always limited by the number of prints that

happened to be in the exchange at any particular time? You sometimes borrowed prints from other exchanges?

[fol. 2688] A. Yes sir.

Q. Depending on the demand in the various territories, it may be shifted from one branch to another?

A. Most of the time that applied to a large town booking.

Q. But it is done, with reference to all your booking situations?

A. Yes sir.

Mr. Wright: That is all.

Cross-examination.

By Mr. Mitchell, For Muscle Shoals:

Q. Mr. Wilson, I hand you a document which purports to be the franchise of Muscle Shoals Theatres with your Company, and attached to it, a letter purporting to have been written by you on May 8, 1940. Please examine that and see if that is a fact and say whether or not you wrote that letter?

A. Yes sir.

Mr. Mitchell: May it please the Court, I call attention to the franchise, which is in evidence or a copy of it, and this letter is attached, to the original franchise, dated May 8, 1940:

(Reading):

"Dear Louis:

"I am enclosing your copy of franchise properly executed covering the seasons 1939-40, 1940-41 and [fol. 2689] 1941-42.

"Very truly yours, Paul."

PSW:EP.

Mr. Mitchell: I offer the letter in evidence.

(Letter marked Exhibit No. 138).

In that connection I wish to call your Honor's attention to the fact that the copy of the letter from Stengel to Paul Wilson, a copy of the letter in evidence written by Paul Wilson, suggesting writing separate franchises for Crescent and Rockwood, was dated May 30, 1940.

The Court: What is the date of this letter?

Mr. Mitchell: The letter is dated May 8, 1940.

The Court: I don't think it is contended by the Government that those two franchises referred to in that letter were Rosenbaum franchises.

Mr. Wright: That is right; that has been stipulated.

Mr. Mitchell: I am glad to hear it is stipulated because I can't be certain.

Cross-examination.

By Mr. Waller:

Q. Have you heard of the Sudekum Circuit as being just the Crescent Theaters?

[fol. 2690] A. No sir.

Q. As including the Crescent Amusement Company alone, or the Crescent Amusement Company and Rockwood?

A. It has been used for years to designate the towns that operate out of the Crescent Amusement Building.

Q. Whether it is Rockwood or Crescent?

A. That is right.

Q. That Rockwood Circuit, has it got a number of different nicknames, have you heard it called the Stengel Circuit?

A. The Stengel Circuit, yes sir.

Q. Have you heard it called the Junior Circuit?

A. No.

Q. Have you heard it called the Red Network?

A. Yes.

Q. Have you heard it called the Kerosene Circuit?

A. That was in the olden days when they were in very small towns.

The Court: That is like Hobo Oil Wells?

Mr. Waller:

Q. Mr. Wilson, do all exhibitors desire to Exhibit A pictures as early as possible after release date?

A. Yes.

Q. With reference to borrowing prints, are you able to borrow those prints from some other exchange, on those best pictures?

[fols. 2691-2692] A. Most of the time we have to borrow them from our Home Offices in New York.

Q. About how many can you borrow?

A. I have never been very successful in doing that, except on the booking of a large town.

(Further this deponent saith not).

Mr. Mosby: If your Honor pleases, Universal Pictures had witnesses here for two days, and if we are not breaking into the continuity of the Crescent Defense, we would like to have the opportunity of presenting these witnesses at this time. However, we anticipated that Mr. Wilson's testimony would take the rest of the afternoon and we have let all the witnesses go back to the hotel.

The Court: Well, does Crescent have any other witnesses they can put on at this time?

Mr. Waller: Not at this time unless we put on Mr. Stengel. I was preparing to put him on tomorrow.

Mr. Mosby: We will have Universal ready in the morning; of course, we could send for them at the hotel now, if you cared to go on at this time.

The Court: It would be time to adjourn before they could get down there; it is 10 minutes after four now.

Mr. Mosby: That is what we thought. We just——

. . . . . .

[fol. 2693] The next witness, K. C. STENGEL, one of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Waller:

Q. Mr. Stengel, you are one of the defendants in this case, are you?

A. Yes sir.

Q. You are employed also by the defendant Crescent Amusement Company?

A. Yes sir.

Q. And you are connected with what other corporations that are defendants in this case?

A. Rockwood, Cherokee and Kentucky.

Q. What is your age?

A. Thirty-five.

Q. How long have you lived in Nashville?

A. Since January, 1926.

Q. Where were you born and reared?

A. Minneapolis, Minnesota.

Q. Did you attend the University of Minnesota before coming to Nashville?

A. Yes sir.

Q. For how many years?

A. About two years.

Q. Before coming to Nashville what business experience had you had, if any? I don't mean all the jobs you had but [fol. 2694] just give a brief sketch—how old were you when you started to work?

A. Ten years old?

Q. Now, just briefly sketch a few of the things you did before you came to Nashville during school vacation.

A. Well, ever since I have been, since the age of ten I have been working after school and summer vacation since—on up to the present time with the exception that I took a vacation in 1933.

Q. Now, did you ever do any work at any time that had anything to do with motion pictures?

A. Yes sir. Of course, when I was very small I threw handbills around to get a pass to the theater and then later when I was in my teens I worked in the neighborhood theatre as usher and popcorn boy, and then I worked, the last year I was in high school and during summer vacation for F. D. O.

Q. What is F. D. O.?

A. It was a film booking office, I believe was the—I think R. K. O. took over F. D. O. in a later re-organization. I worked in the posting room and I helped the booker.

Q. Now, when you came to Nashville why did you come?

A. Well, a boy friend of mine was driving some people to Florida and I was coming down during school vacation, Christmas vacation, and when I came here I heard about Caldwell & Company and all my life I had made up my mind that I wanted to get in the banking business and I had [fol. 2695] studied and read and tried to find out everything that I could about it. I thought the South was going to grow.

Q. You had read some of Caldwell & Company's advertising, had you?

A. Sir?

Q. You had read some of Caldwell & Company's advertising?

A. No, not until I got down here, but it was a well rounded investment company.

[fol. 2696] Q. Well, did you apply for a job to Caldwell & Company?

A. Yes, sir, I did.

Q. Did you get it at once?

A. No, sir, it took me nine months, but I went there two to three times a week until they gave me a job, I think, to get shut of me.

The Court: Worried them into giving you a job.

Mr. Waller:

Q. Who did you work for in the meantime?

A. Equitable Life Assurance Company.

Q. When did you leave Caldwell & Company? Was it before or after the stock market crash in 1929?

A. I started in September, 1926, and left in 1929.

Q. Now, in the meantime, had you married Mr. Sudekum's daughter?

A. Yes, sir.

Q. What was your position with Caldwell & Company when you left?

A. Assistant Trust Officer.

Q. When you were there with Caldwell & Company, had you bought any Crescent Amusement Company stock—any stock in that company?

A. Yes, sir.

[fol. 2697] Q. How many shares?

A. Twenty shares, that cost me $4,000.00.

Q. Have you still got those shares?

A. Yes, sir.

Q. How much Crescent Amusement Company stock have you got now?

A. Slightly less than fifty shares, total.

Q. When you left Caldwell & Company, what position did you take?

A. I left Caldwell & Company to go—I left Caldwell & Company and went over to Joseph Hutton & Estes, as Secretary-Treasurer of their company.

Q. Was that another investment company here?

A. Yes, sir.

Q. How long did you stay with that company?

A. Until September or October, 1932 I believe.

Q. Now, when you left there, what sort of work did you do, at first?

A. Well, I decided to free-lance. I left there because, naturally, during the depression, things were not going so well, and they cut my salary down to about $150.00 a month and I thought I could make more money doing something else.

Q. And then did you act as a stocks and bonds salesman? [fol. 2698] A. Yes, sir.

Q. And for how long?

A. Well, I free lanced for so long and then was employed by the Cumberland Securities Company as a salesman of stocks and bonds.

Q. Well, did you make a living there as a stocks and bonds salesman?

A. Yes, sir, a pretty good one.

Q. Now, when was it you went with the Crescent Amusement Company and under what circumstances?

A. Well, may I explain my answer just a little bit?

The Court: Go ahead.

A. In 1933, why, I was doing pretty good in the investment business. I told Mr. Sudekum about it, and I wanted to get in business for myself, and I didn't see any opportunity in the place I was in, and I tried one or two times to start a company in the investment business and couldn't; so finally Mr. Sudekum told me that he might get somebody in his organization: And I started with him in May, 1935.

Q. Now, did you have a definite job or definite duties when you went with Crescent at first, or what?

A. No, sir. When he hired me he told me to go back into Mr. McCarren's office that was back over there in one part [fol. 2699] of the building, to see what I could find to do.

Q. Well, did you go about learning the business there?

A. Yes, sir; I would go out with Mr. Bank, the maintenance man and try to learn something about operating the machine; and clean up the stock room and try——

Q. You said when you had been with this company out in Minneapolis, you did some sort of work in Minneapolis in regard to posters?

A. Yes, sir.

Q. Now, did you do something with reference to posters?

A. Yes, sir, both with this company and with Finkelstein & Reuben; and when I came with the Crescent Company they didn't have a poster department; they were attempting to route their paper from one department to another, and

the manager couldn't tell what particular advertising results they were going to get, and I asked Mr. Sudekum to let me start it; and he said, Go ahead and work it out.

Q. And then did you start a poster department?

A. Yes, sir.

Q. And did that result in savings?

A. Yes, sir.

Q. Have you still got that poster department?

A. Yes, sir; work five employes in it.

Q. Now, you are familiar with the Strand Enterprises? [fol. 2700] A. Yes, sir.

Q. Tell us about that.

A. Mr. Sudekum, on one of his trips to West Tennessee, one of the times, he met Mr. Haynes; I went along with him, and when he closed the deal he told me I could look after the reports as they came into the office; and I would watch the reports as they came in, to see which was taking in money, and which wasn't, and how the expenses of the theatre ran.

Q. How did you happen to get hold of this theater at Tracy City, Tennessee?

A. Mr. Sam Werner, back a number of years ago, he and Mr. Sudekum and Mrs. Sudekum were very close friends, and as I understand it, Mrs. Sudekum used to spend the summer up there; and Mr. Werner had been after Mr. Sudekum for years to start a theater up there; and finally we went up there one day and looked at the building and agreed to lease it month by month.

Q. Now, who leased that theater, you or the Crescent Amusement Company?

A. I leased the theater, and Mr. Sudekum had some portable equipment that he gave me; we put it in the theater; and used some draperies on the side walls over this sheet iron to take care of the accoustics; and that is the way that [fol. 2701] theater started.

Q. Did you make any money out of that theater?

A. Yes, sir.

Q. Now, how did the Rockwood Amusements, Inc., come into existence?

A. Well, Tracy City was operated as an individual until February 1936, at which time we acquired the Lyric Theater at Rockwood, and then we formed a corporation.

Q. And the first two theaters, then, that went together to form the corporation were the Rockwood theater and the Tracy City theater, is that correct?

A. Yes, sir.

Q. Now, what was your first experience in regard to film deals, Mr. Stengel?

A. Well, when we acquired Tracy City and Rockwood, of course I didn't know anything about operating a theater at all; and the first deal that I can remember was the Fox franchise, when Mr. Sudekum—that was in 1935, I think—told me that he had been working on a franchise, and he was going to include these two towns, and he says, These are the prices; are they all right? And, so far as I was concerned, they were all right, because I didn't know.

Q. Well, you had nothing to do with negotiating that Fox franchise in 1935?

[fol. 2702] A. No, sir.

Q. Now, you say when the Fox franchise was made with the Crescent Amusement, your two towns were included?

A. Yes, sir.

Q. And that franchise, I believe, was signed only by Mr. Sudekum.

A. Yes, sir.

Q. Now, with reference to subsequent film deals where your two Rockwood theaters were concerned, or any subsequent acquisitions of Rockwood Amusements, Incorporated, who handled the film negotiations and deals?

A. Well, the next selling season was 1936-37, at which time I negotiated my deals, subject, of course, to this one idea: that I always asked Mr. Toney at that time if the deal was all right.

Q. So far as the talks with the representatives of the distributor corporations was concerned, who had those talks, you or Mr. Sudekum?

A. I did. Mr. Toney sort of put me in the position of "sink or swim."

Q. And any advise you got was on the side from Mr. Sudekum?

A. Yes, sir.

Q. Now, what about the film deals for the Crescent [fol. 2703] Amusement Company, did you at any time commence to have anything to do with these deals, and if so, when?

A. Yes, sir, I started—First, of course, I just sat in on the transaction in,—well, starting with the 1936-37 season and in subsequent seasons I had more and more to do with

the Crescent Amusement Company, and when I say more to do with them, why, Mr. Sudekum would agree in principle as to the amount of the increase of the number of percentage pictures, and then he would say, Stengel, work out the details with so and so, and we would go over to my office and work them out.

Q. You say those details were passed on to you more and more as the years went by, is that right?

A. Yes, sir.

Q. And have Mr. Sudekum's duties and responsibilities also increased down there at the Crescent Amusement Company as the years went by?

A. Yes, sir, and so have his outside activities.

Q. Did you have anything to do with the five-year Paramount franchise deal?

A. I am referring to the franchise that is now in existence and under which the Crescent Amusement Company is now operating?

A. Yes, sir.

[fol. 2704] Q. What was your connection with that Paramount franchise?

A. Well, Crescent was using the 35-36 product and didn't use the 1936-37 product. However, along in the summer of 1937, or the early part of 1937, Mr. Morgan got in touch with Mr. Sudekum. Mr. Sudekum gave me the old correspondence and told me what had happened to the theater up here and why he had made the 1935-1936 deal; and from that point, on every trip that he made to New York and every conference that he had with any of the representatives here in Nashville, I was present.

Q. Now, after the deal was agreed upon in principle, did you work out the details of that Paramount transaction also?

A. Yes, sir.

Q. In such things as repeat clause, for example?

A. Well, you see, in working out a deal the principal thing is your money; and they had agreed to this fifty-seven or fifty-eight thousand dollars, and that was the Crescent Amusement Company only; and then from that point on we took the individual towns, and there were four percentage pictures that we had to arrive —, and Paramount had to arrive at the total percentage of the pictures; and they finally figured they were worth seventeen per cent.

[fol. 2705] Q. Now you say you went to New York with Mr. Sudekum in connection with that deal?

A. Yes, sir.

Q. And I believe that contract was finally dated as of November 1, 1937, but not actually executed until some time in 1938, is that correct?

A. Yes, sir, some time later. I could not be sure of that.

Q. Did you make a Paramount franchise contract with Rockwood?

A. Yes, sir.

Q. What were the circumstances of that?

A. Well, I bought from Paramount, and in view of the fact that they were giving Mr. Sudekum the theater down here, they wanted representation for their product in every possible situation. However, I told him that I didn't think we would be interested in making a five-year deal which would carry an increase each year.

Mr. Morgan said that he thought that we could get together on the increases and the terms, so we sat down and ultimately worked out a deal.

Q. Was that at the time (same time) as the one for Crescent?

A. Yes, sir.

Q. Was that deal worked out as an agreement for all the Rockwood and Crescent affiliates, when it was worked out for Rockwood?

A. Yes, sir.

[fol. 2706] —. Do you recall the negotiations for the new Warner Brothers franchise for the Crescent Amusement Company to take the place of the one which expired in the end of 1939?

A. Yes, sir.

Q. What connection did you have with that deal?

A. Well I sat in on all of the negotiations and when Mr. Kalmenson came down he wanted the formula, the national formula, that they had had at that time for Crescent Amusement Company towns, so many pictures on percentage and some pictures on percentage to a split figured with a reversing clause in our previous deal with Warner Brothers, all our pictures were on percentage, so all that was worked out and was figured as to the flat rentals on them, I did all of that.

Q. After the principles of that deal had been agreed upon, did you work out the further details with any representative of Warner Brothers?

A. After the principle was worked out with Mr. Kalmenson, he and I went up to my office and I worked out the deal for Rockwood, including all of that.

Q. I was not referring to Rockwood especially but all of them, Rockwood and the other companies of that kind, and with reference to such things as films, did you work out matters of that kind afterwards?

[fol. 2707] A. Yes, sir.

Q. With whom were they worked out?

A. They were worked out with Mr. McCoy and Mr. Williamson and the various branch managers whose territory was affected.

Q. Now then in regard to the Rockwood franchise with Warner Bros.; did you state you did also make a deal with Mr. Kalmenson with the Rockwood corporation?

A. Yes, sir.

Q. Does that include the affiliates of Rockwood?

A. Yes, sir. I negotiated all the film deals for these partners, and I told the salesmen, we worked out this deal. For example for Cherokee subject to Mr. Hendren's approval and then I will call Mr. Hendren and ask him if the deal is all right, and I think nine out of ten times he has said it is all right.

Q. You have always in negotiating for these affiliates of Rockwood, you have done that at the same time that you negotiated for Rockwood proper, is that correct?

A. Yes, sir.

Q. Now the current Fox franchise, the three year franchise which is now in existence, were you present at the meeting in Mr. Sudekum's office, which has been testified to, when Mr. Wilson was present?

[fol. 2708] A. Yes, sir.

Q. What happened at that meeting, who was present and what in general took place?

A. It started just a month or so before that in Atlanta.

Q. Tell us about that?

A. I was in Atlanta and met Mr. Rosenbaum, and I do not know how it came about that we decided we would go up and talk to Mr. Paul Wilson; as our deal was running

out and we walked on up there and I met Mr. Ballance I believe at that time for the first time.

Q. When you say the deal was running out, what do you have reference to?

A. Rockwood and Crescent and Mr. Rosenbaum told me his was running out, and suggested that while we were there that we should go up and visit Mr. Wilson, I don't know how it came about, but we went on up there and started talking about the deal, what he had in mind, Mr. Rosenbaum for Muscle Shoals, and the other theatres.

Q. You were talking of Crescent and Rockwood?

A. Yes, sir, not much serious negotiations principally conversation, which didn't last over ten or fifteen minutes and Mr. Wilson said he wanted a twenty-five percent increase, I believe, and I told him I would be glad to deliver that message to Mr. Sudekum, and Mr. Rosenbaum said he was not going to pay it, and that was about all there was to it.

[fol. 2709] Q. Do you know how the subsequent meeting in Mr. Sudekum's office happened to be called?

A. Mr. Wilson came to Nashville then that day for the express purpose of working out a deal—you want me to tell what happened?

Q. Yes, tell us what happened?

A. There was considerable argument about the twenty-five per cent increase, was the greatest increase, and where we thought we could increase, but he wanted to go up to twenty-five percent, and Mr. Sudekum said no, he was not going to pay that much, and the end of that day I think was a stymie.

Q. Did you have another meeting after that?

A. Yes, I believe the following day, Paul Wilson came back and Mr. Rosenbaum and myself and Mr. Sudekum, and he suggested an alternative, which I understand came about from some conversation that he had had on the previous night or on the way over, with Rosenbaum. He said may be we can get together and suggested that we were apart on the twenty-five percent increase, and that we make some of them twenty, some fifteen, some ten, some five, and so on.

Q. What towns?

A. All the towns that were in the previous franchise.

Q. I believe you said the Crescent Amusement Company franchise had also included your Tracy City and Rockwood towns?

[fol. 2710] A. Yes, sir, that is right.

Q. I mean the towns of Tracy City and Rockwood, a deal with the Rockwood Amusement Company?

A. Yes, sir.

Q. What took place with reference to the Crescent Amusement Company, I mean with reference to the increase in film rental on Crescent Amusement Company towns that Mr. Wilson wanted, was there any agreement made?

A. Well, after late in the afternoon or well in the day, he juggled some lists there, and we juggled some lists, and we agreed on some twenty percent so many at twenty percent, so many at ten percent, so many at fifteen percent, and so many at five percent, and from that point on Mr. Tony said, go ahead and work it out with Stengel.

Q. Did your meeting break up then?

A. Paul Wilson had to go to Memphis, and we went on upstairs and had started to work; but he said he had a previous engagement, had to go to Memphis and come back in a day or two and then we would finish.

Q. When he came back and you finished, what took place then in your dealings with Mr. Wilson, what did you do?

A. Mr. Wilson asked me, there were a number of towns that were not included in the original towns and we had to agree to the respective terms with reference to that with [fol. 2711] all these towns, and after we had done that, he asked me if we had a typewriter there which he could use.

Q. Do not go so into details as to that, Mr. Stengel, were there any agreements as to Crescent Amusement towns, that you had worked out the details of that up there in your office?

A. Yes, sir.

Q. What were they?

A. There was Greenville, Tennessee, was not in the original franchise, Princeton, Kentucky was not in the original franchise; Franklin, Kentucky was not in the orignal franchise; and Brownsville, Tennessee, was not in the original franachise. Now with respect to Brownsville and Greenville, we were using the previous season's product, and we merely agreed as to the percent of increase the first year, the franchise was actually in force. Princeton, Kentucky, that had carried a percentage that previous

year, and we worked out a flat rental deal, based on what the company had earned under percentage.

Q. When you had worked out the final details for the Crescent Amusement Company towns, did you proceed with any other towns? If so, what towns? I do not mean the names of them, but whose were they?

A. Well then I started talking about Rockwood towns, [fol. 2712] and told Mr. Wilson that I didn't think that I could stand that increase on Rockwood and Tracy City. Those were two of the original franchise towns, Rockwood had a twenty per cent increase and Tracy City was at the same, finally.

Q. You mean you agreed on no increase in Tracy City?

A. Finally and the other towns, yes, which were of the Rockwood Amusement Company, Ruffin Amusement Company, and Chickasaw Amusement Company, and Cherokee, we agreed, if a deal was in there the previous year, we agreed as to whether or not it carried an increase, and if so, how much, and in a case where we didn't have a previous deal, that then we worked it out at a flat rental deal.

Q. For all those towns, situations, that were not in the former Fox Franchises?

A. All of those I have been speaking of, yes, sir.

Q. All of them with the exception of Tracy City and Rockwood, Tennessee?

A. Yes, sir.

[fol. 2713] Q. Now then, go on and tell us what you started to say about Wilson and his typewriter.

A. He asked, after we got through—Of course, we had a number of notes written out and he wanted to get it in some sort of form that I would understand and he would understand. So, he asked if we had a typewriter, and I said yes. He said, I will type this up. And he went in the little office there and typed it up. He is not a very good typist, he had to sort of hunt and peck it out. When he brought it back in, I checked it and it appeared all right, other than the fact that I told him that he should have made one for Crescent, so that we could take it downstairs to Mr. Sudekum and ask him, to get his approval, and one for Rockwood, which was separate and apart, and I called his particular attention to the fact that he had included, I believe, some Muscle Shoals town on that. And he said, "Well, Rosenbaum and I agreed to our deal and this is

purely a memorandum from which the franchise will be made up. And that is just about all there was to it.

Q. Is that typewritten memorandum that has just been passed to you, dated June 27, 1939, one of the duplicate carbon copies of that memorandum that Mr. Wilson typed up?

A. Yes sir.

Q. Out of what file does that come?

A. It has come out of my file.

[fol. 2714] Q. Is that signed by anyone?

A. Yes sir, it is signed by Mr. P—It is actually Paul Wilson. I don't know what his initials are, I think P. S.

Mr. Waller: We offer that as Defendant's Exhibit No. 146.

The Court: That is the same thing as Government Exhibit 286?

Mr. Waller: Yes, it is another carbon copy. It bears the signature of Mr. Wilson.

The Court: All right.

Mr. Waller:

Q. What was done about your suggestion that there ought to be three separate memoranda? Was that waived or not?

A. Well, Paul said, "This doesn't mean anything, this is just a memorandum from which I am going to draw up the franchise, or rather, write the New York office to draw up a franchise." He says, "All it indicates is the meeting of the minds." And we went down to Mr. Sudekum's office and went over the particular deals that I had negotiated for the Crescent Amusement Company towns, other than the towns that carried the increase. I called Mr. Tony's attention to the fact that all the towns on there, that Paul had written this himself and that he was to sign for the Crescent Amusement Company, and I told Paul why I signed a copy for our towns.

[fol. 2715] Q. You say "our towns," what do you mean by that?

A. I mean, Rockwood, Kentucky, Ruffin, Dickson, and those various companies and I gave Paul those, and I think that I signed the original.

Q. Was there any copy of it signed by Rosenbaum?

A. Oh no sir, there wasn't any copy signed by Rosenbaum.

Mr. Waller: I just asked that to save Mr. Mitchell the trouble.

Q. What was your understanding with reference to whether or not, under the Fox franchise, you included the Rockwood towns in the same way that the former franchise had included them?

Mr. Wright: There, again, that calls for a conclusion. He can tell what was said and done there.

The Court: Yes, just tell what was said.

A. I don't understand your question.

Mr. Waller:

Q. Was there anything said at that time about having the franchise agreement that would include the Rockwood towns, Cherokee towns, etc., along with the Crescent Amusement Company towns, as in the former Fox Franchise?

A. Oh, no sir, no sir.

Q. Nothing was said about that one way or the other?

A. There is one thing that I would like to clarify with regard to the original Fox franchise and the two towns of [fol. 2716] Tracy City and Rockwood. Mrs. Brockett did the booking for those two towns, she has the booking for the Crescent and she did the booking for those two towns, and as far as outside people knew and the Film people knew, they all thought they were Crescent Amusement Company towns and we never did tell them there was any difference until I started to working in other towns.

Q. Had any change taken place in the way Rockwood Amusement Company or Rockwood Amusements, Inc., functioned after additional towns had been acquired and after it had obtained interests in other corporations?

A. Yes sir. In the early part, or some time in 1936, I don't recall what time, but a little boy by the name of Aby Rochberg, he had been errand boy around Crescent Amusement Company for years and he came over to Rockwood Amusements and he started booking, and of course, other work too, but he started booking for Rockwood and Tracy City, I believe we had Manchester and Huntingdon along about that time, I don't remember the dates.

Q. From that time on did Rockwood and its affiliates have a separate booking department?

A. Yes.

Q. From Crescent?

A. Yes sir, and a separate bookkeeping department, from the beginning.

[fol. 2717] Q. Then, what about general offices, did you have different offices from the Crescent Amusement Company?

A. Rockwood offices were, to start with, were about as big as this space where the Judge is sitting here, and that is all and Aby and I were in it, that is all there was to it. They were in the Crescent building.

Q. Did you pay rent to the Crescent Amusement Company?

A. No sir, I did not because I was working for the Crescent Amusement Company, we didn't then, we didn't in the first year or two.

Q. What was the development and arrangement as you acquired interests in other corporations and acquired additional towns?

A. As it acquired additional towns and acquired interest in additional corporations, we employed more people and I finally got a secretary. I used to write my own letters, or a stenographer, rather, then we got another girl, and finally we took up most of the space over there and then we started to pay rent.

Q. When was it Crescent Amusement Company moved to the present office building on Fifth avenue, the present building occupied by the Company on Fifth Avenue?

A. I think about two years ago, this past December.

Q. Has Rockwood space in that building also?

A. Yes, it has the entire second floor.

Q. Your office is on the second floor?

[fol. 2718] A. Yes sir.

Q. Do you rent that space from the Crescent Amusement Company?

A. Yes sir.

Q. And you have separate stenographers, separate equipment, etc.?

A. Yes sir.

Q. Was that the situation when the new Fox franchise was negotiated?

A. Yes sir.

Q. Now, I believe there was some testimony that you received through the mail from Mr. Wilson a document which included Crescent towns and your Rockwood towns and affiliated towns, in the same document. Did you regard that as a mistake or not?

A. Yes, I did.

Q. Did you return the document to be re-drafted?

A. Yes sir.

Q. In your letter I think something was said about present conditions; did you have reference to this lawsuit that is now on trial?

A. Yes sir, I did. I would like to amplify that answer, if I may?

Q. All right.

A. By telling you that Mr. Wilson called me, as I recall, after he got the letter, he called me or wrote me, and asked if we would not accept the franchise inasmuch as it necessitated a great deal of work to prepare another [fol. 2719] copy. I told him that it would have to be that other way, and again explained this lawsuit to him.

Q. Well, had it been your understanding prior to the lawsuit and prior to the receipt of this franchise, that it was to be in one document or two documents?

A. No, it was to be in two.

Mr. Wright: That is objected to as being nothing but a conclusion. Let him tell what happened.

The Court: Did you have any conversation about that and tell Mr. Wilson at the time that there were two, inasmuch as they were booked through separate offices, did you tell him to prepare two separate franchises?

A. I would think that I did, but I could not make a positive statement to that effect.

Mr. Waller: I think it is competent to ask the witness to explain because this letter has been introduced from which the Government, I suppose, intends to argue that he only wanted two franchises because of the lawsuit.

The Court: I think that would have been a very good reason to want them separated.

[fol. 2720] Mr. Waller: I think so, too, but I want to show he expected to have two anyway.

The Court: That is what I am trying to find out.

Mr. Wright: I think he may show it, the question is, how he shall show it. We asked him if there was any conversa-

tion about how the franchise should be made up at the time the memorandum was made, and he said no, there was not.

Mr. Waller: You can have an understanding without words, sometimes. I think he is entitled to tell what his understanding was.

The Court: All right, let him tell what it was, and then tell how he got it.

Mr. Wright: I don't think either he or Mr. Wilson is psychic, I think they are dependent upon words for communication, just like the rest of us, if there is going to be any understanding about what it about to happen.

Mr. Waller: Perhaps there was a difference in the situation in the Rockwood corporation at the time the first franchise was made and what the situation was when the second was made.

[fol. 2721] Q. I am asking you what your understanding was before you got this document and the letter, as to whether you were to get one or two franchises?

A. Well, I called, if you recall, I told you that in this memorandum, I called Mr. Wilson's attention to the fact that at that time, that he had everything grouped in under one head. And he said, well, that is just a memorandum affair which I will submit to New York and then it will be drawn properly. That is as far as I can tell you with regard to whether—I don't think there was anything specifically said with regard to two or three or how many franchises.

The Court: That was not discussed, other than what you told him about that?

A. That is right, other than what I told him, that it was all right to throw these Rockwood companies in. And I said, as far as Ruffin Amusements and Elizabethton and those other situations, they were all right to be included on that one memorandum. I was merely speaking of the Crescent, because I knew Mr. Sudekum was going to sign it.

The Court: You did know when the franchise was prepared, that the Crescent and Rockwood towns were retained in one franchise, and Muscle Shoals in another?

A. Well, Muscle Shoals never did have anything to do with our negotiations at all.

[fol. 2722] The Court: I know, but they were in these memoranda you are talking about?

A. Rosenbaum had gone home and Wilson went to Memphis, and we hadn't completed the negotiations for the terms for the individual towns. When he came back, we had these various memoranda and Paul Wilson said that he wanted to draw it up, and he talked about the typewriter, then he drew one up. After he brought it in, I called his attention to the fact about Muscle Shoals being on there and Rockwood towns being on one. "Well," he said, "It won't made any difference, I am just going to take it and use it to draw up the franchise. I don't know whether he used the singular or the plural there. Then I went to Mr. Sudekum's office and Mr. Sudekum pointed out—I remember this very well, he said, "Well, I can't sign for Muscle Shoals, Stengel". "Well," I said, "all I want you to do, you sign for Crescent Amusement Company and that is for Crescent Amusement Company". We didn't think it was a permanent record at that time. It merely showed the understanding as to the terms.

[fol. 2723] By Mr. Waller:

Q. Now, Mr. Stengel, his Honor asked you how you accounted for the fact that whoever drew up this Fox franchise included the Rockwood towns with the Crescent towns.

The Court: No, I didn't ask him that.

Mr. Waller: I misundertsood the question.

The Court: I asked him how he accounted for the fact that after all this conversation that he talks about, how he accounts for the fact that when the franchise was finally prepared that the Rockwood and Crescent franchises were in one franchise and the Muscle Shoals in another.

A. Well, our franchise was signed, the final franchise was signed long after Muscle Shoals and our franchise has come clauses in it that I don't believe Muschle Shoals franchise has in it.

By the Court:

Q. What I mean is, why when the franchises were prepared, in view of those circumstances would the Rockwood and Crescent franchises be contained in one instrument and Muscle Shoals in another?

A. Mr. Rosenbaum has always made his own deals. I mean when I say "own deals", there has never been any joint negotiations.

By Mr. Waller:

Q. Well, Mr. Stengel, had the former Fox franchise in-
[fol. 2724] cluded the Rockwood towns and also the Crescent towns?

A. Yes sir, as I told you, there was Tracy City and Rockwood which we didn't tell—at the time I had, that is when we first acquired these towns we didn't tell them that they were not operated by Crescent Amusement Company nor did we tell them that they were operated by Rockwood and, by inference I expect that they thought they were Crescent towns.

Q. In any event the franchises were then separated, I mean your current franchises were separated in one franchise for Crescent and the other for Rockwood and affiliates?

A. Yes sir.

Q. Now, had the deal sheets for the two corporations or sets of corporations, I will say—I mean Crescent on the one hand and Rockwood on the other hand—been signed before this formal franchise was received?

A. Yes sir, within a relatively short period of time after Mr. Wilson went back to Atlanta and after I received, I think, a wire from Mr. Ballance that the deal had been approved, as per the memorandum, then Mr. Wilson made up individual deal sheets. It is a paper about the size of a letterhead and there was one made for each town, and it shows the names of the theatres in the towns and the terms, and down at the bottom it stated our clearance would be agreed upon, I think. And those were signed by Mr. Sudekum for Crescent and me for Rockwood. Now, Mr. Rosenbaum's sheets must have gone to him or I don't even know that he signed them.

[fol. 2725] Q. Did Mr. Sudekum sign any Rockwood or did you sign any Crescent sheets?

A. No.

Q. And that was before this franchise was ever received that had been made up so as to include both corporations in one instrument?

A. Yes sir, that was before the franchise.

Q. Has there been an occasion since you have been connected with Crescent and Rockwood, in addition to this first Fox franchise, where deals were made with any distributor

and the deals for different corporations included in one formal contract or agreement?

A. You mean Rockwood towns and Crescent towns?

Q. Yes.

A. Yes, our deal with United Artists Corporation calls for so many runs that is all in one instrument.

Q. That is Rockwood towns and Crescent towns?

A. Yes sir.

Q. All under the same cover?

A. Yes, sir, but I am not positive without seeing it—I think that it indicates that the towns are operated by different companies.

Q. Now, in the United Artists deal was Cumberland Amusements or Strand Enterprises or Muscle Shoals included?

A. No.

Q. What is the average size of those Rockwood towns, and I mean by Rockwood to include Cherokee?

[fol. 2726] The Court: Well, you have got all that in the record, haven't you?

Mr. Waller: I don't know whether the average is in there or not. I have the tabulations here.

Q. Did you work out or have a memorandum as to the total populations and the average?

A. Yes sir.

The Court: I thought Mr. Wright had a list of all those towns with the populations.

Mr. Wright: We object. In the one he is offering now he says he has the total populations and then struck an average: We didn't have an average on the list I submitted. All we did show was the towns with the 1930 population and the 1940 population as per the census.

Mr. Waller: I don't recall that exhibit. Does it separate the towns of the different corporations?

Mr. Wright: I think it does, yes.

By Mr. Waller:

Q. Well, anyway, do you have it in front of you, Mr. Stengel?

A. The average population of the thirty three Rockwood, of the Rockwood, Cherokee and Kentucky towns is

[fol. 2727] twenty three hundred. I don't know what the combined population is because we don't have that figure. I can give you the figure for each one of the corporations.

Mr. Waller: Well, subject to approval of counsel of the Government, I have that here and I would like to read it into the record, subject to correction. Is that all right, Mr. Wright?

Mr. Wright: Except that I don't see that it has anything to do with the lawsuit. That is the only objection.

The Court: How does it affect the lawsuit if you have thirty three towns with a population of a hundred thousand and you divide a hundred thousand by thirty three and get the average?

Mr. Waller: I want to show, your Honor, that the Rockwood circuit and the Crescent circuit are two entirely different types of operation; that the operating theatres in small towns like these is a different proposition from the other.

The Court: I think that is already in the record that the Rockwood towns and the other towns are smaller towns than the Crescent towns.

[fol. 2728] Mr. Waller: That is in the record but I don't think the figures show. I would like for your Honor to know what they are. It would take but a minute to read them.

The Court: All right. If you want to put in the population of each town, I think that is all right but I don't see how it would help you.

Mr. Wright: It is already in the re-.

Mr. Wright: You have thirty three towns with an ayerage population of three thousand each.

Mr. Waller: I wont put it in if your Honor doesn't think it is pertinent.

The Court: It is all right. Go ahead.

Mr. Waller: Merely this, that there are thirty three towns with an aggregate population of 76,415, an average population of 2315. In other words, the total population of all these Rockwood towns, including the affiliates, is less than half the size of Nashville.

[fol. 2729] Q. Now, Mr. Stengel, has there been any opposition or competition in any of these Rockwood towns, and if so, state what that opposition or competition has been?

A. Well, we had opposition for a few weeks in Central City when we first went in there.

Q. Was that Mr. Pittman?

A. Yes sir. He was already operating one theatre and we acquired the other theatre.

Q. You acquired that Central City theatre, the Selba, from the owners of the Selba, did you not?

A. Yes sir.

Q. And the Empress Theatre was already operating at that time?

A. Yes sir.

Q. And then shortly after sold out, is that correct?

A. Well, he wrote us a letter, asking us if we would buy it.

Q. And you did buy it out?

A. Yes sir. There is another one, Rogersville, still.

Q. In Rogersville what was the situation?

A. The Rockwood Amusement Company bought the Rogersville Theatre from the Cumberland Amusement Company.

Q. Well, at the time you bought that theatre was there a competing theatre?

A. Mr. Miller was operating the Palace Theatre.

Q. And with those two exceptions, a few weeks in Central City, Kentucky, where you bought the theatre with the opposition already in existence, and the Rogersville situ- [fol. 2730] ation where you bought the theatre with the competition already in existence, have you had any competition in any of these Rockwood or Cherokee towns or *towns or* any affiliate corporations, which are defendants in this case?

A. Not any theatre competition, no.

Q. Now, with reference to Newport, Tennessee, is there any competition?

A. Yes, Tim Smith built a theatre over there and closed it up.

Q. Are those the only situations where there was any competition or opposition?

A. Now, you are speaking of defendant companies?

Q. I am speaking of defendant companies, yes sir.

A. That is all.

Q. I will also include Newport, which is not a defendant company. I didn't ask about Ruffin. Was there any such instance in the Ruffin towns?

A. To my knowledge there was not. However, there was some talk about a theatre going to be started in Hickman and I think some work was started on a building over there. That is the only other situation I know of.

Q. Now, Mr. Stengel, have you made up an exhibit from the books of Rockwood, showing the investment of Rockwood and each of the affiliated corporations in these theatres —I mean the Rockwood towns and Cherokee towns?

A. Yes sir, we have made up a schedule showing the original cost of the theatre, the date of the new equipment [fol. 2731] that was bought, and the date the remodelling took place.

Q. Now, do you have one of those for Rockwood Amusements, Inc.?

A. Yes sir.

Q. And one for Cherokee Amusements, Inc.?

A. Yes sir.

Mr. Waller: We will ask that the tabulation for Rockwood Amusements be marked Defendant's Exhibit No. 147; and the Cherokee tabulation be marked Defendant's Exhibit No. 148.

We offer those in evidence, your Honor.

By Mr. Wright: If the Court please, I think these are wholly immaterial. We, of course, haven't any idea what these figures show, and in any event, I don't see what significance they have. I don't see why they should be put in.

The Court: Well, it might show the size of the companies and the financial——

Mr. Wright: We have already shown that. We have got figures which show what the total assets of the companies are, and how much business they do. I don't see what the purpose of these additional figures is in showing the equipment cost, original land cost and remodelling cost. I just don't see what they are supposed to prove or disprove.

[fol. 2732] Mr. Waller: The Government evidently thought they were material because they filed interrogatories and made us get up the information and we thought now that we had gotten it up, we would file it.

Mr. Wright: Is that the same information that was included in the answers to the interrogatories?

Mr. Waller: It may be in a little more detail but I think the same information is in there. We gave the original cost, the remodelling cost and equipment cost, new equipment.

Mr. Raftery: May it please the Court, the distributors would like to have this evidence for the reason that we want to show that they are regularly constituted theatres in these towns and we want to show that we have a desire to sell regularly constituted theatres, and it is absolutely pertinent from the distributors standpoint.

Mr. Wright: What this has to do with regularly constituted theatres I don't know. If they spend $15,000 for land it is a regularly constituted theatre, and if they spend $14,000, it is not? I just don't see the significance of this from Mr. Raftery's standpoint.

[fol. 2733] Mr. Raftery: The answer to it is simply this: Radio City owns the Music Hall and it is the show place of America, the biggest theatre in America, the finest theatre. It naturally gets the best attractions and by the same token, if these figures, and I have never seen them, have any connection to show that there is a substantial investment in a theatre in a town, it is a theatre which the distributor has a desire to sell, irrespective of the ownership, and that is the proposition we think is pertinent from the distributors' angle.

Mr. Wright: Possibly I should have read that American Magazine article.

The Court: Well, if I recall, that doesn't hold that but Radio City Theatre didn't do any good until it changed managements.

Mr. Raftery: That is right.

Mr. Waller: We have got both elements here.

Mr. Raftery: That is only half of it.

The Court: Let me see that.

[fol. 2734] (Tabulation passed up to the Court.)

The Court: I overrule the objection.

By Mr. Waller:

Q. Have you also made a similar tabulation giving the exact figures on the Crescent Amusement Company towns, Mr. Stengel?

A. Yes sir.

Q. About which Mr. Holman and Mr. Sudekum were asked and couldn't give those exact figures and dates?

[fol. 2735] A. Yes, sir.

Mr. Waller: We offer that as Defendant's Exhibit 149.
Mr. Wright: Same objection.
The Court: Overruled.

Mr. Waller:

Q. Now, Mr. Stengel, I notice that on the tabulation as to Rockwood, you have only an expenditure of $662.83 on the Theater in Providence, Kentucky. Will you explain why that theater and the expenditures on same are out of line with most of the others?

Mr. Wright: What possible difference can it make why the expenditures in Providence were $600.00 or what the expenditures are in any event.

The Court: Well, let's see what he says about it.

Mr. Waller: We thought Mr. Wright might think the Providence Theater wasn't so hot.

The Court: Go ahead.

[fol. 2736] A. The theater we acquired there is a theater with a very narrow building, about 22 by 25 feet; and we have wanted to remodel the theater ever since we have been in there; however, under the Kentucky law any theater with a seating capacity of over 300 seats has to be fireproof; and we wanted to put in a balcony, and you can't get many seats in a balcony only 25 feet wide; and so we had been looking around to see if we couldn't find another theater up there, put in another theater up there; in a town of 2700 population, to put in a theater would have cost about $35,000.00, and we weren't doing any good up there, weren't taking in up there over $140.00 to $150.00 a week, and we didn't think it would help us——

Mr. Wright: Well, we don't think anybody, Crescent or anybody else, would put in a new theater, unless there was a chance to make some money out of it.

The Court: Well, as I recall, you are insisting they are not putting in as good theaters in the towns, except where they have competition.

Mr. Wright: No, we don't contend that; of course, if the investment looks as though they can make some money, they [fol. 2737] will make the investment, sometimes competition is an additional stimulant; sometimes, without competition, if it looked as though you could get more out of your town by improving your house, I suppose you would im-

prove it. I don't see any dispute there at all. That is in the normal course of business.

The Court: I suppose so. I overrule the objection.

Mr. Waller:

Q. Now, what about Oneida, Tennessee; what is the situation there?

A. We have been trying to remodel Oneida, Tennessee, for the last year or two; we have a man who has done a lot of work for us by the name of Spate, and for one reason he has been busy, and the other reason is that we couldn't get together with our landlord; and it so happened that that was this past week, and we have started remodeling this theater right now—within next week.

Q. Was that on account of this lawsuit?

A. No, sir; we think we can make money up there if we can get a nice theater up there.

Q. Now, that theater in Central City, Kentucky, have you spent more money on the interior or the exterior of that building?

[fol. 2738] A. Well, that theater is large enough to put a circus into it, and it has a "Lone Peacock Alley"; it is but 20 feet wide and runs back about 80 or 90 feet with some steps in it; there isn't much you can do to it; we painted the lobby in there and decorated the ceiling and walls, and in the auditorium we put in new seats, and a new cooling system was put in; we spent about twelve or fourteen thousand dollars, I believe.

[fol. 2739] Q. I think this shows $12,419.00, that is mainly on the plant?

A. Yes, sir.

Q. Now, Mr. Stengel, in these towns where Rockwood and affiliates operate theatres in small towns, what is the situation with reference to newspaper advertising for your theatres?

A. Well with all due respect to the small town newspaper it is not a very good medium of advertising.

Q. Do they have daily newspapers in those towns?

A. No, sir, they are weekly newspapers.

Q. What do you do with reference to the exploitation of your pictures in those small towns?

A. We have been in these small towns, under twenty-five hundred, it is mighty hard to make expenses, unless you have some special means of advertising in that particular

area, so there are some of our managers who have what was called a gas route, and that these boys distribute hand bills, and this gas route, that is a route of around from a hundred to a hundred and fifty miles, we have little hand bills, circulars made that in addition to the handbills distributed, we have the cars and he gets in the car and rides until he comes to a cross-roads, and these boys get out and deliver the advertising, and he drives up — the cross-roads store, and goes in and buys a Coca-Cola and he talks his [fol. 2740] business, and we get the benefit of that as well as the boys delivering the bill, and they are reminders at the door-step of every house. We do run ads in the newspapers, not display ads, small ads.

Q. Let me ask you this: are there any substantial numbers of those towns, situations where there had been no theatre before Rockwood or the affiliated corporation opened up t- theatre?

A. Oh yes, a number of them.

The Court: All right, adjourn court until Monday at 9:30.

Court thereupon adjourned.

[fol. 2741] Monday Morning, August 26, 1941.

Volume XXVIII

K. C. Stengel, Direct Examination Resumed:

Mr. Waller: Your Honor, on Friday, we offered an exhibit, which was Defendant's Exhibit No. 149. We would like to withdraw that exhibit and will clarify the figures. The Exhibit offered on Friday contains some bookkeeping figures that had depreciation figured in them, in some cases, and in other cases, not. We would like to withdraw that exhibit and offer one which only shows the exact amount spent during the years ending June 30, 1935, and subsequent years, without any depreciation figured on any of the items and without undertaking to include investment as per books to the original date shown in the Exhibit.

The Court: What does that cover now?

Mr. Waller: This covers a period from June 30, 1934, down to date, showing all expenditures for additions, rebuilding, remodeling and improvements on theatres.

The Court: All right.

[fol. 2742] Mr. Waller:

Q. Do you have that, Mr. Stengel?

A. Yes sir.

The Court: How is that material to the questions in this case?

Mr. Waller: Because, the Government has introduced evidence as to monopolistic profits which, as I understand the Government, was supposed to be based on inequitable film rental. We desire to show that one reason for the success of these theatres is the fact that they have kept them up to date and in good condition and that people prefer to go to theatres of that kind. Also, the film companies preferred to deal with concerns that have theatres of that kind, for the reason that it helps their product in various ways.

The Court: If they had the finest theatres in the world, that would not excuse a violation of the Sherman Act.

Mr. Waller: No, your honor, but it is involved in whether or not the Sherman Act has been violated. In other words, we don't argue, by any of this evidence, that it would excuse a violation of the Sherman Act; we say, in determining whether the Sherman Act has been violated, that your [fol. 2743] Honor would have to consider these facts, along with the others introduced by the Government. We think the Government has introduced a great deal of evidence which is incompetent and immaterial, in this case and it is necessary for us to rebut that evidence by showing other facts and circumstances because the Government has only shown a partial picture.

The Court: All right, go ahead.

Mr. Waller:

Q. Mr. Stengel, on Friday, when we adjourned, you had testified that these so-called Rockwood towns, including the towns in the Rockwood Corporation, proper, and its affiliates also, were relatively small towns and that they were one-theatre towns. I want to ask you in that connection whether or not the business of operating theatres in small towns of this character is a hazardous business?

A. It is more hazardous than operating theatres in larger towns.

Q. Will you explain that answer?

A. Well, I don't think that hazardous is quite the adjective that explains the nature of the business. The small

town theatres are hard to operate inasmuch as you have to dig for business. The corporate limits, or rather, the [fol. 2744] people within the corporate limits, are not enough in numbers to maintain the theatre. Therefore, it is necessary to go out in the trade area to get these people to come to our theatre or the small town theatre rather than to go elsewhere. It is developing a habit in those people. If we don't develop that habit, why they would play bridge or do other things other than to come to the theatre.

Q. During the five-year period covered by this suit and the succeeding period up to the time of the trial, have there been any abnormal advantages in the operation of these theatres as the result of the Governmental policies during this period?

A. Yes, very much so. The theatre business is largely dependent on the patronage of people who are wage earners. The Government, during the last six or eight years, has established WPA projects, unemployment insurance and all of those things, which has given money to the show-going people or masses, that is, the people that we cater to.

Q. Have you or not, in those small towns, undertaken to develop the negro business?

A. Very much, yes sir.

Mr. Wright: I didn't hear it, what was that?

Mr. Waller: Negro business.

[fol. 2745] Mr. Waller:

Q. Has that been an important item?

A. Yes sir, it has been something that, when we have developed it, the net results has been more or less a margin of profit.

Q. Now, you have stated that in these small towns, you have no motion picture competition, with certain exceptions that have been mentioned. Is there any other sort of competition that you meet in the operation of motion picture theatres?

A. Yes sir.

Q. What, for example?

A. Well, one of the severest forms of competition that we run into are these affairs such as soft ball games, miniature golf courses, revivals. And I might say, with respect to revivals that the smaller the town, the more competition

they represent. The reason for that being that in very small towns, everybody is interested in anything new that comes to town and evangelists that go into small towns are usually of the sensational type and after they have opened their stay in the town depends on how much interest they can work up in the community.

The Court: And how much the collection is?

A. I wasn't going to say that. And sometimes, they stay there for six or seven weeks. And we have had cases where they have asked to use one of our buildings, and maybe we were not in position to give them the building because it was rented to somebody else; and, in that event, they would probably spend three weeks of the six weeks telling about [fol. 2746] the sins of the theatre. In other cases where we did give them a small theatre that we had closed, they have emphasized that they didn't particularly like the idea of Sunday shows, when we were about to get some Sunday shows, and that closed that issue for a time.

Q. Now, Mr. Stengel, there has been something said about screen advertising and how the popcorn sales has entered into the profits shown in the income tax figures, filed by the Government in this case. Have you, for your Rockwood Company, had a statement prepared giving the relative importance of screen advertising and popcorn sales as compared with other sources of revenue?

A. Yes sir.

[fol. 2747] Q. Will you state what those figures are and explain them for your corporation as a whole?

A. Well, letting the net profit of Rockwood Amusements, Inc., as it appeared on the 1940 income equal 100 per cent——

Mr. Wright: I don't understand but I might point out that the 1940 figures are not in evidence. All we offered were the five years ending with the year 1939.

Mr. Waller:

Q. Well, regardless of that, did you make a statement for 1940?

A. Yes sir, I have it for 1940; but it runs fairly constant.

Q. Well, as long as you have it for 1940, will you give those figures and explain them for that year?

A. This net profit equals 100 per cent. The net profit from popcorn sales and screen advertising equals 39 per cent of that figure. The net profit from theatre operations equals 36 per cent and the dividends from other corporations equals 25 per cent. Those three figures make the total of 100 per cent.

Q. If you eliminate the dividends from other corporations and simply take the profit or income from Rockwood Amusements, Inc. proper, what is the per cent of net profit attributable to popcorn sales and screen advertising as compared with other revenue?

A. It is 52.5 per cent of the total.

Q. In these towns, Mr. Stengel, have you tried to get the best popcorn which is available, choicest popcorn?

[fol. 2748] A. Yes sir. We have found that popcorn is like merchandizing any other article. First, you have to have clean machines; you have to have an attendant that looks clean—his hands are clean and he wears a little jacket and then we go out and buy the best popcorn that we can and we have to have a place here to store it. If you know anything about popcorn, it depends on the moisture content, the percentage of moisture content as to whether it is good corn or not. I mean that is one of the important factors. The same is true with regard to seasoning.

Q. Now, in these small towns where you sell this popcorn has your overhead expense or any other expense over and above what you would ordinarily have in operating those theatres increased or what additional expenses does your corporation have in selling popcorn over and above what it would have if it didn't sell popcorn?

A. Well, of course, the space is available for us. We have to buy popcorn machines and use a little electricity and we employ a boy or girl to sell the popcorn, but as far as overhead is concerned, it costs very little. We pay the local manager a percentage of the popcorn receipts and he looks after it.

Q. Have you figured, in arriving at those percentages, the salary of your popcorn boy or popcorn girl and depreciation on the popcorn machines as items of expense?

A. Yes. And in addition, cost of all supplies.

Q. And the cost of all supplies.

A. We haven't allowed any figure for rental and we [fol. 2749] couldn't determine how much electricity was required in running the machines.

Q. So, in arriving at these percentages, you haven't deducted the cost of electrical current or any hypothetical rental of the space in your lobby?

A. That is correct.

Q. What about the screen advertising? Is there additional expense to screen advertising over and above what you would have anyway?

A. No sir, none at all. Our screen advertising runs two minutes, maximum, on every complete show and the film is sent to us prepaid and the operator puts it on and runs it with the other film. As far as expense to the company is concerned, it has not been increased at all.

Q. About how long ago did you develop the popcorn business in connection with your theatres and the screen advertising? Just give a brief statement or history of those items in your corporate income.

A. Well, in the early 30s the general procedure with respect to screen advertising was that the local manager might want some beaverboard or other supplies around town and he would go to the merchant and say "I will run a slide on my screen if you will give me this." As a result, the income to the company was negligible. About 1936 or 1937 we decided that screen advertising was a good medium of advertising inasmuch as it represented two things, vision and sound, as it combined the newspaper and the radio, so we [fol. 2750] talked with one of the national companies with regard to screen advertising and attempted to set up rates in our various towns and as a result we get a very substantial income from screen advertising, and that advertising is conducted in such a way that it will not affect the public by staying on the screen for too long a period of time.

Q. Now, what about the popcorn? When did you start that business?

A. Well, we went into it intensely about three or four years ago.

Q. At the same time that the Rockwood corporation went into these extra sources of revenue and profit did the Crescent Amusement Company do the same thing?

A. Yes sir.

Q. In addition to your over-all figures for Rockwood which you have given, have you, at my request, segregated a few of your specific Rockwood and Cherokee towns with reference to popcorn sales to show a comparison as to both popcorn and screen advertising with other sources of revenue in those towns?

A. Yes.

Q. What towns did you make those figures for?

A. Greeneville, Kentucky, Providence, Kentucky, Manchester, Tennessee, Cowan, Tennessee, Burnsville, North Carolina and Oneida, Tennessee.

Q. Now, in any of those towns did your margin of profit [fol. 2751] depend entirely upon the screen advertising and popcorn sales?

A. In four of the six towns listed we showed a loss before figuring income from popcorn and screen advertising.

Q. Which four of those towns are they and what were the figures with reference to popcorn sales and screen advertising as compared with the net loss from other operations?

A. The Palace Theatre at Greeneville, Kentucky showed a loss of $1172.55 from the theatre operations. After figuring the profit from popcorn sales and screen advertising that figure changed to a net profit of $491.78. In the Lido Theatre at Providence, Kentucky before figuring the income from popcorn sales and screen advertising it showed a loss of $283.86 and after taking those increments of income into consideration our profit was $637.75. The Rex Theatre at Cowan, Tennessee showed a loss from theatre operations of $64.33 and after taking into consideration the popcorn sales and advertising our net profit was $962.85. [fol. 2752] (Continuing) A. In Burnsville, North Carolina, the Yancey Theatre, we showed a loss of $148.47. After taking into consideration popcorn sales and screen advertising, we showed a profit of $935.47.

Q. Now, in the other two towns how did the profit from popcorn sales and screen advertising compare with the profit or loss from other operations?

A. At the Lyric Theatre, Manchester, Tennessee, we showed a profit of $245.77 from theater operations, and after allowing for popcorn income and screen advertising, our profit increased to $742.05. At the Capitol Theater,

Oneida, Tennessee, we showed a profit from theater operation of $271.54. After taking into consideration the income from popcorn sales and screen advertising, our profit was $1220.32.

Q. Now, have you had a tabulation prepared giving the itemized figures on the net profit from popcorn sales and screen advertising, the total profit and then the net profit or less from theater operations and the total net loss or profit from all sources in these situations?

A. Yes, sir.

Q. We offer that as Defendants Exhibit No. 151.

A. I would like to call your attention, Mr. Waller, also to the fact that your statement that you made a few minutes [fol. 2753] ago is true also with respect to these six situations, in that that we were unable to allocate the electric current.

Q. When you realized this profit——

Mr. Wright: May it please the Court, we would like to ask what the exhibitors intend to prove?

The Court: Well, it goes to show the net profits as shown in the income tax, which of course consists partly of sales of popcorn and screen advertising.

Mr. Waller: In other words, it is intended to show that these income figures do not show monopolistic profits, and are not offered for the purpose the Government insists they are offered, and reflects considerably on that evidence.

Q. Let me ask you this, Mr. Stengel: Where you refer to net profit and loss from theater operations, does that include any profits from other operations, stores, etc.?

A. Yes, it does; we have a number of other situations in stores and situations from which we get income and it was impossible to segregate those figures separately, because we would have to take into consideration taxes, insurance, depreciation on the building, and all like that.

[fol. 2754] Q. With reference to the Crescent Amusement Company itself, the net profits also include income from theaters and stores?

A. Yes, sir. Then they are more than the Cherokee.

Q. Does that also include the Hippodrome in Nashville?

A. Yes, sir; that is where they have boxing matches.

Q. Now, with reference to your small town theater operations, what is your relative importance of your Saturday business as compared with the business for other days in the

week? I am asking for a general statement, and then I will ask you to give detailed figures on that.

A. Generally speaking, the 33 or more situations in the Rockwood towns are concerned, that revenue runs from 25 to 50 per cent of the entire week's receipts, and averages about 33 to 35%.

Mr. Wright: What does this refer to?

Mr. Waller: Westerns on Saturday.

The Court: Westerns on Saturday?

Mr. Wright: I think we are entitled to something better than Mr. Stengel's general statement on that.

[fol. 2755] The Court: He is going to get to the other.

Mr. Waller: I am going to get to that.

Q. Now, Mr. Stengel, what is the difference in the Saturday business and the business on other days of the week, with reference to what you would show, what entertainment you provide for the public?

A. Well, we run Western pictures; we have tried other types of pictures, including pictures which border on the Western, such as Zane Gray pictures; and we find that there is not enough shooting and action in those pictures to interest the country trade that we cater to, and they just won't come to the theater.

The Court: I thought the Zane Gray pictures were particularly action pictures?

A. They are action but not quite enough.

Mr. Waller:

Q. Who produces those Western pictures?

A. They are produced by a number of independent producers and are distributed through such companies as Republic Pictures Corporation, Monogram, Big Featurites, Picture Producer Corporation. Mr. Bob Severas' enter-[fol. 2756] prises— I have forgotten the name of them; he is located in New York; and Affiliated, are a few of them.

Q. Are any of those Affiliated you mentioned in this case distribute any of the features called Western features?

A. Yes, sir; do you want me to cover that?

Q. Yes.

A. Warner Brothers, ordinarily, doesn't distribute any out of this list; Paramount had six last year; Fox doesn't distribute any; Metro doesn't distribute any; Universal

about eight; RKO has from 4 to 6, and charges a price; they are also classed as Westerns but only don't get as much business as the other type of Westerns that I am talking about.

Q. Would United Artists produce any Westerns?

A. The United Artists doesn't produce any. They produced one—the "Stage Coach,"—but it was too rich for our people's blood.

Q. In your motion picture theaters, can you state whether this predeliction for Westerns is a nation-wide matter, or is it a sectional proposition?

A. It is a sectional proposition.

[fol. 2757] Q. I understand that they are just for western pictures?

A. That generally the western pictures in the east or middle west, in the last Gene Autry that was shown in Los Angeles in an A theatre for the first time this last year.

Q. Mr. Stengel, you said you had prepared some figures comparing your Saturday business with your average daily business on days of the week excluding Saturday; is that a correct statement of the way your tabulations were prepared?

A. Yes, sir.

Q. Do you have one of those tabulations for Cherokee and Rockwood?

A. Yes, sir.

Q. Covering all the towns?

A. Cherokee Amusements towns of Oneida, Tennessee, Spruce Pine, North Carolina, Lenoir City, Tennessee.

Q. On those three situations will you now state the number of days in the week your theatres operate and the percentage of business done on Saturday as compared with the average daily business on other days.

A. Capitol theatre, Oneida, Tennessee, operates seven days. 39 per cent of our business is done on Saturday and an average of 10.2 per cent is done on each of the other six days. You want me to continue on?

Q. Yes, continue on with the other two situations.

[fol. 2758] A. The Lyric theatre at Spruce Pine, North Carolina, is a six day operation, 44 per cent of our business is done on Saturday, and an average of 11.2 per cent is done on the other five days of the week. The Grand theatre Lenoir City, Tennessee, is a six day operation. Thirty-five

per cent of our business is done on Saturday, and an average of thirteen per cent is done on the other five days.

Q. In what section of the state are Oneida, Tennessee, and Lenoir City, Tennessee?

A. They are in east Tennessee.

Q. And Spruce Pine, North Carolina?

A. Is in what part of the state?

Q. Spruce Pine, North Carolina is in what part or section of North Carolina?

A. It would be in the western part of North Carolina.

Q. Have you also prepared such percentage for Rockwood Amusements, Inc., giving the town in West Tennessee, and two in Kentucky, as well as a town in East Tennessee?

A. Yes, sir.

Q. Will you give those percentages?

A. The Rockwood theatres are as follows: McKenzie, McKenzie, Tennessee, is a seven day operation, forty per cent of our business is done on Saturday and an average of ten per cent on the other six days of the week. The Lido theatre, [fol. 2759] Providence, Kentucky, is a seven day operation, twenty-nine per cent of our business is done on Saturday, and an average of 11.8 per cent on the other days. Palace theatre at Greenville, Kentucky, seven day operation, thirty-per cent on Saturday, 11.70 per cent on the other six days. The Rogersville theatre, Rogersville, Tennessee, is a six day operation, forty per cent of the business on Saturday, and an average of 12.2 per cent on the other five days of the week.

The Court: What place was that?

A. Rogersville theatre, Rogersville, Tennessee.

Mr. Waller:

Q. Now, McKenzie, Tennessee, I believe is in the west part of the state?

A. Yes, sir.

Q. And you said you operated there seven days a week?

A. Yes.

Q. And your Saturday business was 40 per cent as compared with ten per cent daily average on the other days, including Sunday?

A. That is correct.

Q. Rogersville, Tennessee, is in the eastern part of the state, is it not?

[fol. 2760] A. Yes, sir.

Q. And Providence, Kentucky, and Greeneville, Kentucky, are in what parts of the State of Kentucky?

A. Central part, Providence is very near the northern part of Kentucky.

Q. Will you file that tabulation as defendants' exhibit number 152?

A. Yes, sir. I would like to call your attention to the fact that these figures represent an average of two years' business, 1939 and 1940.

Q. Mr. Stengel, have you had a similar tabulation prepared with reference to the new Crescent Amusement Company towns?

A. Yes, sir.

Q. I believe on Friday you stated that the average size the average population of your Rockwood towns and including affiliates, was twenty-three hundred, if you exclude Nashville and Gadsden, Alabama, from the Crescent towns; do you know the average population of these towns?

A. The Crescent towns?

Q. Yes, sir?

A. Is eighty-six hundred.

Q. Is the Western business in those towns a small proportion of the daily business collectively, proportion of the weekly business than in the small towns of the Rockwood Circuit?

[fol. 2761] A. You are speaking collectively of Crescent business?

Q. Yes.

A. It will run a few percentage points less, yes, sir.

Mr. Wright: Your Honor please, if we are going to have any figures on the whole business, let's have what the figures show.

Mr. Waller: I will withdraw that.

The Court: All right.

Mr. Waller:

Q. Did you prepare a tabulation of certain of the Crescent towns, giving the per cent in the same way as you did on the other towns?

A. Yes, sir.

Q. What towns have you used on that percentage?

A. Earlington, Kentucky, Greenville, Tennessee, Gallatin, Tennessee, Harriman, Tennessee, Lebanon, Tennessee, Paris, Tennessee.

Q. Are those towns in different sections of the state?

A. Yes, and when we prepared this list we tried to take a few from each geographical center.

Q. Will you give the per cent on those towns on the [fol. 2762] Saturday business as compared with the average daily business for the other days of the week, other than Saturday?

A. Earle theatre, Earlington, Kentucky, 43.3 per cent on Saturday, other days average 9.4 per cent.

The Court: A six day week?

A. The book-keeper that prepared this did not put the number of days' operation.

The Court: 9.4—it would be a seven day week.

A. The Capitol theatre at Greenville, Tennessee, 32.3 on Saturday, 13.5 per cent average on the other days.

Mr. Waller:

Q. Is that your A house in Greenville, Tennessee?

A. Yes, sir.

Q. All right, go ahead?

A. At the Palace theatre, Greenville, Tennessee, 47.6 on Saturday, 8.5 average on other days.

Q. Does that complete Greenville, Tennessee?

A. Yes, sir. The Lyric theatre at Gallatin, Tennessee, 29.2 per cent on Saturday, 14.1 per cent on the other days of the week. The Prince theatre, Harriman, Tennessee, which incidentally is the B house, 33.8 per cent on Saturday, 13.2 per cent average on the other days. The Princess [fol. 2763] theatre Harriman, Tennessee, 30.4 on Saturday, 13.9 per cent average on the other days of the week. The Princess theatre, Lebanon, Tennessee, 38.2 per cent on Saturday, 12.4 per cent average on the other days. The Capital theatre, Paris, Tennessee, 23.3 per cent on Saturday, 12.7 per cent on the other days of the week.

Q. That last must be a mistake? Isn't it?

A. It appears to me that it is too.

Q. Will you examine that?

A. May I verify that?

[fol. 2764] Q. Perhaps you had better take it and ask to be allowed to correct that later, if it is a mistake?

A. That is what I mean.

Q. Will you file that tabulation, subject to making that correction, if it appears necessary, as Defendant's Exhibit No. 153?

A. Yes.

Mr. Waller: We offer that in evidence.

Mr. Wright: If the Court please, this is objected to as wholly immaterial. There is no dispute, and there is no claim there were not any pictures at all.

Mr. Waller: The complaint is predicated on feature pictures, and we want to show the importance of Western pictures, as well as popcorn sales and screen advertising in this case.

The Court: All right, objection overruled.

Mr. Waller: We would like at this time to introduce, by stipulation, as Defendant's Exhibit No. 154 a tabulation showing the total releases of pictures by major companies and independent companies for the years 1934 to 1939, inclusive; also a breakdown with reference to major companies among the eight distributors who are mentioned in this case; this tabulation being made up of figures contained [fol. 2765] in the Film Daily Year Book for 1940. I understand that it is agreeable that that be stipulated.

Mr. Wright: The figures are correct, but we object to the Exhibit, because it has nothing whatsoever to do with the lawsuit or with the issues that we are trying here. It doesn't make any difference how many independent pictures were released in those years, we are not concerned with it, here.

Mr. Waller: We will ask that be made Defendant's Exhibit No. 154. That shows over 700 pictures annually.

Mr. Wright: There isn't any argument here that anybody, who wanted to run a theatre, can get something to project on any kind of screen to fill up the screen with, some sort of picture for his moving picture audience, without any difficulty whatsoever. That is all this tabulation tends to prove.

The Court: Overruled.

Mr. Raftery: The only objection we have to it, we don't want to be classified with the major companies; we still are one of the Little Three.

The Court: All right. Overrule the objection. Let it be admitted.

[fol. 2766] Mr. Waller: That shows that for 1939 the Major Companies made 383 releases and the independent companies made 373 releases. We won't read the comparisons for the other years, but they are along about the same line.

Q. Mr. Stengel, have the Crescent Amusement Company, the Rockwood Amusements, Inc., and its affiliates, followed the policy of exhibiting double features?

A. No sir, this a considered single feature territory.

Q. From your knowledge of the business of operating motion picture theatres, can you state what is the general practice throughout the country with reference to showing single features or double features in the mall towns?

Mr. Wright: Obviously, he is not competent to testify to that and I don't see what possible connection it has with what we are trying here, anyway.

The Court: How is that competent?

Mr. Raftery: It is competent, on this proposition: The charge is monopolization of supply. Anybody in the picture business knows general conditions throughout the country. The double feature territory uses up a lot more product than a single feature does. Obviously, playing single features in these towns makes a great amount of film avail-[fol. 2767] able for anybody else who wants it. The statement as to double features or lack of double features is competent to show the impossibility of monopolization of supply. That is the issue the Government is talking about.

Mr. Wright: Even taking Mr. Raftery's statement at its face value, how could what happens in another part of the country affect the monopolization of film here?

The Court: How does the supply of film in other territory affect Crescent in this State?

Mr. Wright: That, I say, is the issue here, evidence as to what was available in this territory, what has happened here, not what happened in other parts of the United States.

The Court: That is just the reason I am inclined to sustain the objection.

Mr. Waller: Let me state what I was intending to prove, which was simply this: We have shown there were 761 releases in 1939. We want to show that the necessity for that large number of releases is the fact that in many parts of the country where they have double feature policy in effect,

those pictures are shown. They are not things that cannot [fol. 2768] be shown, as Mr. Wright seems to suggest, and they are not produced for the fun of it. They are available for exhibition.

Mr. Wright: That is not what you are offering to prove by this witness, you couldn't possibly prove by this witness those other pictures, the conditions and extent to which they are exhibited, that is something that is completely outside of this trial. If you are undertaking to show what happens to the balance of the pictures on this list in other parts of the United States, Mr. Stengel obviously is incompetent to give testimony on that point.

The Court: I sustain the objection.

Mr. Waller:

Q. Mr. Stengel, on Saturday——

Mr. Raftery: We reserve the right to offer the evidence of some witnesses that we are going to call on the question of double feature. We are trying to get out of this case the false situation of monopolization of supply that is projected into it by Mr. Wright.

The Court: The question is, whether or not films have been monopolized in the section served by the Crescent, in this territory.

[fol. 2769] Mr. Raftery: That is the monopolization of supply that we are talking about, whether or not they have a local monopolization of supply in the theatres in those towns. The Government charges that the normal flow of supply of motion pictures has been slowed up and in that way the Sherman Act has been violated.

Mr. Wright: We have not given——

Mr. Raftery: I want to finish my statement.

Mr. Wright: Go ahead.

Mr. Raftery: Mr. Waller is offering evidence on the numerically available pictures generally released in the United States and available for exhibition.

The Court: Well, I have admitted that evidence.

Mr. Raftery: And the other step following it is to show, that generally, I believe it will run 80 per cent of the country, geographically, double features are the rule rather than the exception, therefore, twice as many features are used up in that type of territory, which is some evidence that those other pictures are made. I expect so show that.

The Court: You say used up; it wouldn't prevent them from being shown in other territory by Crescent or anybody [fol. 2770] else. Whenever you show a picture, you don't use it up.

Mr. Raftery: You use it up so far as exhibition value is concerned, which is the only thing that is of value.

The Court: What difference does it make in that exhibition value as to whether or not a certain film was to be shown in the Crescent Theatre which had previously been shown as a double feature in Cleveland, Ohio or Newark, New Jersey, or some other place?

Mr. Raftery: That is not the point for which this evidence is offered. The evidence is merely offered to show that there is available pictures that are generally being shown throughout most of the country.

The Court: I thought the evidence was offered for the purpose of showing there were not available films because it was used up by these double feature films.

Mr. Raftery: No, just to the contrary. Mr. Wright has said he is willing to concede that any theatre can get all the pictures it wants; he is willing to concede that, but he says, that the Crescent people have the choice of films. Now, [fol. 2771] the evidence is offered to show that those pictures are made to be shown and they are generally shown in the double feature territories by some exhibitors or all exhibitors.

The Court: What difference does that make?

Mr. Raftery: It makes this difference, that there could not be a monopolization of supply if there were 700 pictures, and if Crescent uses 4 a week, or 200 a year out of the 700, you have got 500 pictures still available to anybody else that wants to go in and open up a theatre in any theatre towns, that there are usable pictures available. That is the only purpose of the offer, from the Distributors' standpoint.

Mr. Wright: Even if they prove it, which he has not obviously attempted to prove here, that every one of those independent productions are shown as a part of a double feature program somewhere else, that wouldn't tend to prove at all that any one of those pictures was or ever could be suitable for a single-feature film in the Crescent towns in the particular territory that we are concerned with here. Taking everything he has said as having been proven, it would [fol. 2772] not have the slightest relevancy to the issues that

we are trying here, the monopolization of pictures for exhibition in this particular territory.

Mr. Waller:

Q. Mr. Stengel on Saturdays do you sometimes play both a feature picture and a Western feature?

A. Yes, in most of our theatres, we double-feature on Saturdays. One of the principal reasons for that is, this: Western pictures are very short in length of time they run, about 60 minutes or 63 minutes and we try to work out a two-hour show on all days of the week.

The Court: Then these figures that you have given about the percentage of your Saturday's business, that is not based entirely, then, on Western films?

A. No, it is based on a Western program.

The Court: What do you mean by a Western program? You mean one Western picture shown alongside of a feature picture?

A. Yes sir.

Mr. Waller:

Q. What I wanted to ask you in that connection, Mr. Stengel, is what has been your experience with reference to the importance of a Western picture for a program?

[fol. 2773] Mr. Wright: That, if the Court please, is purely a conclusion. If he is going to testify here, as evidently he does, that the feature helped to attract the audience there or he wouldn't run the picture with the Western on Saturday, therefore he is not competent to show the extent to which the Western attracts his patrons or the extent to which the other feature attracts patrons.

The Court: Well, I will see what his idea is about it.

A. Do you want to know why we run both pictures, is that it?

Q. Yes, why you run Westerns and why you run the other and then you can state anything else that would elucidate the question?

A. We have tried to run pictures other than Westerns on Saturdays and we haven't been able to do nearly the business that we have running the Western and the feature. Then we have run Westerns alone without feature pictures,

and we have put in short subjects to add to the length of our show, the idea being that we would like to build up about a two-hour show. Within the last three or four years, it has been very hard to get slapstick comedies. Some of the producers are getting away from making two-reel comedies, they make only short subjects. Slapstick comedies go with Westerns on Saturday, they are an ideal bill of [fol. 2774] fare, because they please children and they please people that come into the theatre and that is all you want to do, and they are long enough so that you can put several of them in there and build up a show of an hour and forty five minutes or two hours. Now, we went into the double feature on Saturday for two reasons. The first, because we couldn't get what we thought was desirable short subjects. [fol. 2775] So we had to build up our time and we put a second picture in there. Another reason that we put it in there, we hoped that it would attract more patronage. I can truthfully say that it has not, as far as I can see and we have been doing it about two years, I believe. I can't see where it has attracted a great deal of additional patronage; maybe five per cent, maybe more. By doing that, of course, you have got two ways of getting people into your theatre.

Q. What character of feature picture do you usually play with the Western where you play two pictures on Saturday?

A. Pictures like "The Jones Family" or a Mr. Motto series, a picture without box office value.

Q. Now, in these towns where you have no competition, Mr. Stengel, and where you have never had any competition what is the policy with reference to showing pictures of only a few distributors or of many distributors?

A. Well, we always try to buy, to do business with every company that we can and the only way you can do that without overbuying and paying for pictures that you don't use is to make short commitments.

Q. You mean on contract that gives you choice of pictures?

A. Yes sir.

Q. Now, why do you do that in these small towns where you have no competition?

A. Well, we can make more money by doing it and by virtue of making more money, of course, the public is better [fol. 2776] satisfied, or they wouldn't come to the theatre.

Q. Well, do you try to show the best pictures of each producer?

A. Certainly.

Q. And do you do that in towns where you have never even heard a rumor of competition?

A. Yes, in every town.

Q. Is the purpose of that to tie up the product so as to keep out competition?

A. No sir.

Q. Now, Mr. Stengel, something has been said, a great deal has been said in this case about the Dixie Theatre at East Gadsden, Alabama. Has the Crescent Amusement Company to your knowledge ever asked for any clearance over the Dixie Theatre or any priority of run over the Dixie Theatre?

A. Well, I have negotiated or rather sat in with Mr. Sudekum on every deal that has been made for the Crescent Amusement Company for the last three years—that I am sure of, as to the time, and we have never mentioned, either collectively or myself individually, the East Gadsden Theatre and I didn't know anything about it—I knew there was a theatre there but just thought it was a suburban theatre and never did know anything about it until this lawsuit.

Q. Now, you have examined these Dixie Theatre contracts that have been put in evidence in this case and are there any of them that contain any clearance or priority [fol. 2777] of run in favor of Alabama City over East Gadsden?

Mr. Wright: Now, if the Court please, the contracts speak for themselves.

Mr. Waller: Well, that is a preliminary question.

The Court: Well, that is true but he is asking, has he looked at them to see whether or not they do.

Mr. Waller: I think we can stipulate the Loews contract is——

Mr. Wright: No, we won't stipulate that they show a thing but what they do show. They all show first run Ritz in Alabama City. It is definitely created as a prior run to the second run that is sold to the Dixie in East Gadsden.

Mr. Waller: In the East Gadsden contract?

Mr. Wright: The East Gadsden contract provides for second or subsequent run. The Ritz in Alabama City contract provides for first run in Alabama City.

Mr. Waller:

Q. Well, let me ask you this: Is Alabama City set up in your film deals as a separate situation or as a part of Gadsden?

Mr. Wright: That is a conclusion again. It appears how [fol. 2778] it is set up on the face of the contracts.

Mr. Waller: If it is set up as a separate town, of course, every town has a first run, if it has only one theatre.

The Court: Go ahead.

A. In our negotiations in making film contracts we have always treated Gadsden, Alabama and Alabama City as two separate towns and have bought for Alabama City as a separate situation, and have bought for it as first run as an independent town, not an independent town but as a separate town.

Mr. Waller:

Q. Is that a separate situation from Gadsden?

A. Yes sir.

Q. Now, have you ever asked for any clearance of Alabama City over East Gadsden?

A. No, we haven't.

Q. Did you notice Loews' contract with the Dixie Theatre in East Gadsden that is in evidence in this case?

A. Yes sir.

Q. Where the East Gadsden contract or the Dixie Theatre contract stated that the run should be subsequent to Alabama City?

A. Yes sir.

Q. Did you ask for that or know anything about it until the contract was produced here?

A. We did not.

[fol. 2779] By the Court:

Q. Is that Loews?

Mr. Waller: Loews, yes sir.

A. Mr. Waller, I would like to ask a question, if I may.

Q. All right.

A. You are talking about negotiations for pictures, aren't you?

Q. Yes.

A. No sir, we have never done that.

Q. Is it an uncommon practice for a film company on its own initiative to require intervals between the exhibition of some pictures in the same or neighboring communities?

A. Yes sir, and with further regard to Loews——

Q. I say, is it an uncommon practice?

A. No, it is not.

Q. Now, can you give any illustrations when that has been done and why it is done?

A. You mean hold subsequent run behind first run?

Q. Yes sir.

A. Well, in Nashville, for example, Fox holds our second run sixty days behind our first run. Do you want some more?

Q. Yes sir.

A. Paramount holds us back a certain length of time. The idea is to protect the revenue from other first run situations.

Q. Is that done at your request or on the initiative of the film company?

[fol. 2780] A. Well, I think in those particular cases that I have cited it is done at their request. However, our practice is in small towns where we have two theatres, where we run a picture a second time in the town, we hold it back also.

Q. Now, Mr. Stengel, to illustrate, do you now have—I mean does the Crescent Amusement Company now have the only theatre in Earlington, Kentucky as well as the theatre in Madisonville, Kentucky?

A. Yes sir.

Q. Do you play Madisonville ahead of Earlington?

A. Madisonville plays ahead of Earlington.

By the Court:

Q. How much ahead?

A. I can tell you by giving you some specific pictures and the dates of them.

Q. Well, just approximately.

A. The general booking set-up is from thirty to sixty days, an average of about forty five days.

By Mr. Waller:

Q. Mr. Stengel, in the three franchises that have been referred to in this case, the Paramount franchise, the Fox Franchise and the Warner Brothers franchise, did you have anything to do with the negotiation of these repeat run clauses in those franchises?

A. Yes sir, I did.

[fol. 2781] Q. Was that one of the details that you worked out with the film companies?

A. Yes sir.

Q. What was your reason for wanting those repeat run clauses?

A. The principal reason was that you can make more money in repeating a big picture in a town than you can playing a picture that doesn't have any box office value.

Q. Have you ever had any difficulty in gettting a film company to agree to permit you to repeat a picture where you had no repeat run clause in your contract?

A. Well, I don't think that they would have prohibited us from using it but we couldn't get together as to the money which we wanted to pay.

Q. Well, is it always then a question of price?

A. Yes sir.

Q. When you want to repeat some big picture?

A. That has always been our problem.

Q. Then if you don't have a definite repeat run clause in your contract and want to repeat a picture, what is the procedure?

By the Court:

Q. Well, you have to negotiate as to price?

A. That is right.

By Mr. Waller:

Q. Then, Mr. Stengel, when you negotiated these repeat run clauses in these franchises was there a definite price [fol. 2782] basis fixed?

A. Yes sir, there was.

Q. Did you have any other purpose or motive in asking for those repeat run clauses other than what you have stated?

A. Yes sir, we had this thought definitely in mind, that we were paying out a large sum of money to these people each

year and in some cases with an accumulated increase and we wanted a contract that we could get along with and we insisted on the repeat run clause, asked for one and tried every way that we knew how to get clauses in the contracts that would help us make money.

Q. I don't know whether you understood the question but I will ask you to state again; Then what purpose or purposes did you have in mind in insisting upon the repeat run clauses?

A. To repeat pictures so that we could play them back a second time in the towns. You see, most of our theatres are in one-theatre towns.

Q. What I am getting at is, was it a question of fixing the price in advance or what?

A. Oh yes, that was the big thought.

Q. Did you have any purpose or intent to try to tie up the product to prevent some competitor from getting it?

A. No.

Q. Was that ever discussed between you and any of these film companies?

[fol. 2783] A. Yes sir, it was discussed with Fox.

Q. Well, did you get a letter from Fox, from Paul Wilson?

A. Yes sir.

Mr. Waller: (To Mr. Wright.) Do you have that letter, Mr. Wright?

(Letter handed to counsel.)

Q. I have here a lettter, which I understand was furnished to the Government by the Twentieth Century Fox Film Corporation and which I understand the Government wants introduced in evidence and I will be glad to stipulate and have it marked as the next Government exhibit.

Mr. Wright: I want to add that that letter wasn't furnished until after Mr. Wilson testified.

Mr. Waller: Yes.

Mr. Wright: You can offer that if you want to offer it.

Mr. Waller: I understood you wanted to. I would rather have it go in as a Government exhibit, if you want it.

Mr. Wright: Well, I will of-er it as an exhibit when it comes our turn.

Mr. Waller: Did you state to me the other afternoon that you wanted it stipulated as a Government exhibit?

[fol. 2784] Mr. Wright: I stated I wanted to offer it as a Government Exhibit and I will offer it at the appropriate time.

Mr. Waller: I told him I would stipulate about it and I am stipulating—if he doesn't want it, I will put it in as a defendant's exhibit. It don't make any difference which one it goes in as.

The Court: Well, it is immaterial to me.

[fol. 2785] The Clerk: Government Exhibit 360 and Defendants Exhibit 155.

The Court: All right; we will have a short recess.

(Recess.)

Resumption after Recess:

Mr. Waller: I will read this letter, your Honor.

The Court: All right; read it.

Mr. Waller: It is dated November 22, 1939: (Reading:)

"Mr. Kermit C. Stengel, Rockwood Amusements, Inc., Nashville, Tenn.

DEAR KERMIT:

Regarding letter received from Mr. Armistead dated November 7 attached to your letter of November 9 and in accordance with my letter of October 20, the Company will not accept a clause setting up a basis for the privilege to use repeat runs, because this would virtually set up a second run with no obligations or commitments on the exhibitor's part to use the pictures. [fol. 2786] As a matter of fact we are at this time facing the possibility of a law-suit on a similar clause in a situation where the town has a population of 20,000, exhibitor played three pictures repeat run and did not purchase second run, opposition went into the town, and the exhibitor maintains that we have no right to sell second run to the opposition.

As Mr. Ballance explained to Mr. Sudekum during his last telephone conversation with him, we would submit contract covering twenty-six pictures in towns requested, and these second runs were the particular situations that you gave me over the telephone for which quotations were attached to my letter of October 28.

I assure you that Mr. Ballance has looked into this matter from every angle and he feels that the clause just cannot be inserted.

Very truly yours,"

This is a carbon copy, with initials "PSW."

Did you receive that letter from Mr. Paul Wilson?

A. Yes, sir.

The Court: Has that been marked, what is the number? [fol. 2787] The Clerk: Government Exhibit 360, Defendants Exhibit No. 155.

Mr. Waller:

Q. Now, Mr. Stengel, when you received that letter, did the repeat run clause that you have been discussing include the clause which is now the last sentence in Article 8 of the Fox franchise reading as follows: "It is further understood and agreed that if during the term of this franchise a competitive theater operates in any village, city or town listed on the attached deal sheets (where a definite second-run isn't sold) the exhibitors shall not have the right to exhibit any feature motion pictures as a repeat run."

A. No, sir.

Q. When you received this letter from Mr. Wilson, did you take it up with him in any way to find out exactly what he was objecting to?

A. I think I called him up over the telephone and told him that my interpretation of the repeat run clause certainly did not prohibit him from selling second-run; and he says, Well, we just don't want it in there. Now, you must take into consideration the fact that we hadn't made a definite offer on that; the only way we could get together in the 52 picture deal was that we had to give up twenty per cent of the cancellations; that is one point to illustrate how hard we were trading, and I think this letter was more or less a feature; and I called him and he said no, he wouldn't [fol. 2788] give us the right; and I talked to Mr. Armistead and told him why we wanted the repeat run in there; and told him as far as we are concerned, if they want to put a clause in there whenever we get competition that clause is void, that is perfectly all right with us; and he said, I see nothing wrong in that, and he in turn wrote the letter, and I signed it and sent it to Mr. Wilson.

Q. Is that how this clause got in Article 8?

A. Yes, sir.

Q. Now, what was the period of this correspondence and negotiations with Fox with reference to the time of the Paramount repeat clause and the modification of it? In other words, your letter here is dated November 22, 1939, from Mr. Wilson.

A. Oh, that was a long time afterwards.

Q. Did you have any objection at all to the clause providing that the repeat run privilege would be void in case of competition?

A. No; it was put in at our suggestion.

Q. Did anybody connected with Paramount ever suggest a similar clause in that franchise?

A. Not to my knowledge or recollection.

Q. Now, with reference to franchises generally, Mr. Stengel, and to these franchises that have been referred to, [fol. 2789] are there any advantages to an exhibitor of having a deal for more than one year as compared with a deal for only one year?

A. Yes, sir, there are.

Q. Well, what are they?

A. Well, it assures you, gives you assurance of a supply of some product at the beginning of the season; and when you start trading at the beginning of the selling season with the different distributors or their representatives until you have closed your first deal, why, all of them are sort of reluctant to make a deal because they feel they can hold out and get better terms. How that information gets out I don't know; but the minute you close with two or three or three or four of them it is much easier to negotiate with them.

Q. How is it with reference to your time and the expense, is the negotiating for films an important item in your business?

A. Certainly yes, sir.

Q. Is there any expense saved by getting a deal for more than one year as compared with only one year?

A. Yes, sir; take my own case as an example: It takes almost sixty per cent of my time from September through December to negotiate film deals.

Q. Now, how about the time and expense of the one year [fol. 2790] deal as compared with a one picture deal? Have you had that experience?

A. Yes, quite often, we have negotiated for one film—well, not quite often, but occasionally, we have negotiated for one picture.

Q. Did the company sometimes hold out some exceptional picture out of that?

A. Yes, sir; there is a road-show clause, is my understanding, in every film contract.

Q. What do you mean by road show clause?

A. The distributor has the privilege of withdrawing a picture that looks like it is going to make money; and then again, they may have a picture made by some outside producer which would be outside of the product covered under your contract.

Q. Then, if you have a picture like that which is withdrawn from your contract, you have negotiated for that picture individually?

A. Yes, that is true.

Q. Now, have you ever had any experience about trading for blocks of five?

A. Just one.

Q. Well, what would you say as to the relative advantages or disadvantages of a one-year deal as compared with a five block deal?

[fol. 2791] Mr. Wright: May it please the Court, I don't see that that is relevant here; that would have been true——

The Court: You have been offering that all along, haven't you?

Mr. Raftery: No, I have been trying to show the Big Five are as good as any.

Mr. Waller: It is all a relevant proposition, whether it is only one year or two or more years or a block of five, it is all a matter of experience.

The Court: Well, I don't know whether he has ever had any experience in buying blocks of five or not.

Mr. Waller: He has stated that he had.

Mr. Wright: Well, if he has, somebody has violated that decree.

Mr. Waller: You mean you can't negotiate except for one?

Mr. Raftery: It becomes "must" on the first of September; that is the only distinction.

[fol. 2792] Mr. Waller:

Q. Did you buy a block of five for the Paramount Theater here in Nashville, about a week ago?

A. In a block of five?

Q. Yes?

A. Yes.

Q. In a block of five you know in advance what each picture is, do you, Mr. Stengel?

A. And you are supposed to but in order to know you have to sit down and look after them and find then what I think about the box office quality of the picture; whether I have seen it, how it appeals to me, is no criterion as to how it is going to appeal to people from whom we get our money at the box office.

Q. Comparing a two or three year deal with the one year deal, is there, from the standpoint of the distributor, an advantage; in other words, is that a consideration determining whether you would prefer a one year deal or a deal for more than one year?

A. You mean if you knew what the pictures were?

Q. No; I say, as a matter of practice, do you know any more in a one year deal than you do in a three year deal?

A. No, you don't—Well, to a certain extent; the companies prepare a prospectus prior to the selling season, of [fol. 2793] what they are going to release for the ensuing fall. Take, for example, Paramount: two or three years ago they announced they were going to release five or six outstanding pictures, and at the end of the year they withheld them and released them the following year.

Q. Now, in these three instances where you negotiated or helped to negotiate franchises for Crescent and also negotiated franchises with the same distributors for Rockwood and its affiliates, what was the sequence with reference to the Crescent deal and the Rockwood deal?

Mr. Wright: I don't see the importance to show how he covered those negotiations in some detail; I don't see the importance of it.

Mr. Waller: I was leading up to something else, your Honor. I am sorry I repeated myself.

Q. In any of those cases was there any suggestion by you to the distributor that the Crescent deal would be abandoned if the Rockwood deal was not made?

A. No, sir; on the contract most of the time they would say we would like to make a deal for the Rockwood towns.

Q. Well, was there any suggestion by you to any of these distributors that the Rockwood deal would be abandoned [fol. 2794] if the Crescent deal wasn't approved?

A. No, sir.

Q. It appears that some of these franchises had been actually executed late in the season, after the following season had started, is that correct?

A. You mean formally signed?

Q. Yes.

A. That is true.

Q. Did that prevent your companies from playing those pictures, or how was that handled?

A. Oh no; the particular consideration in any film deal, whether it be a one year deal or a franchise, is the amount of money involved, and in our case, due to the fact that we have so many different theaters, and it would necessitate signing an application for each one of those theaters, to eliminate that work, we would write down on a slip of paper the things that we had agreed to, and then ordinarily, we were dealing with the District Manager, and the District Manager would call his New York office, and in the event the New York representative is here, he would see what deal could be made and say go ahead, and start playing; now, we will agree on the clearance and we will agree on these other things; in no case has any deal been thrown out after [fol. 2795] we have once agreed on the amount of money to be paid, and in no case has the deal been thrown out because we agree on the other terms included in the deal.

[fol. 2796] Q. There has been something in the evidence about negotiations for a franchise with Loew's and about the failure of Crescent to make a deal for the 1939-40 product of Loew's; did you participate in the negotiations with Loew's for the 1939-40 product on behalf of the Crescent Company?

A. I did, yes, sir.

Q. What was the situation with respect to that suggested franchise, what happened about that?

A. Well the Metro representatives came to Nashville to see us, I believe Mr. Kesnick and Mr. Avey, Mr. Kesnick stating that for the 1939-40 product they were going to want thirty-six percentage pictures. In the past or previous season we had bought flat rental. We said we could not

do anything about that. These negotiations went on over a period of time. Finally late in the season may be in December or some time in January, they kept insisting on percentage pictures, and they got down to twenty-four and fourteen. We said, we can't see anything like that, it is getting late, we will just make a five year franchise with you, then may be we can get together on something like that, and they said, no, they were not interested in making any five year franchise. Well, when they said that, that immediately looked like they were coming around, so I said, I said on the five year franchise business, hoping if their [fol. 2797] policy was against making a five year franchise, we could trade and traffic along, asking for certain things in the deal, and we went on with the deal, I would tell them that we were not going to take that deal and they asking us to enter into some other deal, and then it was that we began to talk a one year deal, a two year deal.

Q. You mean 1939-40 and 1940-41?

A. That is right.

Q. Were those negotiations prolonged by you in order to keep any independents from getting Loew's pictures?

Mr. Wright: Your Honor please, I think that is a pure conclusion.

The Court: Overruled.

Mr. Waller:

Q. Go ahead?

A. Well, we did not know whether they were going to sell anybody or not, and we did not tell them not to sell anybody.

Q. Did they consult you about it at all?

A. No, sir, they did not.

Q. On Friday, I believe the United Artists' deals were mentioned, when the Rockwood towns and the Crescent towns were included in the same deal; will you explain how [fol. 2798] that came about?

A. Well the history of the United Artists' negotiations or contracts with the Crescent Amusement Company have been for a lump sum of money.

Q. Very well?

A. There was something at that time, whether Loew's at least have a contract with them, when I came with the company, and the first time that I sat in on the United

Artists' deal, there was a considerable argument with regard to the amount of monty that would be paid for a picture or a number of pictures, each picture carrying its own price, so during the course of the negotiations—this was back when Rockwood just had probably three or four towns, and we will say—taking a hypothetical figure, at least fifteen hundred dollars, and that we would say we would only be willing to pay twelve hundred for both, Crescent Amusement Company possibly then he figured on that, then we couldn't get together, looked like we were at loggerheads as to how to proceed, if you will give us more run we will pay you that much money, that is how it started.

Q. In other words, instead of coming down in the money, you would go up in the number of situations?

A. That is right.

Q. So on or about that time, you included the Rockwood towns with the Crescent towns?

[fol. 2799] A. That is right.

Q. Did that procedure come up on any subsequent deals?

A. Yes, sir, it regularly kept on, in fact I made that part of the United Artists' deals, by that I mean handled the original negotiations, and submitted the deal, so far as the Crescent Amusement Company was concerned, to Mr. Sudekum, after we had gotten pretty well together in the negotiations.

Q. Now, Mr. Stengel, there has been some testimony in the case in regard to the purchase by Rockwood of the theatre at McKenzie, Tennessee; when was your first trip to McKenzie with regard to the theatre at that place, and how did you happen to go?

A. Well I couldn't be sure of the date, but we received a letter from Mr. Dunlap, who was the Worshipful Grand Master of the Masonic Lodge at McKenzie, to the effect that the lodge owned the theatre and was interested in securing a new tenant for it. That was the substance of the letter. I went on down there and talked with Mr. Dunlap, and he was working at a grocery company, wholesale grocery company, and we asked him what was wrong with his present tenant, and he told me that the present tenant was there in arrears with his rent, so he wanted us to make an offer as I recall, and I told him—finally asked him what he wanted and he told me some figure, and I said [fol. 2800] we would not be interested in making any deal,

with him, and I said not until we go and talk with the man that was running the theatre. Then I went over and talked with Mr. Moore.

Q. Did you talk with Mr. Moore as to the rentals, and whether he was in arrears in his rentals, as Mr. Dunlap had stated?

A. I think I told Mr. Moore exactly as to the subject matter of the conversation I had had with Mr. Dunlap, and Mr. Moore told me he was doing a little trading himself, that he wanted to make a lease, wanted to make a better lease with the masonic organization, that the organization was hard pressed for money and he thought if he played his cards closely he might be able to make a better deal, and come out on it.

Q. Was that the nature of that conversation? Or conference with Moore, or what happened?

A. I do not know if all this happened in one conversation, but that happened in a very short period of time.

Q. You mean you made two trips to McKenzie or one trip?

A. I think I made two trips, because I went to see this building, that this building was going to be put up for sale, and then that Mr. Moore hadn't told me the whole story, and some time later I got a letter from one of the banks here in Nashville telling me about this building being put [fol. 2801] up for sale, and anyhow the subject matter of these two conversations amounted to this, Doug Moore said this, I am going to make a deal with these people, and when I do I am going to remodel the theatre and it will be a nice theatre, as nice as anything here. I told him that it looked to me like his theatre was very poor and the people were not getting what they deserved, and if he did not build a theatre, that I would come in there or somebody else was, because the people were demanding the theatre. I had been through there about a year before that on a booster trip, or about that time, one of the Nashville boosters, and some one had talked to me about it. At the time I didn't pay any attention to it.

Q. Did you shake hands with Mr. Moore about it?

A. I told Doug we were not interested in running him out of business, if his idea was to go ahead and build a new theatre, and explained this that we were not interested in coming in but of course we learned, in the mean time that

Mr. Red Moore, his brother, had asked me not to come into the town against him.

Q. That is Mr. Doug Moore's brother who lives in Nashville?

A. Yes, sir.

Q. Communicated with you, or Mr. Sudekum?

A. Yes, sir, with me.

[fol. 2802] Q. Mr. Doug Moore, was he working at the theatre business full time, or was he working at the post office, and looking after the theatre part of the time?

A. He was a mail carrier, he looked after the theatre on part time.

Q. His full time was not taken up with the theatre?

A. No, sir, he was a mail carrier.

Q. What did you find out or understand that Mr. Moore was about to do with respect to making this an up to date theatre?

A. Yes, sir, I did, I found out that he had bought some Booth equipment, and acquired some simplex machines, which is a portable type, and he had taken some of the equipment out of the auditorium, and I believe that is about what he did to the theatre, because he told me at the time of our negotiations that he had spent about two thousand dollars remodeling it, the theatre, and you can't do much more than that for two thousand dollars. The seats were still veneer seats, and I know there are not any rest room facilities in the theatre.

Q. What did you do as to the situation?

A. What do you mean by what we did? What we did next?

Q. Yes, what did you do next?

A. We had rented a store on the square that was about twenty-five feet wide and about seventy-five feet in depth, [fol. 2803] and had made inquiry as to the adjoining store, about the building of a theatre, the room you need, the depth, there wasn't building room depth enough, in the theatre business you need a minimum of about a hundred and twenty, a hundred and ten to a hundred and twenty feet, and you prefer about a hundred and thirty feet for the depth, and when we had looked around, that was what I wanted, we couldn't find that, we looked around, we wanted to stay on the square, so finally we did find a piece of property which fronted on the square that was occupied by the Lovelace Farmer Grocery Company.

Q. In the meantime, Mr. Stengel, before you bought that piece of property, how did you buy it, from Mr. Moore in McKenzie?

A. You mean how it came about?

Q. Yes, I want to know how it came about, first?

A. Well as I say, I left Mr. Moore in McKenzie, I believe it was about a year before we went back in town, and as I say he hadn't done any of the remodelling that I thought he was going to do, and we thought that he had been going to expand the theatre, and we thought we could make some money here, but we went on through there and did not contact Mr. Moore, and rented a building at that time, we tried to get the other building but we couldn't. However in a few days Doug Moore came to Nashville and said [fol. 2804] he was interested in selling out. He suggested a partnership, and I told him I thought it was too small for a partnership and we were not interested in the partnership, asked him what he wanted and he said, Make me an offer, and I said, Doug, I couldn't put a value on your personal property, your personal holdings, you will have to decide for yourself what it is worth, you will have to decide yourself what it is worth. And I asked him how much he had spent on your building and how much is it worth, and he took his pencil and figured it out and we paid him somewhere between eight and nine thousand dollars, and we paid him his price.

Q. You paid him the price he asked you?

A. Yes, sir.

Q. After that you stayed in McKenzie, or what was done?

A. Yes, sir, got the building that housed the McKenzie theatre that is Mr. Moore's theatre was there, with a very poor location, at the end of an alley, a dead end street, and we knew we could not depend on any transient business, it was very hard to send out any lobby displays, and ask the public up and so we wanted to get out on the square, and bought this building, and the property cost us seventy-five hundred dollars, as I recall.

Q. When did you buy that property?

A. I do not remember exactly when we bought Mr. Moore's property, I think, I am not sure of the exact date, [fol. 2805] that would be in 1939.

Q. All right, what delayed the construction?

A. That is right, October, 1939.

Q. What delayed the construction of your theatre?

A. Mr. Ben Maddox or Huntingdon, our attorney, had served notice on this grocery company, Lovelace, Farmer Grocery Company, thirty days, giving them thirty days to evacuate the building, and it seemed impossible and being delayed, they couldn't find another location, so on and so forth, we did not get possession of the building until about a year later, or longer, and we started work on the theatre, and opened the theatre here a few weeks ago.

[fol. 2806] Mr. Waller:

Q. I will pass you a photograph and ask you if that is a picture of the Park Theatre, a picture of the new theatre in McKenzie?

A. Yes sir, it is.

Mr. Waller: We offer that as Defendant's Exhibit No. 156.

Mr. Wright: The same thing is true of this photograph that is true of the others showing what the picture is like in relation to any other building, to give some idea, they crowd the camera right in front of it to show the theatre and it looks like it is new and magnificent, whereas, if you ever see a picture of that as it really is, you would not be nearly so impressed as you would be by those pictures. It shows what can be done when you introduce a photograph, when you don't introduce anybody to show the true condition. It is possible to introduce photographs in a way to mislead and give a misleading picture of the theatre that it represents, just as they single out a theatre in Earlington and took a picture of that two years after it was closed with the windows broke. I don't think this sort of evidence is competent to prove what is is here offered to prove, even if the proof had some relation to the issues of [fol. 2807] the case, which I don't think it has.

The Court: Overruled.

Mr. Waller:

Q. Mr. Stengel, while Mr. Moore was still operating the theatre at McKenzie, had the Rockwood company acquired the theatre in Huntingdon, Tennessee?

A. Yes sir.

Q. From whom was that theatre acquired?

A. Rockwood acquired it from Strand Enterprises.

Q. Had Strand Enterprises acquired it shortly prior to that time from the former owner?

A. Yes sir, from Mrs. Linnie Carter.

Q. I will pass you two photographs, one taken with the camera close up and the other taken with the camera quite a distance away, of the Huntingdon Theatre, the Court Theatre, which Mr. Wright says is a perfect example of what he was talking about and will ask you if you can identify those pictures as to what they are taken of and what the building is?

A. This is the Court Theatre in Huntingdon, Tennessee, and it was evidently taken from the Court House steps.

Q. Which one?

A. The one that includes several other buildings.

Q. And the other one was taken close up?

[fol. 2808] A. The other one was taken close up.

Mr. Waller: We offer those two pictures as Defendant's Exhibits Nos. 157 and 158, respectively.

Q. I also pass you two photographs of a building, one close up and one from a distance, and will ask you if you can identify them?

A. This is the Masonic Building in McKenzie, Tennessee, the lower floor of which is used for the theatre.

Q. Is that the Moore Theatre that you talking about?

A. Yes sir. The picture——

Mr. Waller: We offer those as Defendant's Exhibits Nos. 159 and 160, respectively.

Mr. Wright: We have the general objection to all of these photographs as being irrelevant and immaterial.

The Court: All right, Overruled.

Mr. Waller:

Q. As to the two towns, McKenzie and Huntingdon, Mr. Stengel, from your experience with those two towns, can you make any comparison between them as to being theatre towns, that is, from the standpoint of operating a theatre in those two towns?

Mr. Wright: I don't follow the purpose of this.

The Court: What is the purpose?

[fol. 2809] Mr. Waller: The Government brought the situation in when they introduced proof about Huntingdon getting clearance over McKenzie.

Mr. Wright: How would this information that he is asking him to give, possibly bear on that question of clearance?

The Court: What is the question?

Mr. Waller: I asked him if he could compare the two towns, McKenzie and Huntingdon as theatre towns, how they compare?

The Court: They might compare on the question of clearance from the defendant's standpoint by showing that.

A. May be the easiest way to answer the question would be to tell you that, from the time we acquired the McKenzie theatre until we opened the new McKenzie theatre, that we grossed more money in the Court Theatre at Huntingdon, than we did in McKenzie.

Mr. Waller:

Q. Is that true although McKenzie is a larger town than Huntingdon?

A. Yes.

Q. I believe Huntingdon is the County Seat of Carroll County?

A. Yes.

[fol. 2810] Q. And McKenzie is in the same county?

A. Yes.

Q. Does a town which is a county seat have an advantage over another town in the same county as a theatre town?

A. Yes, it does, because, first, it has the advantage of First Monday, and your Quarterly Court, and then on Saturday, the country people come in there to attend to their business and, naturally, while they are there in town, they bring all the children and they go to a picture—at least, we hope they do.

Q. What do you mean by First Monday?

A. First Monday is quite often called Mule Day. It is one of the best show days in the year in a number of communities. People come in from far and near.

The Court: That is First Monday in every month?

A. Well, it may be.

Mr. Waller:

Q. You mean by First Monday, the First monday in each month?

The Court: I know as much about that as he does.

A. Maybe more.

The Court: The meeting of quarterly county court is also on that day, on First Monday.

Mr. Waller:

Q. Mr. Stengel, the Government introduced evidence to the effect that the Rockwood Company purchased the Selba [fol. 2811] theatre in Central City, Kentucky. Will you explain how that came about, how the negotiations started and what the result was.

A. The people that were running the Selba Theatre, which was Selba Amusement Company and was owned, in the majority, by the two Martins, Guy Martin and his brother, they told us that they were losing money and they solicited a number of people to come into Central City and take that building off their hands, that is, lease it from them. And so, we went on in there and there never was any argument about who was going to take it. We told them that we would take it, we didn't know what we could afford to pay, we didn't know whether the town could get along. But we worked out with them a first run something like this; we would take the lease on a two-year trial basis, with an option of ten years and any equipment that we put in the theatre within the two-year period that we had the right to take it out at the end of the two years, because we were not, as I say, sure whether we could get along. We did exercise our option for the additional ten years.

Q. At the time you made the trade for the Selba Theatre in Central City, Kentucky, was Mr. Pittman running the Empress at that time there?

A. Yes, he was.

Q. What was the Empress Theatre like, as compared with the Selba Theatre,

[fol. 2812] A. Well, the Empress Theatre is a theatre about, has a seating capacity of about three or four hundred seats, is on a side street, it is, in exterior appearance, fairly nice. Its interior won't compare with the interior of the Central City Theatre. It has no rest room facilities, for one thing.

Q. To make it short, did Pittman and Rockwood have any negotiations about the Empress Theatre, if so, who started them and what was the result?

A. Well, we had been in there a week or two and I recall, when Mr. Pittman wrote a letter to Mr. Sudekum, or called Mr. Sudekum and said he would like to sell out and he would like to have a job, that he thought if he could get out of the show business and could get a good job, he would like to get rid of his theatre.

Q. Did he make a proposition to Rockwood after that?

A. Yes sir, he did.

Q. Was the proposition accepted, or what happened?

A. He said he figured his theatre was worth five thousand dollars. We didn't argue with him about it, although I thought it was a very full proposition, and we paid him five thousand dollars.

Q. There has been some testimony introduced by the Government about Mr. Pittman's measuring a garage lot in Greenville, Kentucky. What did you know about that at the time it happened?

[fol. 2813] A. Well, I called the theatre managers every Saturday night and in the course of one of our conversations he told me that a building, a garage building had burned down in Greenville.

Q. First, was Mr. Pittman a resident of Greenville, Kentucky?

A. Yes, he lived in Greenville.

Q. How far is Greenville from Central City?

A. About eight miles.

Q. What did he tell you about Greenville?

A. He told me a garage building had burned down up there and he understood the people who owned the garage were not going to rebuild it and it was a one hundred per cent location and it might be bought cheap and would we be interested in it. I said I appreciated it. He said, I believe you can buy it so that it will be a good investment; it would be a dandy location for a theatre. I said, well, go ahead and look at it if you want to. I said that more to get shut of him than telling him to go over there.

Q. Was the conversation to the effect that he was trying to make you a profit by putting up a theatre in the town of Greenville?

Mr. Wright: We object to that.

(Objection sustained.)

Mr. Waller: I way trying to get along fast.

Q. Did you have any communication from Mrs. Roark, [fol. 2814] who owned the building where Grif Head had a theatre in Greenville, Ky.?

A. Yes, very soon after we went into Central City, I received a wire or letter from Mrs. Roark stating that she had a piece of property available for use as a theatre in Greenville, Kentucky, and asking if we would not come by and see her. And we did not.

Q. Did you hear from her again?

A. Yes, she wrote me another letter, I believe, in two or three months, and sent me a wire, I am not sure which came first the wire or the letter, and said she was going to Florida and she would appreciate it if we would stop by up there.

Q. What happened after that in regard to this building owned by Mrs. Roark?

A. Well, on one of the trips that I made to Central City, going back by way of Greenville, I stopped by to see Mrs. Roark and asked her what she had in mind. At that time she told me that she owned the Palace Theatre building, which was operated by Grif Head. I told Mrs. Roark that we were not interested in acquiring her building unless we could make some sort of deal with Mr. Head.

[fol. 2815] Q. Well, did you talk to Mr. Head?

A. Yes sir. I think we had stopped by to see Mr. Head sometime before that.

Q. Now, go on and state what happened with Mr. Head and Mrs. Roark in as few words as possible so we can get along.

A. Well, from Grif Head's angle, we had stopped and talked with Grif and Grif had suggested a partnership and we weren't interested in a partnership and didn't know if we were interested in Greeneville because we knew that a right smart money was going to have to be spent in Greeneville for a theatre building. So Grif finally said, well, I will sell you my theatre for so much money and I said, Grif, I am not interested in buying your theatre unless we can find out whether we can get a satisfactory lease from Mrs. Roark. So then I would go to Mrs. Roark's about two blocks away and talk with Mrs. Roark and Mrs. Roark would say, Now, are you going to get together with Mr. Head, and I would say, Yes, and back and forth. I spent two days up there running back and forth and we finally closed a deal and we bought the building.

Q. The Government has introduced some evidence of a conversation you had with Mr. Page at Mt. Pleasant, Tennessee in regard to negotiations with Mr. Page for the purchase of his theatre in Mt. Pleasant, Tennessee, and there was testimony about a statement by you to the effect that you could build a theatre and operate it three years at a loss in Mt. Pleasant. Do you recall that conversation?

[fol. 2816] A. Yes.

Q. In which words like that occurred?

A. Yes sir, I made that statement, for this reason; that Mr. Page didn't have much theatre. He didn't own the building at that time, or if he did, he told me his equity in the building was a very nominal sum, I believe he said $1800.00, but I am not positive of that, and he also talked about a partnership, he suggested a partnership, and finally I talked with him one night and he said—I said, what do you want for your holdings? He said, I will take $25,000.00. I said, Mr. Page, are you serious? He said, Yes. I said, What does $25,000.00 include? He says, Well, my theatre and my home. I said; We don't want your home. He said, $25,000.00 is my price. So I said, Mr. Page, for $25,000.00 I can build a theatre across the street and lose money for three years and still save money on it.

Q. Did the Crescent Amusement Company get an option on a lot in Mt. Pleasant, Tennessee?

A. I don't know whether we had a definite, I mean a written option or an oral option. We did have an option on a lot, yes sir.

Q. In connection with those plans did you take up with any distributors the question of finding out whether product was available in Mt. Pleasant?

A. Yes sir. You see, I went through Mt. Pleasant on an average of once every six weeks and I noticed that Mr. Page was not playing anything but Paramount, Columbia and Universal. I never did see any other pictures advertised. [fol. 2817] So that let five of the companies out and I talked with probably three or four of those companies with regard to pictures for Mt. Pleasant and in one case I recall I had a contract with Fox because at the time we thought we were definitely going to build a theatre there.

Q. Why were those plans abandoned?

A. Well, in the first place, the lot that we had was about ninety feet deep and the asking price was around $5000 for

the lot, which was a lot of money for a small town lot a block or two from the square, and we figured it would take $35,000 or $40,000 to build a theatre there and we just didn't have the money at the time.

Q. Did you notice any remodelling done by Mr. Page on his theatre there sometime after that?

A. Well, I went through there, as I say, regularly and I noticed that he put up a marquee sign.

Q. Did you know what he did inside or did you go in?

A. I didn't go in. I understand he enlarged it some.

Q. Now, Mr. Stengel, there has been evidence introduced by the Government with respect to the failure of Rockwood or one or more of the other defendant exhibitor corporations to assume film contracts of a theatre operator where you had purchased his holdings. What was your policy in regard to assuming film contracts which had been made by somebody else?

A. Well, the real reason for that was that I figured if somebody else could make a deal for certain terms and if the deal was a good one, I certainly wanted to try to better [fol. 2818] it. The whole story in the film buys is this, that whatever price you paid the previous year, that is the starting point for the deal for the next year, and the curve of film rental is always up and never down. So if you go into a new town the first time you are going to make a deal in that town you try to bargain as hard as you possibly can to get the best possible film deal, even if you leave out that particular town, as we have done once or twice, leave a town out and not include it in our deal.

Q. Well, in forming corporations such as Cherokee Amusements or acquiring an interest in corporations as Cherokee Amusements and Newport Amusements, did you find out anything about the film deals that this concern had?

A. Yes, I found out particularly when I started buying, but in a case of that kind, why, the same person was usually interested in the theatre and was the managing head of the theatre and the contracts were assumed, or rather they just went on with the business.

Q. That was just the incorporation of a business or the acquisition of an interest in a business?

A. That is right.

Q. Well, in situations like that do you find that all independents had the same kind of contracts with respect to film

rentals, I mean did you find that all the independents had a higher film rental as compared with chains?

A. Oh no. You take some of the Kentucky towns, for example——

[fol. 2819] Mr. Wright: That is just a conclusion.

The Court: Well, he is going to particularize.

A. In some of the Kentucky towns, for example, I believe, Providence, Guthrie and Greeneville, they were buying serials for $3.00, when for towns like Tracy City, Manchester and Rockwood,—the first two towns are just as small as you can get in the way of towns—we were paying $5.00.

Q. Well, what did you find with reference to, say, compare Mr. Baird's deal at Newport, Tennessee with Parrott & Hendren's deal in their towns.

A. There is no set rule for film deals. For example, four companies, Metro, Fox, Warner and RKO may not be all—the deals in the towns may be entirely different. They were in Mr. Baird's case.

Q. Were you able to get better film deals in some of Parrott & Hendren's towns after Cherokee Amusements was formed?

A. Yes sir. It is a question of have to because they were spending more money before we went in than they were taking in.

Q. It was a question of getting better deals or closing up?

A. That is right.

Q. Was the same thing true in Newport, Tennessee where Mr. Baird was an independent?

A. Mr. Baird was a good operator and had made some [fol. 2820] pretty good film contracts, and I believe, for example, in the case of Fox, the first year I bought Fox I paid more money than he did.

Q. Did he have a franchise?

A. Yes sir, he had a franchise. I think that same statement is true with regard to Metro.

Q. You don't mean Metro had a franchise?

A. No, Metro didn't have a franchise but I mean I had to pay as much or more.

Q. Now, Mr. Stengel, have you ever been advised by any distributor, any one of these eight distributors in this case, of the terms of a deal which that distributor was about to

make or had under negotiation with one of your competitors?

A. No sir, I don't remember any deal. I would like to qualify that answer in this way, that whenever you are negotiating for films in competitive towns they might say, Well now, I believe I could get more money from the other fellow, and I tell him to go ahead and sell the other fellow.

Q. Well, have you ever been consulted by a distributor and your approval or consent or wishes asked as to a deal with a competitor?

A. No sir, never.

Q. Has your approval or consent to a deal with any independent operator ever been asked by any distributor?

A. No sir.

Q. Have your wishes or desires in such matter ever been [fol. 2821] asked by any distributor?

A. You are talking about clearance?

Q. I am talking about any deal that a distributor was making with an independent theatre operator, has he ever consulted you or asked your wishes or desires about whether he ought to make it or not?

A. Not before a deal was consummated or approved.

Q. Well, after it is consummated he couldn't ask your wishes or desires, could he?

A. No but I might not like the clearance or something like that but there wasn't anything that I could do about it.

Q. Have you ever individually or as an officer of any of the defendant exhibitors had an agreement or understanding with any one of the distributors or exhibitors or anybody else to keep any competitor or other independent from obtaining films?

A. No sir, I can't say that I have.

Mr. Wright: The same objection.

Overruled.

By Mr. Waller:

Q. You say that you can't say that you did there. Do you mean you have or you haven't?

A. Oh, I haven't, no sir. What I was thinking about, we have always tried to negotiate for the best pictures available and there was just running through my mind that if [fol. 2822] we buy them that doesn't leave them available until the next year for the other fellow.

Q. You mean on the same run?

A. Yes sir, on the same run.

Q. Have you ever bought more pictures than you needed for yourself to prevent an independent or a competitor from using those pictures?

A. We have never bought any pictures with the possible exception of one or two—one of them, Dreaming Lips, in a few situations, where we had paid for the picture and not used it.

Q. Those situations that you talk about such as Dreaming Lips—was that bought for the purpose of keeping somebody else from using it?

A. No; that was bought and not used for the purpose of not showing it to the public.

Q. You mean a picture that you didn't think ought to be shown?

A. It lacked entertainment qualities.

Cross-examination.

By Mr. Mitchell:

Q. Mr. Stengel, I want to ask you about the playing of some pictures at the Knickerbocker Theatre in Nashville, pictures that were available to Buchanan under his Universal Film contract for the year 1938-1939 and under his RKO contract for the year 1937-1938.

[fol. 2823] Q. You have a memorandum of exhibitions at the Knickerbocker?

A. Yes, sir, I have a list of pictures played at the Knickerbocker.

Q. Tell me what Universal products were played at the Knickerbocker—By the way, let me ask you this: What is the rank of the Knickerbocker in Nashville as a motion picture house?

A. We consider it the nicest theater in Nashville; it is one of the top theaters in Nashville.

Q. Well, did the Knickerboeker play the picture "Three Smart Girls Grow Up", with Deanna Durbin and Nan Grey?

A. Yes, sir.

Q. That is a Universal product?

A. Yes, sir.

Mr. Wright: May it please the Court, we don't understand that when Mr. Buchanan mentioned that specifically, you don't contend that any of the pictures referred to were not played by Buchanan?

Mr. Mitchell: Mr. Buchanan testified he closed his house for lack of any product. And I want to show that these pictures were at the Knickerbocker, the best house in Nash-
[fol. 2824] ville, and that he could have obtained them had he wished.

The Court: I recall Mr. Buchanan was asked specifically about some pictures; I don't recall the name of the pictures.

Mr. Mitchell: From our standpoint it is not important that Buchanan played or not, but we want to show that high quality pictures were offered. I would just as soon stipulate that this product was played at the Knickerbocker and it was available to Buchanan; that is all I want to show. Is that pleasing to you?

Mr. Wright: Sure.

Mr. Mitchell: This reads "Three Smart Girls Grow Up, Danna Durbin, Nan Grey. First Love, Deanna Durbin; When Tomorrow Comes, Irene Dunne, Charles Boyer; Son of Frankenstein; Basil Rathbone, Boris Karloff; Can't Cheat an Honest Man, W. C. Fields, Edgar Bergen; East Side of Heaven, Bing Crosby, Joan Blondell, Mischa Auer; Unexpected Father, Baby Sandy, Shirley Ross, Mischa Auer; Sun Never Sets, Douglas Fairbanks, Jr., Basil Rath-
[fol. 2825] bone; Spirit of Culver, Jackie Cooper, Freddie Bartholomew. Stage Door, Katherine Hepburn, Ginger Rogers, Adolph Menjou; Wise Girl——

Mr. Wright: Just a minute; With respect to the RKO pictures you are now referring to, what season's pictures are they?

Mr. Mitchell: 1937-38.

Mr. Wright: Those pictures were rejected at the Rosenbaum theaters, were they not?

A. I wouldn't call it with the word "rejected". They were released by Rosenbaum for the benefit of Buchanan and called RKO.

Mr. Mitchell: (Continuing reading list): Wise Girl, Miriam Hopkins, Ray Milland, Walter Abel, Having Wonderful Time, Ginger Rogers, Douglas Fairbanks, Jr., Joy

of Living, Irene Dunne, Douglas Fairbanks, Jr., Fisherman's Wharf, Bobbie Breen, Irene Dare; Hawaii Calls, Bobby Breen, Ned Sparks.

The Court: All right; adjourn until 1:30 P. M.

(Noon Recess.)

[fol. 2826] Afternoon Session

Cross-examination.

By Mr. Wright:

For the Plaintiff:

Q. Mr. Stengel, I understood you to say on your direct-examination that you didn't discuss with the representatives of the distributors what they might or might not do in connection with licensing their films to your competitors; is that right?

A. That is the statement I made, yes, sir, Mr. Wright; and I cannot remember at the present time of any specific case where they have.

Q. Well, there is one very important qualification to that statement in any event, and that is with respect to the question how pictures you may play may be made available to competing theatres; is that correct?

A. It may be correct from the standpoint of merchandising film, but it has never had anything to do with our buying film.

Q. Well, has you- buying film got anything to do with your merchandising of the film; what do you mean by merchandising film as distinguished from buying film?

A. When we buy film in small towns we want two runs——

Q. Want two what?

A. Want two runs; the problem of zones of clearance [fol. 2827] between runs doesn't come up.

Q. Well, what were those clearances and negotiations that were turned over to you in connection with these franchise agreements, about, up there, if you didn't have to do with clearance and rent?

A. They had to do with clearance in towns other than in the same town?

Q. Well, in any event, whether it is in a different town or in the same town, you do have a distinct interest, do you

not, with what will be done with pictures that play in your houses after you get through playing them, isn't that right?

A. Well that interest has never gone so far that we have taken it up with the film company in the negotiation for film.

Q. Haven't discussed that with them, is that right?

A. As for one town and one town alone and the number of runs in that town——

Q. I didn't ask you that. Just listen to the question and answer the question. Now, it is a fact, is it not, that in negotiating with the film companies you do discuss the terms upon which the pictures that are used by you may be made available in competitive situations, or theaters competing with your theaters?

[fol. 2828] A. No, we don't discuss the terms. We discuss the clearance.

Q. Well, clearance as you understand it is an item that is usually incorporated in a licensing contract, isn't that right?

A. Yes, it is a part of the contract.

Q. And whenever you discuss a clearance with a distributor, you are in that sense discussing the terms on which the films that you play will be made available to theaters which compete with you, isn't that correct?

A. As to the clearance yes; not as to your definition of the word "terms".

Q. And the reason that you do that is because what happens to the film that you buy with reference to when it plays in theaters that are in opposition to your theaters, does affect your business and the value of the film to you, isn't that correct?

A. Certainly, you want clearance to make more money and to protect your own revenue.

Q. Yes, and the further back you can hold the competing theater and the films that you play, the more money you can make, is that right?

A. Well, there is a reasonable clearance; in other words, that depends upon the particular clearance clause in their [fol. 2829] contract.

Q. That is right; but as a general proposition, when you negotiate these deals you attempt to get just as much clearance as you can, isn't that right?

A. Up to 60 days, and, possibly, in one or two cases, 90 days, and that is the maximum.

Q. Well, after 60 or 90 says, it doesn't make much difference to you, does it?

A. It doesn't make any difference; but that is the most we ever ask for.

[fol. 2830] Q. Well I assume that you thought that you could make your exhibitions of the films more profitable by getting a hundred and twenty or a hundred and eighty days, you would do it, would you not, you would not hesitate to ask for that, would you?

Mr. Waller: Objected to, it is argumentative.

The Court: Sustained.

Mr. Wright: His whole testimony has been argumentative on his whole direct here, as to what he does with his film deals.

The Court: Sustain the objection.

Mr. Wright:

Q. Now in connection with this current Fox franchise, as the deal was originally set up in the memorandum that was introduced in evidence here, you had the privilege of a repeat run in any and all of the Crescent, Rockwood situations, that is correct, isn't it?

A. Mr. Wright I believe I said that there was not a second run sold, that is what I said, there were no second runs sold.

[fol. 2831] Q. That is what I said, there are no second run sold, but you had the privilege which was given of a repeat run?

A. No, I said we had a repeat run in any situation where a specific second run was not sold on specific franchise business.

Q. I am not talking about the franchise which was finally incorporated in the later documents, I am talking about the deal as it was originally made with the Crescent, as evidenced by the memorandum here, I believe Government's exhibit number 286, that deal you originally negotiated did not provide for any second runs at that time, did it?

A. No, sir, those were all first run contract that were listed on that sheet, and all were put in there and the repeat run, that was to apply to all situations.

Q. That is what I am asking you, I mean the wording of that clause did not specifically exempt any towns?

A. That did not specifically exempt any towns where we already had second run contracts?

Q. It could not very well exempt second run if you hadn't bought a second run contract?

Mr. Waller: We object to that, it is argumentative.

The Court: Overruled.

[fol. 2832] Mr. Wright: Have you the exhibit here, Mr. Clerk. Let us see what the exhibit says.

The Court: It is here somewhere.

Mr. Wright:

Q. Well in any event, regardless of what is is in the exhibit, you did not negotiate any second runs for Crescent or Rockwood towns until the fall of 1939, isn't that right?

A. No, sir, we would go into negotiations but did not acquire any second run, the second run negotiations at that time were not completed at that time inasmuch as they wanted larger commitments than we felt we could use in those particular towns. I believe they asked us for something like thirty pictures second run in the various towns, and we couldn't get together as to the number of pictures to be used.

Q. Well in any event, the deal sheets under the Crescent franchise in which the second run terms are incorporated are dated December 14, 1939; does that or does that not represent the date on which you made the agreement with respect to the second run that are incorporated in the franchise?

A. Well as I previously stated, Mr. Wright, I could not be sure that the second run contracts were negotiated at that time, or at a later date.

[fol. 2833] Q. Please answer the question?

A. It would indicate it to me, yes, sir.

Q. Now I will ask you to look at this memorandum agreement, marked as Government's Exhibit Number 226, and ask you to show me where there is anything there about exempting second run situations? (Passed to the witness.)

A. It says nothing about it in here.

Q. Well, is it your testimony now that you had some understanding about it that was not in there?

A. There wasn't any understanding, no, sir.

Q. Well it is a fact, is it not that you did not negotiate the second runs that are now incorporated in the Crescent franchise until you found out you could not have a repeat run clause in those towns?

A. Yes, sir, immediately; just as much as it is a fact that those clauses did not appear until we agreed to them.

Q. Now I will hand you this letter of November 9, 1938, photostat letter, from you to Mr. Wilson, and ask you if you wrote that letter, on that date?

A. Yes, sir, I wrote it.

Q. I will ask to have it marked as next Government's exhibit.

[fol. 2834] The Clerk: Government's exhibit 361. (Marked.)

Mr. Wright: I would like to read this, I am offering it in evidence, and I would like to read it, if the Court please.

This is a letter dated November 9, 1939, from Mr. Stengel to Mr. Wilson, marked Government's Exhibit No. 361.

> "With further regard to our phone conversation relative to the clearance clause and the repeat run clause in the franchise, I wish to advise that I discussed this matter in detail with our attorneys.
>
> "They, in turn, discussed same among themselves and have written us letters, copies of which are enclosed herewith, as to their opinions in the matter.
>
> "Best wishes and kindest personal regards."

Q. Now what was this telephone conversation that is referred to in this letter, is this the one in which you say that you said that it was agreed to we have the repeat run clause where opposition might come in?

A. No, that was not this conversation in which Mr. Wilson himself said first run agreements any other clearance in any town, where that town did not have a clearance provision in the original franchise and with respect to repeat [fol. 2835] runs, he said we did not want to give you the repeat run privilege?

A. And he said we have had quite a bit of trouble about it, or words to that effect, you want me to tell you what I said?

A. Yes?

A. I told him with regard to the clearance clause there were only a few towns in the original franchise that some of the clearance that we are asking for was over theatres

that were not in existence, when the original franchise was drawn, and the original clearance terms agreed to, and with respect to the balance of the towns, which are not in the original franchise that I was against tying ourselves up for three years, and we wanted certain assurance on a flat rental contract of those films, that they would not be dated in those particular towns ahead of us. With regard to the repeat clause I told him that at least seventy-five or eighty per cent, I will put it this way, that fifty per cent of the Crescent Amusement Company towns were one theatre towns, about eighty-five per cent of the Rockwood Amusement, et al., towns were one theatre towns, and our purpose of wanting the repeat run clause was the privilege of playing for a second time in the town a big picture *m* run some picture that had been attracting patronage at the box office.

[fol. 2836] Q. Did you say anything to him in this conversation about being willing to waive the repeat run privilege in a situation where competition might appear?

A. I believe that came out later, Mr. Wright.

Q. When did that come out?

A. I think this came out about within, I suppose, the dates, six weeks to about two months. It may have been longer, it took a long time. We were arguing that repeat run clause, I was asking most of the time, but in accordance with one of his conversations, that one of these letters he wrote said your would have the privilege, if any opposition came in a town, and we would have the right to second run, that there is also a repeat clause, but that would detract from the second run clause, contract, in the town, and we did not want to take that risk, and he said all right, it doesn't matter to us if you want it.

Q. If the clause was not there if there were competition, that clause does not function, is that right, it is all right?

A. Yes, sir.

Q. That is what I wanted *go* get, and when you finally decided that matter?

A. You mean the exact date?

Q. Yes?

[fol. 2837] Mr. Waller: I object to that form of question.

Mr. Wright:

Q. When did he undergo that, when did he make the decision, and Fox then put it that way?

A. Mr. Wright, let me clarify one thing, may be this will help. Mr. Wilson in Atlanta, with these deal sheets, which we were getting up that we were hoping to get, he said that Mr. Ballance will not go for the repeat clause, and I will not go for the clearance.

Q. That was some time before this letter of *O*ctember ninth was written?

A. I am talking about this little memorandum of ours was say from that time on we were asking for a repeat run, I wanted a repeat run, bec-use of the money I thought we could make out of it.

Q. I would still like to know when it was that you told Mr. Wilson that Mr. Ballance, Mr. Wilson or Mr. Ballance that you were agreeable to the insertion of the clause that now appears in the franchise, which waives the repeat run privilege in the event opposition appears?

A. When was the date on the letter, please, sir, in which it was made?

Q. This letter is dated November 9, 1939.

A. Well it must have been on or about that time.

[fol. 2838] Mr Waller: I think that is with regard to some other matter, that is before the letter that he has, I do not think the witness understood.

Mr. Wright:

Q. Well this letter refers to two copies of an opinion of your attorneys, are those opinions the ones that contain this suggested language that is in the franchise, about wa-ving the clause if opposition appears?

A. Yes, sir. I went to Mr. Armistead and explained the situation to him just as I have explained it to you, and I said if the opposition is not there, if competition is not coming into the town, we do not care about it, we want the privilege of repeating pictures.

Q. Yes, now the copies, if I understand you correctly, the copies of the opinion which were inclosed in this letter of November 9th, were the ones which pointed out this particular phraseology that is now in the franchise?

A. Yes, sir, I explained that to Mr. Armistead and that is the way we put the repeat run clause in the contract.

Q. You are sure that is included in this letter that went with the opinions, you are sure that t-e letter in which they were enclosed was not the letter of November 9, 1939.

[fol. 2839] A. What was that, Mr. Wright?

A. I say you are sure that the opinions you have just referred to which pointed out this particular phraseology that is in the franchise as a means of solving the competition problem, were the opinions which were enclosed with this letter of November ninth?

A. I would be sure for this reason, there are the only two opinions that I ever got from Mr. Armistead about a film contract, so I am sure they must be the ones.

Q. You haven't got copies of those have you?

A. I do not know whether I have or not, Mr. Wright.

[fol. 2840] Q. I notice, in reading second run deals, that you made for the Booker of Crescent towns, they say: "A minimum commitment of 26 pictures each year." That meant that in selecting those pictures that you were to play second run, you were to take 26 out of the entire year's product?

A. Had to use a minimum of 26.

Q. Those were to be selected as and when the particular films were released?

A. Yes sir. I think there is a general clause in every film contract that said the pictures must be selected within a certain time after release date. Isn't there a playing arrangement on that deal sheet?

Q. I don't see any.

A. I don't know. There isn't on the deal sheet, but I believe that somewhere in the contents of the franchise itself there is something about playing the pictures one-fourth of the pictures each quarter, I think is the way it read, or words to that effect.

Q. But in any event, you were not compelled to select the 26th picture until after you had seen the last picture released during the season, that is correct, isn't it?

A. That might be true in theory, but it certainly was not true in practice.

Q. Well, in practice, you were not compelled to select the [fol. 2841] *the* pictures under commitment for a number of your theatres until late in the Spring of 1940, isn't that right?

A. I didn't understand the first part of your question?

Q. I say, as it worked out, you didn't begin to actually play off the commitment for the 1938-1939 pictures there until the Spring, or for the 1939-1940 pictures, until the Spring of 1940, isn't that right?

A. Well, the contracts weren't negotiated until December, were they?

Q. That is right.

A. You see, in booking, particularly, a second run house, or a house that follows release date by some sixty or ninety days, you book three and four months in advance. For example, in the Rockwood house, I am pretty well booked right now through—Let me see. This is August; September, October and well into November. And that is the way that you book for a second run house.

Q. Well, now, take Morristown, second run pictures that were to be played in the Ritz or Princess, as a matter of fact at that time you were only operating the second run house there about one or two days a week, isn't that right?

A. I couldn't be positive how long we were operating it, how many days a week.

Q. Where you continued to operate them one or two days a week, you didn't use all of them there, did you?

[fol. 2842] A. I don't know whether we did or not.

Q. Don't you recall discussing with Mr. Wilson, or any other representative of Fox or with the Fox booker, the bookers complained that the 1939-1940 product had been tied up second run, on those deals but that actually they were receiving very little second run revenue out of them because a number of theatres that you had covered here were either operated one or two days a week or were closed.

A. I believe that there is a clause in the franchise that protects us to this extent? We made a franchise over a period of years and you can't see in the future, you don't know what is going to happen and there is one in regard to one-theatre towns, that in the event it is necessary to close the theatre, then that the contract commitments shall be reduced in proportion to the playing time that has been cut down, and I think that that clause is also true with respect to the second run deal. Because we can't tell how conditions might be. For example, you have got an Army Camp over here at Manchester and Tullahoma, there it is necessary to run two theatres full time. But as soon as that goes out, may be two theatres can't get along.

Q. Now, you can answer the question.

A. I thought I was answering it, I am sorry that I did not. What is the question?

(Question read by the Reporter.)

[fol. 2843] A. If there were any communications or complaints of that nature, they were directed to Miss Brockett, who handles the booking. I don't know that there were any.

Q. Well, in any event, under a deal of this kind, whether you actually used the full amount of the pictures of 26, or any other number, the distributor is definitely effectually prevented from selling the same pictures second run to somebody else, isn't that right?

A. If we have a second run contract, I mean, if we have a second run contract, certainly he cannot sell second run to anyone else.

Q. Even though your commitment may be for only one-half of the pictures he may have released?

A. I don't think you would find many contracts that would carry more than a fifty per cent commitment second run in any town as small as ours.

Q. You say these questions of booking are taken up with Miss Brockett. Is she Crescent Booker.

A. That is correct.

Q. She doesn't make the decision as to whether or not to close a house, or how many days a week to operate it, does she?

A. She certainly does not.

Q. That is made by you and Mr. Sudekum?

A. That is correct; Mr. Sudekum for the Crescent towns [fol. 2844] and I for Rockwood.

Q. From your standpoint, what you try to do is to achieve the greatest degree of flexibility you can, in your operations, isn't it, with respect to the amount of product you have committed?

A. Yes, flexibility is always desirable.

Q. You want to be in a position to operate one house or two houses in the town?

A. You wouldn't buy a second run contract unless you had a place to use it, Mr. Wright.

Q. Now, in connection with the Warner clearance; I understand that you carried on clearance negotiations for both the Rockwood and the Crescent towns with Mr. McCoy?

A. I did.

Q. By the way, when the term "Rockwood towns" has been used, that includes the towns with theatres operated

A. The other defendant corporations: Rockwood, Cherokee and Kentucky Amusements.

Q. It includes more than that, doesn't it? Also includes Ruffin and Cherokee?

A. Yes sir, it includes—Do you want all of them?

Q. Yes.

A. It includes Hartsville Theatre Corporation, it includes Lawrenceburg Theatres, it includes Chickasaw Amusement [fol. 2845] Company, it includes Ruffin Amusement Company, and Newport Amusement Company.

Q. In addition to Kentucky and Cherokee, that are defendants?

A. Yes, Kentucky, Cherokee and Rockwood. That is about all of them, I believe.

Q. I will show you a letter dated December 15, 1939, from Mr. W. C. Hames, Office Manager for Warner, to you, and ask you if you received that letter shortly after that date?

A. Yes sir, I received it.

Mr. Wright: I will ask to have that marked with the next Government Exhibit number, and offer it in evidence.

The Clerk: Government's General Exhibit No. 362.

Mr. Wright:

Q. Did I understand you to say, in discussing these clearance situations with Warner, there was no discussion of the competing theatres that were affected?

A. I didn't say that, no sir.

[fol. 2846] Mr. Waller: May I see that letter that has been offered in evidence? I haven't seen it. (Letter handed to counsel.)

By Mr. Wright:

Q. Your testimony is that in connection with, at least with discussing Warner clearances you did discuss competing theatres, which would be affected by that, isn't that right?

A. I don't know as I understand your question but I will tell you the way it happened. We first agreed on the dollars and cents for the pictures or the percentage terms. Then Mr. Kalmanson left town and I worked out the clearances with Mr. McCoy and Mr. Williamson was not here and I gave him a list of the clearances that we wanted and he said

Q. Yes, I understand that. I am trying to find out now whether there was or there was not at the time you discussed the situations where you wanted clearance with Warner any discussion of the theatres that were operated by competitors and yours that would be affected by the clearances.

A. Well, naturally in any clearance negotiations, why, you always argue as to why you want it and any distributing company is always reluctant to give clearance of any kind, so you have to have a number of reasons, bring out a number of reasons why you want any clearance and why you are justified in it. It is again a question of selling the film companies on the idea, and you, just like anything else, sometimes ask for more than you really want or expect to get.

[fol. 2847] Q. And in that kind of discussion you discussed these competitive situations which are affected by the clearance, both yours and those of any independent that might happen to be in opposition to yours, don't you?

A. Discuss them in what way, Mr. Wright?

Q. In arguing and pres-nting your case for the granting of clearance in favor of your houses.

A. Oh, I will make this statement—I think our theatre a better theatre. Like the man over here when I was arguing Huntingdon and McKenzie, for example—I brought out the particular point that McKenzie was being run as a part-time operation by Mr. Moore and we were hiring a manager who was working full time in Huntingdon; also, Huntingdon was the county seat; that it was a better theatre physically than Mr. Moore's theatre was; that the potential possibilities looked better and so-forth and so on.

Q. Now, that is the kind of discussion that is typical of any discussion you have with respect to clearance?

A. Yes sir, certainly, surely.

Mr. Wright: I will offer this letter of December 15, 1939, marked Government's Exhibit No. 362 in evidence.

The Court: Suppose you read it.

Mr. Wright: The letter is as follows:

[fol. 2848] "Dear K. C.:

situations, we are enclosing herewith a schedule that we have worked out. This covers your theatres, as well as Crescent Amusement Co.

We cannot grant clearance that you requested as listed below:

Rockwood, Tenn., 14 days over Spring City.
Columbia, Tenn., 14 days over Mt. Pleasant.
Gadsden, Ala., 21 days over Attalla, Albertville, Guntersville, Center, Piedmont, Jacksonville, Boaz and Coleyville, Ala.
Alabama City, Ala., 14 days over Attalla.

It so happens on all of the above we had already made contracts on our new product, which makes it impossible for us to extend clearance as you have requested.

Won't you please be kind enough to check over the attached schedule very carefully, and if there is anything that is not satisfactory, you can discuss this with Mr. McCoy as he will be in Nashville sometime the early part of next week.

Wishing you and yours a Merry Christmas and a Happy New Year, I am

Very truly yours, W. C. Hames, Office Manager."

[fol. 2849] Q. Now, when was it that you finally agreed upon the clearance which is incorporated in the Warner franchise?

A. What is the date of the letter you just put in evidence?

Q. December 15th.

A. I would imagine sometime in the spring of the following year or rather the early part of the following year. I couldn't be positive as to the exact date.

Q. Now, with respect to this clearance between Huntingdon and McKenzie, I believe you testified that after you took over the operation of both theatres and played Huntingdon prior to McKenzie the receipts from Huntingdon were greater than they were from McKenzie. Is that right?

A. I didn't make that statement, Mr. Wright.

Q. What was the statement that you made?

A. I made the statement—you asked me about McKenzie and Huntingdon?

Q. Yes. I didn't ask you——

A. Now, from the time we acquired McKenzie, from that time until we opened the new theatre in McKenzie the average monthly gross receipts were more in Huntingdon than they were in McKenzie, although—and I didn't put this clause in my statement before—pictures were played in some cases ahead of Huntingdon and in some cases behind Huntingdon.

Q. Now, let's take the specific case of Paramount. It is a fact, is it not, after you took over the theatre at McKenzie you had clearance written in favor of—or before you took [fol. 2850] over the theatre rather, you had clearance written in favor of Huntingdon as against McKenzie, isn't that right?

A. Yes.

Q. Do you recall that?

A. That is right.

Q. You say now after you took over the theatre at McKenzie then instead of continuing clearance, you began playing the theatre day and date?

A. No, I didn't say that.

Q. Well, did you continue, after you took over both houses, to play the theatre at McKenzie after Huntingdon?

A. Are you speaking of some particular product?

Q. Paramount, yes.

A. I couldn't answer that question without looking at the books but I would be willing to speculate that in many cases we played some Paramount pictures in McKenzie ahead of Huntingdon, asking for that permission from the Memphis office. We were losing money in McKenzie and trying to get the theatre up on a paying basis.

Q. One of the things that might cause you to lose money at McKenzie would be playing pictures there behind Huntingdon, isn't that right?

A. Well, I can best answer that question by telling you of a case where we did play pictures in McKenzie ahead of Huntingdon and it didn't help our gross on the week. Our manipulations with respect to bookings didn't help Mc- [fol. 2851] Kenzie's gross until we opened the new theatre.

Q. You have very complete records, haven't you, Mr. Stengel, which would show precisely what any particular pictures did or didn't gross in McKenzie and what they did or didn't gross in Huntingdon and the relative dates on which they played the two theatres, isn't that right?

A. Yes sir.

Q. And those records would be better than any memory that you can give us now on the stand as to what actually happened?

A. Mr. Wright, I didn't make any statement—I would like to explain this. I didn't make any statement with respect to any given picture. I was speaking of the accumulative week's gross.

Q. Now, when was it you acquired this 75 foot lot in McKenzie?

A. 75 foot lot?

Q. Yes sir. I believe you testified you bought a lot there that was seventy five feet deep?

A. No, sir.

Q. Or you had an option on a lot?

A. No.

Q. What was it you did say?

A. We rented a building, now, which was approximately twenty five feet wide and something like seventy five or eighty five feet deep. The rental price was about $25.00 or $35.00 a month, right on the Square.

[fol. 2852] Q. That building was leased by you and that was just a few days, you say, or weeks, before Mr. Moore came in to see you about a sale?

A. It is my recollection Mr. Moore came in right after that. How he found out that we had leased the store I don't know.

Q. You knew at the time you leased the store that the store wasn't suitable for the erection of a theatre that would be superior to that of Mr. Moore, didn't you?

A. You mean that one building?

Q. Yes.

A. I think that a theatre could have been erected there that would have been far superior to Mr. Moore's in that particular location. The trouble was, as far as we were concerned, spending that much money to erect a theatre and then only end up with approximately three hundred seats, we weren't accomplishing anything.

By the Court:

Q. I understand you say that in getting in a theatre

ing a hundred and ten feet in depth and preferably a hundred and twenty feet, is that right?

A. Yes sir, that is correct. You see, in a lot of these small towns an alley runs behind and they usually have about eighty foot lots, and it is quite hard to find a lot [fol. 2853] of that depth—I mean there may be only one or two pieces of property available in the town in a good location and, of course, it is kinder hard to trade for it. I understood Mr. Wright's question in this particular case was, could you have bought this particular store building and build a theatre that would have been nicer than Mr. Moore's, and my answer to that is, yes, and I know that we could have.

Q. Do you know the depth of Mr. Moore's lot?

A. I would guess about ninety to a hundred feet. However, it is located on acreage there and could be extended as far as you would want to extend it.

By Mr. Wright:

Q. Well, in any event, when you took over Mr. Moore's theatre you continued to operate it without any new equipment or any remodelling whatsoever, is that right?

A. That is correct, but may I explain this?

[fol. 2854] The Court: Go ahead and make your explanation.

A. There is a clause in his lease with the Masons that within a certain length of time that he occupied the premises he was supposed to put in some rest rooms; and the Masons tried to get us to do it, and I told him we were going to build a new theater.

Q. But you continued to operate it for over two years before you opened any new theater, that is right; is'nt it?

A. I believe that is about right as to the time; I could not be sure without checking it.

Q. Well, according to this tabulation of some equipment and remodeling, there was nothing whatsoever spent on the theater?

A. I think the work started in January of this year.

Q. I am talking about the theater Moore operated.

A. No; we didn't spend any money on it.

Q. And you didn't acquire his land for the new theater, did you, until March 1940, at least March 21, 1940, is the

date you have on defendant Exhibit No. 147 opposite a figure of original cost of the land and building of $7500.00?

A. Isn't that the figure that was in the interrogatory and date?

[fol. 2855] Q. I am taking the figure now off your Exhibit No. 147.

A. I don't know; that must have been the date the deal was closed, I presume.

Q. As I understand it, you decided to go into McKenzie because you didn't believe that Moore had been giving the public there the service to which you thought they were entitled, is that correct?

A. Well, that may be one way of phrasing it; but I don't think that was the complete reason. We thought we could make money out of a good theater operation in McKenzie.

Q. When you say "We" who are you referring to?

A. Rockwood Amusement Company.

Q. Did you discuss the matter with Mr. Sudekum?

A. Which particular matter?

Q. Going into McKenzie?

A. I am sure that I did, because I discussed most everything with him.

Q. Did I understand you, Mr. Stengel, to say, that you never concerned yourself with the terms by which a distributor would serve a competitor of yours with his pictures except with respect to clearance?

A. Well, I don't know exactly what you mean. I would do every sort of thing that I knew how to do that was legitimate to buy film in negotiations; and if I ever heard [fol. 2856] that somebody was paying $7.50 for a picture, I would certainly try to get it for $6.00.

Q. I am referring now to any suggestions you might make to a distributor as to the terms on which he would serve his pictures to a competitor of yours?

A. To the best of my recollection, Mr. Wright, I have not.

Q. I will show you this letter, dated August 15, 1938, from you to Mr. Barnard of Paramount Pictures, and ask you if you wrote that letter on that date?

A. Yes, sir, I did. Would you like to know the reason why?

Q. I will ask to have it marked as the next Government Exhibit.

The Clerk: Government Exhibit No. 363.

Mr. Wright:

Q. While we are waiting you might just tell us why you wrote it?

Mr. Waller: I would like to see the letter, your Honor, before the question is answered.

The Court: All right.

Mr. Wright:

[fol. 2857] Q. Go ahead and answer it.

A. That letter has to do with a ten cent admission price that is being charged by Mr. Dozier on Paramount pictures in Earlington, Kentucky, and we were playing pictures in Madisonville, Kentucky, which is a town about three miles away at an admission price of 25 to 35 cents. One of the reasons for that matter was this: that Mr. Dozier was running a trailer on his screen, which said, in substance, wait and see Paramount pictures at this theater for ten cents. Now, I wrote the letter with the hope that there was a clause in Mr. Dozier's contract as to minimum admission prices and hoping he was violating that clause so he would have to raise his price. But that wasn't during the time of negotiations for any film contracts.

Mr. Wright: I have had the letter marked, and I will read it.

The Court: All right, read it.

Mr. Wright: I will read it (Reading):

"DEAR MR. BARNARD:

I have just received some information which I would like to pass on to you. Mr. Dozier, of the Roxy Theatre, Earlington, Ky. has stated to some people that he is [fol. 2858] going to buy Paramount pictures this season, playing them after Madisonville at 10¢ admission prices. As you know, we played your pictures in Madisonville this year behind Earlington and charged full admission prices. I am giving you this information as it came to me, as I am sure you feel as we do with regard to playing Paramount pictures at 10¢ prices."

Q. Mr. Stengel, I believe you testified that you negotiated the United Artists deal that is in evidence here that was dated April 8, 1939 and covered the 73 Crescent and Rockwood situations?

Mr. Raftery: That is the wrong date. April 8, 1939 is the 61 situations deal; 73 is the next year.

Mr. Wright:

Q. All right. Did you negotiate the 61 situation which was dated April 8, 1939 and which is in evidence here?

A. Which was dated when—April 8, 1939?

Q. Yes?

A. I worked with Mr. Sudekum in making that particular deal, yes, sir.

Q. And do you recall who represented the United Artists?

A. Bob Mocrief and Dave Prince, I believe.

[fol. 2859] Q. Now, I will hand you a letter dated April 14, 1939, from you to Mr. Prince, and ask you if you wrote that letter on that date.

A. Yes, sir, I wrote the letter.

Q. I will ask to have that marked with the next Government Exhibit number.

The Clerk: No. 364.

Mr. Wright:

Q. The contracts that are referred to in the letter are the contracts dated April 8th, which cover the exhibition of United Artists' 1938-39 product in sixty odd Crescent and Rockwood situations, is that right?

A. I think so, but I couldn't be positive without seeing the contract. I am sure, reasonably sure, that that is what I refer to there.

[fol. 2860] Q. I think on your direct examination, Mr. Stengel, you testified that the Rockwood Company or its subsidiaries, built theatres in a substantial number of towns where there had been, had never been a theatre before; can you name those towns for me?

A. Yes, sir, I can. May I refer to this tabulation?

Q. Sure? (Refers to memorandum.)

A. The following towns to the best of my knowledge did not have a theatre that had been operated since talking pictures came in, or at least they were not operating any theatre when we went in the town. Manchester, Tennessee, Tracy City, Tennessee, Cowan, Tennessee, Carthage, Tennessee—there was a person came in there and he set up a tent and ran for a night, he ran it on a circuit, but there

was no legitimate theatre being run there full time. Thompkinsville, Kentucky was closed at the time we went in there, or it had closed, because it was sold at the courthouse door, that is how we acquired it.

Q. The theatre was there?

A. Oh yes.

Q. You acquired an existing theatre?

A. Oh yes.

Q. Where I asked you was situations where you built theatres where there had been none before?

[fol. 2861] A. There was not except that one, that is the reason I stopped to explain it.

Q. Is that true as to Tracy City too?

A. Yes, sir, there was a building there that was not being used, it had not been for ten years.

Q. It was a theatre building?

A. Yes, it was a theatre building.

Q. The question I asked you was to name those towns where no theatre had existed before, and where you constructed a new theatre?

A. Burnsville, North Carolina. Continuing; Pruden, Kentucky, Greenfield, Tennessee, Halls, Tennessee, that is about all of them.

Q. Are there any in that list now like Tracy City, where you took over an existing theatre building?

A. Let me check it again, Mr. Wright, if I may. Manchester, Tennessee, Dr. Womack built a building for us and we leased it. Cowan, Tennessee, there was not a theatre building—come to think of it, I believe they set up vaudeville equipment on a flat floor, it was closed when we took it over and remodeled the building, in fact we gutted the building that was there. The same was true with reference to Greenfield, that might be termed a theatre building, but we gutted the theatre building. Burnsville, we built all of [fol. 2862] it. Pruden, Kentucky, we did not build a theatre, we leased a building and the same is true of Greenfield, Tennessee, we built the building.

Q. I hand you this Government's exhibit No. 364, a letter from Mr. Stengel to Mr. Prince, the letter says:

> "Dear Dave: We are in receipt of your letter of April 10th wherein you advise that your producers have approved the various contracts dated April 8, 1939, for our various operating companies.

"In checking the contracts we find that one of the suburban runs was inadvertently omitted, and that Mountain City, Tennessee, was inadvertently included in the contracts. As per our verbal agreement over the phone today, we are leaving the suburban runs as written and are substituting the Palace Theatre, Greenfield, Tennessee, in lieu of the Strand Theatre, Mountain City, Tennessee. In other words, this will leave exactly the same number of runs and in substance amounts to our substituting Greenfield, Tennessee, for one of the Nashville suburban runs.

"I have discussed the sicty day clearance clause with regard to the Nashville runs with Mr. Sudekum. I have explained to him why this figure instead of a thirty [fol. 2863] day clearance was put in the contracts, i. e., because of the terms of the last contract. Mr. Sudekum stated that in view of the fact that most of the pictures included in the deal had already been released, it would be quite alright to leave the sixty day clause as written. In the future, however, whenever we make any other contracts, he wants it distinctly understood that a thirty day clause for the Nashville runs is to be effective.

"We are returning herewith properly executed the contracts dated April 8th and previously referred to."

There is another paragraph that refers to something else.

The Court: I did not think the Nashville situation was included in this lawsuit?

Mr. Wright: This is the contract that is offered primarily for the reference to the contracts of April 8th, 1939, when they were finally executed by the exhibitor company.

The Court: All right, introduce it for that purpose.

[fol. 2864] Mr. Waller: If it is for that purpose, if that is the purpose for which it is offered, we object to it because the contracts are the best evidence, and they are here.

The Court: Is there any question about that, any difference?

Mr. Wright: The contracts are dated April 8th, and that is the way they appear in our tabulation, actually this shows they were not approved and signed or executed by the United Artists Company or by the exhibitors until April fourteenth.

The Court: What difference does that make?

Mr. Wright: We think it is significant in connection with the deal that was made with the United Artists, Muscle Shoals and Athens, Alabama, that actually this deal was hooked onto this deal here and that is why it sent to April.

The Court: What is the date of the Muscle Shoals contract?

Mr. Wright: April twelfth, when he said he went in nego- [fol. 2865] tiations.

The Court: All right.

Mr. Wright:

Q. Now in connection with this tabulation you offered which is entitled, Equipment and Building Additions as per years closing on June 30 of each year, 1935 to 1941. That tablulation is not confined, is it, strictly to additions, doesn't it also include original building and equipment cost?

A. That exhibit, the way it is prepared, Mr. Wright, shows merely this, the amount of money that we spent on remodeling the building, or any new equipment during that five year period omitting any investment that might have been made prior to the time that the exhibits first start, which I think was June thirtieth.

Q. In addition to remodeling some of these items, opposite the word building, represent new building?

A. Certainly, that is correct.

Q. You did not make any distinction here between remodeling old buildings and building new ones, is that right?

A. No, sir, just to show you there that there has been a continuous flow of money going out toward bettering the theatres we did have; and also for us to acquire new ones, [fol. 2866] if they are on there.

Q. And also these items with respect to equipment include such purchases of equipment as you might have made from an operator at the time you acquired a lease on his theatre, isn't that right?

A. I am sure that would be correct.

Q. The sixty-five hundred dollars that is on here opposite the word equipment for the Doradele theatre, is that with regard to what you paid to the operator for his equipment et al., when you bought him out?

A. That is correct.

Q. And it does not refer in any way at all as to the character and condition of the equipment?

A. There is an estimate made to show the character and condition of the equipment in the exhibit.

Q. Are there any of those figures?

A. Naturally I would like to point out if we had the theatre prior to the first year on there, it doesn't show any money that was spent on original acquisition, or original cost.

Q. Throws no light whatsoever on the physical condition of the theatre or equipment, does it?

A. For example, you can take Bowling Green there, and you can look to see how much money we spent in Bowling [fols. 2867-2869] Green to remodel the theatre, which we already had there.

Q. May be you can, but I can't tell from looking at this exhibit whether any money was spent at Bowling Green, or what it was spent for, the only items that you have on here is an item of building and another item of equipment?

A. That is correct.

Q. As I understand it, you did not attempt to make any segregation between remodeling or new construction?

A. No, sir.

. . . . . .

[fol. 2870] (After Recess.)

Mr. Wright: I wish to substitute a letter or photostatic copy of letter dated August 15, 1938, from Mr. Stengel to Mr. Barnard, the original of which we just marked in evidence, in lieu of original.

The Court: What is the number of the exhibit you are substituting it for?

Mr. Wright: Have you got the number of the original letter there. I think it was the only original letter that you had.

Q. Mr. Stengel, this morning, or on direct examination, you testified in respect to popcorn sales. I will ask you if all those popcorn sales that you were talking about are made in machines, that you keep in the lobbies of the theatres that you operate?

A. Yes, sir.

Q. They are all made, as I understand, and conducted as a part of your theatre business, isn't that right?

A. There is one exception, that is, in Manchester, Tennessee, there is a man that has a store just adjacent to the

theatre lobby and we have a partnership with him in the popcorn machine; he pays us fifty per cent of the net profit.

Q. Otherwise, it is run—You sell popcorn to people who are patrons of the theatre?

[fol. 2871] A. No sir, we try to capitalize our popcorn machines and get them on the street. The psychology and theory of selling popcorn is to put them in the way of people where they have to walk around it.

Q. But customarily, you put your popcorn machines out on the sidewalk or in the lobby?

A. On Saturdays, when the weather will permit, we put it out on the sidewalk.

Q. With permission of the city or town officials? You don't rent any space from the towns to put your popcorn machines out there?

A. No. Sometimes, we have had to move them back in.

Q. Popcorn sales are on while the performance is going on, is that right?

A. Yes.

Q. And when the theatre closes, you close the popcorn machines?

A. Yes. We have some competition in it, too.

Q. You have figures, that we didn't read here, that show the percentage of your gross that comes from popcorn sales, don't you, you show the percentage of total gross receipts from sales of popcorn, is that right?

A. They don't show, but it could be easily figured out, I could tell you if you wanted to know.

Q. I am just going by the record you gave.

[fol. 2872] A. I can tell you right now if you want to know.

Q. I would rather see the original actual figures. You have kept those records, you had those for every year from 1935 through 1939, inclusive, that is right?

A. The popcorn business with us, Mr. Wright, is something sort of new.

Q. Well, the extent to which popcorn figured in your gross receipts is not shown by records which you have kept for all of the years from 1935 through 1939, that is right, isn't it?

A. Yes. I can tell you our gross popcorn receipts and gross theatre receipts, is that what you are asking about?

Q. I just asked you if you had the record which showed that?

A. I am sure our books would show that, yes sir.

Q. The only tabulation you offered here related to the year 1940 and I just wanted to be sure that was not because you only had the records for 1940 and did not have the records for former years?

A. No, we keep records on all of our transactions.

Mr. Waller: Was there any other year you wanted on that?

Mr. Wright: I don't want any of it. I don't think that this year is material.

Q. These figures you have quoted, you have just figured [fol. 2873] by taking the gross revenue from the popcorn and deducted it from the cost of the popcorn and the cost of the salary of whoever was handling the machine and selling, is that right?

A. No, that is not right.

Q. How did you figure it?

A. We took the net profit, as it appeared on our income tax, we took the gross sales——

Q. Just a minute. Your tax return doesn't segregate the profit.

The Court: When you arrived at that net profit for your popcorn, what expenses did you take into consideration?

A. We took all expenses into consideration, other than electricity, which we could not segregate and any rental of space where the machine is located.

Mr. Wright:

Q. You didn't allocate any of the general theatre main office overhead, did you?

A. No sir, we didn't do that.

Q. Or theatre operating expenses?

A. We took the depreciation of the machine and salaries paid and the cost of the popcorn supplies itself.

Q. You didn't attempt to measure, in dollars and cents, the extent to which the operation of the theatre contributed [fol. 2874] to the popcorn business?

A. The only way I can answer that is, in a number of theatres, before we put popcorn machines, we knew what our expenses were, and we know what our expenses were after the popcorn machines were put in, and it didn't cost us any more.

Q. I understand that. Now, this screen advertising. You also have figures which showed exactly what proportion of your receipts came from screen advertising for all the years from 1935 down to the present, don't you?

A. Yes sir.

Q. And in figuring what was the profit from screen advertising, I believe you testified that there was no expense at all, you just took the receipts that came in from screen advertising and called that profit, is that right?

A. That is correct exactly.

Mr. Wright: I move to strike the tabulations that have been brought and read in evidence here as to popcorn and screen advertising. They don't throw any light on the issues here.

Mr. Waller: We would like at the same time to move to strike all the income tax figures that the Government has put in.

Mr. Wright: These figures do not in any way tend to explain the gross income figures or have any relation to them [fol. 2875] whatever, which are in evidence.

The Court: As I understand it, the figures on the popcorn sales only apply to the year 1940.

Mr. Waller: We produced them for that year and I think they reflect——

The Court: That is the only year I can consider.

Mr. Waller: I think the fact that popcorn sales and screen advertising are a very important item in the earnings of this corporation, and so testified to, should be considered.

The Court: It may be. If you want to submit figures, I can tell more about it. You only submitted figures for 1940.

Mr. Waller: I was under the impression the Government introduced income figures for prior years and they had not submitted income figures for the year 1940. I would like to ask at this time to be permitted to offer similar exhibits for 1939.

The Court: All right.

Mr. Waller: And 1938, if your Honor would like to see them.

[fol. 2876] The Court: It isn't a question of what I would like to see; it is a question of what you want to submit. As it is now, I know nothing whatever about the income from the sales of popcorn for the years 1936-1937, 1938, or 1939.

Mr. Waller: We would like to supply those figures for at least 1939.

The Court: As it now stands, the figures you supply for the year 1940 don't in any way reflect on the income that has been produced by the Government for the years 1935, 1936, 1937, 1938 or 1939.

Mr. Waller: I think the evidence shows, your Honor, that the income tax figures that have been submitted are not relevant or material to any issue in the case.

The Court: I ruled the other way on particular figures.

Mr. Waller: We would like to have those others marked.

Mr. Wright:

Q. This comparison, this percent comparison on the tabulation, that is labeled, "per cent comparison of Saturday on Western feature operation as against the feature busi-[fol. 2877] ness of other days in the week, covering a period of June 30, 1939 to June 30, 1940." That is a somewhat misleading label, is it not, in view of your statement that those Saturday operations also included the exhibition of a regular feature in addition to the Western?

A. No sir, I wouldn't think so, Mr. Wright, because there are some spots where we didn't run double features regularly on Saturday.

Q. How about those spots that you put in the tabulation, do you know whether they were double feature or single feature during this period.

A. May I see the tabulation?

(Handing witness document.)

A. (Continuing:) The B-house in Greenville, Tennessee, is a single feature house. It shows 47 per cent of the business done on Saturday.

Q. I understand all those are single feature houses, in the sense that they normally play single features.

A. I am speaking of Saturdays here.

Q. In your single feature houses, you run a special Saturday bill in which you will run a Western along with your feature, is that right?

A. In Greenville, Tennessee, in the B house we don't run a feature on Saturday; we run merely the Western.

[fol. 2878] Q. Are you quite sure about that, for that period that is covered there?

A. Yes sir.

Q. Did you make any personal examination of the records which show the title and character of the pictures which were played at that house during that period?

A. Yes sir, I inquired to find out.

Q. Go ahead. You say that the theatre you have listed there is the B. house is that right?

A. We have listed both the A house and the B house. You asked me, as I understood, which theatres had double features on Saturday and which ones did not.

Q. What are the facts with respect to the A-house which you have got listed there?

A. I think the A-house has double features, but I would have to check that.

Q. You hadn't checked it when you prepared the list, is that right?

A. I saw no reason for checking it at that time. I did not anticipate this question.

Q. What can you tell us about the rest?

A. In the Rockwood towns of Central City, Guthrie, and Cowan, we regularly run a single feature instead of a double feature. That is, we only use the Westerns on [fol. 2879] Saturday. Guthrie, I would like to qualify it by saying that the majority of Saturdays during the year.

Q. Are you talking about your present program policy, or are you undertaking to say what happened during this particular period that is covered by the tabulation?

[fol. 2880] Q. Are you talking about the present program policy or are you undertaking to say what happened during this particular period that is covered by the tabulation?

A. Well, it is just within the last two or three years that we have started using double features on Saturday.

Q. I don't think that answers my question.

A. Prior to that time we used single features. Is that what you mean?

Q. I say, are you just testifying now from your general knowledge as to how you are conducting the business or are you undertaking to testify from a knowledge as to what features were shown in those particular houses during the particular period of time that is covered there?

A. I understood your question to pertain to this particular subject, which was for the year ending June 30th, 1940——

Q. Yes. Now, can you tell me——

A. —and it is my understanding that in the B house in Greeneville, Tennessee, and in Harriman, Tennessee we use a single feature, a single Western.

Q. Do you use it now or used it during that period?

A. During the period specified. However, I will be glad to corroborate this statement, attempt to check it further and see if I am correct.

Q. You couldn't tell me off-hand at this time the name of any Westerns that played at any of those houses on a [fol. 2881] particular Saturday, could you?

A. I wouldn't attempt to.

Q. Go ahead.

A. No, I wouldn't attempt to. I mean it would be physically impossible for me to remember the titles of two hundred and some odd pictures.

Q. You are giving us your best recollection as to the general course of your business or you are not undertaking to testify as to what your records show as to the features that played those houses, are you?

A. Mr. Wright, I must have misunderstood your question. I said if you want additional information I will be glad to get it for you.

Q. I don't want any additional information. I simply want to know what this information is based on and how it was made up. Tell us the rest of it.

A. The only way I can tell you about this—I might tell you about this, about the Crescent Amusement Company towns, that there—we keep a little book showing the total gross for a given week in a given town. That gross includes popcorn receipts. We also have another column that shows the Saturday business but does not include the popcorn income on that particular date, so these figures are misleading in this sense, that, for example, in one of these towns where we show we did 43 per cent of our theatre business on Saturday we actually did 44 to 45 per cent of our business on Saturday.

[fol. 2882] Q. Who prepared the tabulation you have got in front of you?

A. The auditor for the Crescent Amusement Company, Mr. Webb Hays.

Q. He is available here, is he not?

A. Yes sir, he lives here in Nashville.

Q. Go ahead.

By Mr. Armistead: There is no question.

By Mr. Wright: Well, I asked him to tell me about the rest of the items there; go down the list at each of those places where they have double features and where they don't have double features on Saturday.

A. I said I don't know as to the A house in Greeneville, and the B house single featured.

Q. Now, how about the others?

A. The same is true with respect to Harriman, the B house, and I shall be glad to check that and give you the exact information, if you wish.

Q. You don't know whether the A house double featured on Saturday or not?

A. I think it does, yes sir.

Q. Well, do you know whether they use—whether one of those features is a Western or not?

A. Yes sir, it is.

Q. How about the other?

[fol. 2883] A. Those are the only two that I can definitely answer.

Q. As to the others that are shown there you don't know whether during that particular period two features were shown or one feature and a Western or one Western, is that right?

A. I would want to check up before I would hazard a guess on it or make a positive statement.

Q. Well, the answer is, you don't know, then?

A. Yes sir, that is true.

Q. Well, as a matter of fact, these figures of percentage of business relate to total admissions, don't they, number of admissions?

A. No, they don't. They represent the dollars and cents, the percentage of dollars and cents that was taken in on Saturday as against the total dollars and cents that was taken in on the whole week.

Q. You are sure of that?

A. I am positive.

Q. But you didn't make up the table yourself?

A. No, but it was made up at my suggestion.

Q. Mr. Hays told you that that is what this represented?

A. Yes.

Q. Gross receipts and not the number of admissions?

A. Yes sir, that is right. We had no idea of making it up as to the number of admissions.

Q. Now, this same data that Mr. Hays made up this [fol. 2884] tabulation from is kept and is available for all the theatres during the prior years from 1935 to 1939, inclusive, is that right?

A. That is right. We merely tried to select towns from each geographical location that was affected in this lawsuit.

Mr. Wright: I move to strike these exhibits, I don't think any proper foundation has been laid for them. The witness who has testified about or identified them doesn't know—he didn't prepare them and he doesn't know what they show or what they don't show. They purport to cover a two year average, or one of them includes a year in which we have offered figures for, and one which does not. That one there covers the fiscal year ending June 30th, 1940, is that right?

A. That is right. And the other one is for a two year period.

Q. I will hand you this tabulation entitled Percentage comparison on Saturday Western feature operations as against average business for other days in the week, period covered calendar years 1939-40 for Cherokee and Rockwood, and ask you if you can tell me exactly what the policy of each of those theatres that are listed on there was on Saturday during that period.

A. I couldn't make a positive statement about that without checking the records. Generally speaking, the policy was double feature, a Western and another feature.

Q. How did you happen to take two years and combine them into one instead of showing each year, do you know?

A. This report, report for the Crescent Amusement Com- [fol. 2885] pany was prepared by Mr. Webb Hays, auditor for the Crescent Amusement Company. The report for Cherokee and Rockwood was prepared in my office by our bookkeeper, and I presume that I was not specific enough in that respect.

Q. How did you happen to tell your bookkeeper to take two years and put them into one, 1939-1940?

A. How did I happen to do it?

Q. Yes sir, what was the purpose of that?

A. There wasn't any purpose at all. I told him I wanted to know what percent of our total week's business came in on Saturday.

By the Court:

Q. What he means is, why did you happen to select those two particular years.

A. Judge, I was speaking, talking about it to two individuals at two different times, and I told them that we wanted to know what percent of our business, of a week's business was done on Saturday and I would like to have it for the last year or two and the boy in the Rockwood office took me literally with regard to a year or two and Mr. Webb Hays took a year.

Mr. Wright:

Q. Who is the boy in the Rockwood office who prepared it?

A. I think two of them worked on it, Mr. Caruthers and Mr. Rothberg. Mr. Caruthers is the bookkeepeer and auditor for the Rockwood Amusement Company.

[fol. 2886] The Court: I will have to sustain the motion.

Mr. Waller: Well, your Honor, there has been a good many tabulations and exhibits put into the case without requiring strict identification and complying with the strict rules of evidence, and under the circumstances I would ask leave to recall Mr. Stengel or recall whoever would be competent to prove these things in a legal way.

The Court: You can call the party that prepared the figures.

Mr. Wright: It is not a question of——

Mr. Waller: I want to put the Government on notice, however, that from now on we will call them to the same strict rule of evidence.

Mr. Wright: It is not a question of strict interpretation of the rules of evidence. It is a matter of knowing what the exhibit shows or what it doesn't show. We don't care about them being brought to the stand if anybody can make clear exactly what this data is supposed to show and what it doesn't show. Certainly Mr. Stengel hasn't been able to tell us.

A. What is it you want to know, Mr. Wright? Maybe I can help you.

[fol. 2887] Mr. Wright: He is just offering an exhibit and I don't think anything that is in there has any relevancy to the issues in the lawsuit. The objection we are discussing

here is, even if they did, the figures haven't been properly authenticated.

Mr. Waller: Well, I ask leave to recall Mr. Stengel, your Honor. If that is not satisfactory, then we can call the bookkeeper. As I understand Mr. Wright, he doesn't insist on the bookkeeper.

Mr. Wright: Just so we have someone who knows what he is talking about when the exhibit is handed to him.

The Court: All right, I sustain the objection. Go ahead and handle it in the manner you think proper.

By Mr. Wright:

Q. I show you this memorandum, Mr. Stengel, one about Harriman, one dated July 1st and one July 2nd, 1938, and ask you if you can tell me in whose handwriting that appears.

A. Just as to the handwriting, I have never seen it before, and I don't recognize the handwriting.

Q. Have you ever had anybody to make reports for you as to your operations, comparative operations in certain situations?

A. Well, I might make this statement, if a competitor has [fol. 2888] something for the convenience of the public that we don't have, we would like to know about it so we can get it.

Q. Did you ever send anybody into a town to make such a report for you about what a competitor has got as compared with what you have got?

A. I don't know that we have expressly sent them in there to check up. We have certainly had them volunteer. You see, each one of our managers is on a bonus basis and he can think of a dozen reasons why he should get more business and how he could get more business if certain things were not in existence, and he is always calling those particular things to our mind or to our attention.

Q. Well, you think that report was probably made by one of your managers?

A. I wouldn't want to even hazard or speculate a guess as to who did it.

Q. You don't recall ever having asked anybody in your organization or outside of it either for a report on Harriman?

A. I don't recall any specific case, Mr. Wright, other than you are always interested in what the other fellow has. If

I went to Harriman I would go by the other fellow's place to see what kind of theatre he had.

Q. Well, the answer is you don't recall?

A. The answer is, I don't recognize the handwriting and I don't recall; no sir.

[fol. 2889] Re-direct examination.

By Mr. Waller, for Defendants Rockwood, etc.:

Q. Mr. Stengel, you were asked by Mr. Wright in regard to the negotiations with Fox of a second run deal in connection with a franchise; I believe you stated that Fox wanted a larger number of second run pictures in your commitment than you wanted, is that correct?

A. That is correct.

Q. And you said something to the effect that 26 pictures was a good commitment in a second run deal; is that correct?

A. Yes, I made that statement.

Q. Now, why is a fewer number of pictures a good commitment in a second run deal than in a first run deal?

A. Well, generally speaking, with respect to small towns, there isn't any film company that makes over six or eight or ten pictures that are outstanding pictures during the year, and there is no reason to repeat a picture or play it second run in a town or make a definite commitment for some pictures you know won't stand up. They don't have box office value in the first instance, and they have less box office value in the second instance.

Q. You mean that there are pictures that you would be willing to play once in a town but that you wouldn't be will-
[fol. 2890] ing to play twice in a town.

A. Yes, sir.

Q. And for that reason you want a shorter run on the second run deal than on the first run deal?

A. Yes, sir.

Q. And when did you first start to negotiate with Fox about this second run?

A. I believe, on or about the same time that the first run deal was agreed to, or very soon thereafter; Mr. Wilson came to Nashville and——

Q. Well, was it after this correspondence about the repeat run clause that you first took up the question of second run contracts?

A. No, no; it was before that.

Q. And you were negotiating about that proposition all along?

A. Yes. We naturally tried to buy as few pictures as we possibly could run second run, because, because your pictures that had played first run and had to play second run theaters, B houses; this wasn't the biggest value to play in an A theater.

Q. Well, did you as much as possible try to get any first run pictures run second run?

A. Yes.

[fol. 2891] Q. Does that prevent you playing second run pictures over and above the first commitment?

A. Oh no.

Q. You were asked by Mr. Wright with regard to the size of the lot, or the size of the location that you leased in McKenzie, Tennessee, before you actually bought a different location. Why was it that you leased the first location in 1939?

A. We were going to build a theater there, and we had reason to believe or we were told that we could get the building next door. However, this location is a hundred per cent location, and by that statement I mean this: that store building is located in the center of the best business block in town, the block with the most stores in it, and the block that has the greatest number of pedestrians walking along the street.

Q. Did you have that location in actual contemplation as a theater location?

A. We did.

Q. You were asked about a letter that you wrote to Mr. Barnard on August 15, 1938; do you know whether you sent that airmail or not?

A. No; there would be no reason to send it air mail.

Q. I want to call your Honor's attention to this deal 21, [fol. 2892] the application date is May 5, 1938, and the opening date is August 16, 1938, and provides admission price for adults 15 cents and children 10 cents. Now, Mr. Stengel, in regard to this Madisonville and Earlington situation, prior to the writing of that letter what had been Mr. Dozier's custom and practice with reference to the advertising of pictures which he was going to play in Earlington; I mean, as to whether they were ads anywhere outside of Earlington?

A. Well, his customary practice was, he would run an advertisement in the Madisonville newspapers, and then he would buy window-cards and put them up all over town in Madisonville in the business section, that he had certain pictures playing on certain date or dates in his theater in Earlington.

Mr. Waller: That is all, your Honor, except recalling Mr. Stengel on these other matters.

Recross-examination.

By Mr. Wright, for the Plaintiff:

Q. One thing I forgot to ask you about before, Mr. Stengel: And that was, you referred to this block of five Paramount that you just negotiated for?

A. Fox-pictures for Paramount Theater.

[fol. 2893] Q. That was for the Paramount Theater that you were talking about?

A. Yes, sir.

Q. Isn't that also covered by your franchise?

A. I think it is covered by—I am not sure whether it is or not but if it is, why, they are not serving us under the franchise because of the conference that you (Mr. Wright) have had with Mr. Johnson, that the franchise is illegal. I don't believe we have a franchise, first run Nashville, for Fox; I am reasonably sure we don't.

Q. Now, after you left the witness-stand for this last recess, did you discuss your testimony with anybody?

A. No. I think I can tell you about everything that I said——

Q. I don't want to hear everything you said; I want to know if you discussed your testimony with any one?

Mr. Waller: In that connection, I have seen Government counsel discussing testimony with their witnesses at very nearly every recess that has taken place, your Honor.

The Court: What is the purpose of it?

Mr. Waller: I don't know what he had reference to.

[fol. 2894] Mr. Wright: Well, let him answer; and if he says he did not, there is nothing more.

The Court: Well, he has a right to discuss it with his counsel.

Mr. Wright: There has been quite a distinct change between his first testimony in the discussion of the second fun-

with Fox and what he has just given his counsel on re-direct examination.

Mr. Waller: That is an incorrect statement, your Honor.

Mr. Wright: That remains to be seen from the record.

A. I think I told Mr. Waller this, at noon recess, that in regard to first-second run; I think he asked me the question if they were negotiating second run and I said yes, and he said, Well, what happened? And I said, Well, the negotiations fell off because we wouldn't take as many of the pictures as they wanted to sell us, and I told him we would only take so many, and we talked about whether pictures second run were offered Gadsden, that is, second run. I believe that is about all I told him on that occasion.

[fol. 2895] Redirect examination.

By Mr. Waller, For Defendants:

Q. Mr. Stengel, you recall that there was a second run Fox contract in this theater in East Gadsden, the Dixie Theater, in East Gadsden, when Mr. Crawford was the Manager of that theater?

A. Yes.

Q. Is that what you were mentioning, what we were talking about during the noon recess?

A. That is what I was talking to you about. When we told them we couldn't take but so many at a time, they went ahead and sold what we would want them to sell.

By Mr. Wright, For the Plaintiff:

Q. One other question, Mr. Stengel: In the letter you wrote to Mr. Barnard were you referring to the admission prices of children or adult admission prices?

A. No, sir, we were referring to adult admission prices.

And further this deponent saith not.

The Court: I don't quite understand the statement, Mr. Wright, that he changed his statement or testimony about Fox.

Mr. Wright: His original testimony was that they stood [fol. 2896] by the original deal without any second run at all; and the deal sheets plainly show that it wasn't after the second run and repeat option proposition that they were

rejecting and they got together and made up deal sheets for a second run for a number of the Crescent towns which are shown in the franchise.

The Court: You mean at the noon recess?

Mr. Wright: No, I mean the last one that occurred here.

The Court: I see.

Mr. Wright: The recess that occurred between by cross-examination and his re-direct.

Mr. Raftery: I think it would be well to wait and read that record tomorrow morning.

Mr. Waller: Mr. Wright in his question, insinuated that that was true, and I was trying to bring out in another question that it was not true. I think it was a question of counsel forming a question in order to get a response that [fol. 2897] was not entirely in accordance with the facts.

Mr. Wright: I don't think it needs to be argued now, but we will take the position that this is exactly what did happen; that the second run deal was not made until after the repeat option couldn't be got over, and the record shows that.

Mr. Waller: Your Honor, the date of the deal sheets, as I get it, December 14, 1939, which was after the date of this correspondence. But the question I was asking Mr. Stengel, and what I thought Mr. Wright was trying to get at, I understood Mr. Wright had insinuated that they didn't start negotiating second run contracts until after this correspondence about this repeat run clause.

Mr. Wright: No, the point was that they didn't need or want the second run deal there until it appeared that they couldn't tie up a second run, buy a second run option.

[fol. 2898] KERMIT C. STENGEL, Being Recalled by the Defendants, he having been previously duly sworn, testified further as follows:

By Mr. Waller, For Defendants:

Q. Mr. Stengel, when you were last on the witness-stand you testified concerning the proportion of the net profits of Rockwood Amusements, Inc., for the year 1940, which were attributable to dividends from other corporations, and the proportion attributable to popcorn sales and screen advertising, and the proportion attributable to theater oper-

ations, including real estate leases; since you were last on the witness stand have you prepared similar data for the year 1939?

A. Yes, sir.

Q. For the year 1939, will you state the percentage of your net profits attributable to each of those three items—and I assume that you figured the net profit in the same way that you explained previously on the witness stand, is that correct?

A. Yes, sir.

Q. In other words, rent, popcorn sales and screen advertising you did not deduct overhead expense but did deduct actual expenses, such as cost of the popcorn, salary of the popcorn boy or girl and the depreciation on the pop-
[fol. 2899] corn machine?

A. Yes, sir, everything but electricity and any rental space that might have been set up for placing the machine in the lobby of the theater.

Q. Now, in 1939 as well as in 1940, was it true that there were no additional overhead expenses as a result of these two activities?

Mr. Wright: If the Court please, that is a pure conclusion there, as to what expenses there were incurred by the activities; it is a matter of accounting theory as to whether expense you should charge your theater operating expenses to an activity which obviously depends for its very existence on the operation of the theater.

The Court: Well, what he has in mind is, as I see it, the actual overhead expenses; what were incurred would have been incurred whether he had a popcorn machine or not.

Mr. Wright: Well, that is true as to tickets; I suppose you could say that the first hundred tickets were charged
[fol. 2900] against the cost of operating the theater, and the last hundred tickets would represent revenue against which no costs should be charged.

The Court: Well, that is not a comparable situation, because they are the same activities.

Mr. Wright: Well, my point is, there is just as much reason to charge theater overhead against screen advertising revenue, popcorn sales or anything else; it is incidental to the operation of the theater as a charge against tickets admission revenue.

The Court: That might be true for income tax purposes.

Mr. Wright: Well, for any purposes of accounting; that is a very complex accounting question, as to whether or not these expenses of operating theaters are properly attributable to the income that is derived from popcorn sales and how much they should be charged against that; that isn't something of which I think Mr. Stengel or myself is an authority, but I can at least recognize the existence of the question.

Mr. Waller: I don't think it is an accounting question. [fol. 2901] We have stated how we got up the figures.

The Court: I assume that the percentage from popcorn sales would be greater in proportion to the net profit of the operation of a motion picture theater after overhead expenses were deducted, than it would be if the gross receipts, if it were presented on the basis of the gross receipts from the sale of popcorn, before deduction of expenses, would be to the gross receipts of the theater before deduction of expenses and depreciation; and for that reason, counsel presented it in that form.

Mr. Wright: Well, it is a very obvious distortion, your Honor.

The Court: Of course, it is more favorable to them, on the theory that if they were operating a motion picture theater that they would have incurred these expenses, regardless of the sale of the popcorn and that the sale of the popcorn was more or less a side line; and I will consider the evidence in that light.

A. Mr. Waller, I might make the statement that I spent four or five years doing accounting work; so I am somewhat familiar with accounting procedure.

[fol. 2902] Mr. Waller:

Q. Well in any event, Mr. Stengel, is that the way the figures were gotten up, I mean you got the figures for 1939 as you previously explained for 1940?

A. That is correct.

Q. As a materr of fact, regardless of accounting procedure——

The Court: Excuse me just a minute. It might be a matter of preference, the examination that you have or cross-examination on a proportion of gross.

Mr. Waller:

Q. As a matter of fact and without regard to accounting theories, as to whether or not you should allocate overhead to popcorn sales or not, were your overhead expenses increased by your screen advertising and your popcorn sales?

A. No increase. I will say no. Amplifying or qualifying the statement to this effect; that any increase in expenses was deducted and charged up against the operation of the popcorn, in computing this tabulation.

Q. Will you explain further what you mean by that? So that there can be no misunderstanding how the figures were gotten up; in other words, what were the deductions?

A. We deducted the depreciation on the popcorn machines, the cost of popcorn supplies, the cost of the person [fol. 2903] or attendant at the popcorn machine, the bonus which is paid to the manager of the theatre, which bonus is based on the grosses of the popcorn receipts. We were unable to arrive at the amount of electricity used by the popcorn machines, and we did not set up any rents for having the machine in the lobby of the theatre.

Q. Any rent would be a theoretical amount as I understand it?

A. Certainly, yes, sir.

Q. In other words, you did not have to pay any additional rent to any landlord or any one who owned the theatre, from whom you were renting it for the privilege of putting the popcorn machine in there?

A. No, sir.

Q. Now on that basis will you state for the year ending December 31, 1939, what percentage of the net profit of Rockwood Amusements, Inc., came from dividends of other corporations, what percent of the popcorn sales and screen advertising, and what per cent from the other operations, including not only the operation of your theatres, but the leasing of any real estate you owned?

A. May I read this as I have prepared it?

Q. Yes?

A. Rockwod Amusements, Inc., ended December 31, 1939, a total net profit of Rockwood Amusements, Inc., for the [fol. 2904] year 1939, including dividends received from other corporations represents one hundred per cent. The entire net profit from popcorn sales, plus screen advertising

for the year 1939 equals 29 per cent; the net profit of our theatre operations for the year 1939 equals 55 per cent. In connection with that particular figure that also includes any rentals from real estate, the dividends received from other corporations for the year 1939, represent 16 per cent.

Q. Now did you figure the ratio between popcorn sales and screen advertising and the net profit of the theatre operation, but excluding dividends received from other corporations?

A. Yes, sir.

Q. Will you state what that ratio is?

A. The net profit on popcorn sales, plus screen advertising for the year 1939 equals 34.4 per cent of the net profit, exclusive of dividends received from other corporations.

Q. Now in 1939, did you sell popcorn in all your theatres during the full year?

A. No, sir, we did not.

Q. In several situations did you sell popcorn during the year 1939, during only part of the year, and what was the number of weeks in each of those situations when you did actually sell the popcorn?

[fol. 2905] A. We started selling popcorn at the Rex theatre, Cowan Tennessee, on eight, twenty-eight, thirty-nine, and that represented a total of seventeen weeks of operation. The Lyric theatre, Guthrie, Kentucky, started selling popcorn on June 12, 1939, and twenty-nine weeks of operation. The McKenzie theatre, McKenzie, Tennessee, started selling popcorn April first, 1939, and there were thirty-nine weeks of operation. The Lyric theatre Rockwood, Tennessee, started selling popcorn January 21, 1939, and that represented 49 weeks of operation. The Dixie theatre, Tracy City, Tennessee, started selling popcorn on August 28, 1939, and that represents eighteen weeks of operation.

Q. Now what is the total number of situations, or what was the total number of situations in 1939 of the Rockwood Amusements, Inc., as distinguished from its affiliates?

A. Twelve towns.

Q. The other seven of those towns had popcorn sales during the entire year 1939?

A. Yes, sir.

Q. In 1940, as I understand it, all twelve of your towns had popcorn sales during the entire year, is that correct?

A. That is approximately so.

Q. Is that correct approximately?

A. It is approximately correct, some of the theatres did [fol. 2906] not sell the entire year.

Q. Now with reference to the Saturday business of Rockwood and Cherokee affiliates, have you made up a new exhibit covering the years 1939 and 1940, covering three Cherokee Amusement towns and four Cherokee towns, showing the ratio of the Saturday days to the other days of the week, and specifying all those on which only a western picture, as distinguished from the Saturdays on which a western and a feature, or another picture was shown?

A. Yes, sir,

Q. Does that tabulation include the same situations as were covered in the tabulation which you have previously introduced, or were there any substitutions, and if so, where?

A. Providence, Kentucky was eliminated, due to the fact that we previewed certain of our Sunday shows on some of the Saturday nights involved in this two year period, and we therefore eliminated Providence, because we thought it might be confusing.

Q. In other words, at Providence you did have some feature you showed on Saturday, that you felt might have some effect on the Saturday receipts?

A. That is correct.

Q. And therefore you eliminated it from the distribution [fol. 2907] which *which* you think affected it?

A. Yes, sir.

Q. They are any others?

A. Yes, sir, Palace Theatre, Greenville, Kentucky, was eliminated for the reason we had what we term owl shows on Saturday night, which are late shows that start about ten o'clock, and we used a feature picture usually quite a scary picture.

Q. Did you put in two Kentucky towns in place of those you left out?

A. Yes, sir.

Q. What two Kentucky towns did you put in?

A. Central City, Kentucky, and Guthrie, Kentucky.

Q. Now, Mr. Stengel, with reference to the Cherokee town of Oneida, Tennessee, which was included in your other tabulation and is also included in this one, your former tabulation showed that the Saturday business was 39 per cent of the average daily business, and exclusive of Saturday was 10.2 per cent; have you segregated the number of Saturdays when you had a double feature program from the number of Saturdays when you had a single feature program; have you done the same with the other three Cherokee towns?

A. Yes, sir.

Q. What did you find with reference to those towns, and [fol. 2908] whether with a single or double feature?

A. In the Cherokee towns very few single features were used on Saturday.

Q. I notice you have a single feature on Saturday in Oneida, Tennessee; was that a western picture?

A. Yes, sir it was.

Q. What per cent of your business on that Saturday as compared with the average daily business of the other days of the week?

A. That Saturday's business represented 30.2 per cent of the entire week's business.

Q. I do not believe you have the other daily average figures, have you?

A. No, I do not.

Q. Now on the Spruce Pine, North Carolina, situation; how many single feature Saturdays?

A. There were three single feature Saturdays.

Q. And what was the Saturday percentage there?

A. 39.3 per cent.

Q. In Lenoir City, Tennessee, how many feature Saturdays?

A. One.

Q. What was the percentage on that?

A. 32.1 per cent.

Q. Coming down to McKenzie, Tennessee, in Rockwood; that was also in your other tabulation?

[fol. 2909] A. Not Rockwood, Rogersville.

Q. McKenzie, Tennessee, I intended to ask you?

A. Yes.

Q. That is a Rockwood town, is it not?

A. Yes. I misunderstood you.

Q. How many single feature Saturdays in the year period?

A. Fifteen.

Q. Were those fifteen Saturdays days on which nothing was shown but a western picture and shorts, of course?

A. That is correct.

Q. And on those fifteen Saturdays where only a Western picture was shown, what was the ratio of the Saturday business to the business on the other days in the week?

A. 40.8 per cent.

Q. Now on the 76 Saturdays when in the tabulation where double features were shown, what was the Saturday Business as compared with the business of the other days of the week?

A. 39.5 per cent.

Q. So there you had a higher daily average on the Saturday's where you had a western plus another feature?

A. That is correct.

Q. In Central City, Kentucky, what was the situation?

A. We did not use any double features there, there were only single feature Saturdays.

Q. What was your ratio there?

[fol. 2910] A. Saturday business represented 36 per cent of the total business done in a week.

Q. As compared with an average daily business of what outside of the Saturday business?

A. 10.7 per cent.

Q. That is the only situation shown in this tabulation where there were no double feature Saturdays?

A. That is correct.

Q. Now Guthrie, Kentucky, you also substituted, how many single feature Saturdays in the period for Guthrie, Kentucky? Seventy as compared with thirty-four with double features?

A. That is correct.

Q. What was the ratio of the Saturday business to the business in other days of the week, on the days when you had double features, including a western, and on the Saturdays when you had only the western?

A. In the case of double feature in Guthrie, Kentucky, the Saturday business represented 28.6 per cent; in the case of single Westerns for the program on Saturday, the Saturday business represented 28.5 per cent.

Q. Now Rogersville, Tennessee, Mr. Stengel, how many single feature Saturdays and how many double feature [fol. 2911] Saturdays, and what was the ratio in the case of double feature programs in Rogersville, Tennessee?

A. In Rogersville, Tennessee, there were eighty-five of them used, and the Saturday business represented 38.9 per cent of the week's business, 19 single feature programs were used and they represented 40.2 per cent of the entire week's business.

[fol. 2912] Q. Now, there, again the ratio was higher when you had a single Western than when you had a Western and another feature?

A. That is correct.

Q. Mr. Stengel, I think I overlooked asking you in regard to popcorn sales, whether you had made up a separate exhibit for specific situations for 1939, which has been included in the Exhibit for 1940 previously introduced. Have you done that?

A. Yes sir.

The Court: I am going to sustain the objection to the introduction of popcorn receipts for the year 1940.

Mr. Waller: I am substituting this Exhibit for that.

The Court: All right.

Mr. Waller: I think the real relevancy perhaps of the other one would be to show that the popcorn sales were on the increase, when they used it during all the——

The Court: But that is not an issue in the case. As I understand it, the only purpose of this evidence is to show that a part of the revenue that is shown by the income tax returns for the years 1934 to 1939 was realized from the [fol. 2913] sale of popcorn, not all from the exhibition of motion pictures. So there is no evidence of that character in connection with that year of 1940 and no reason to show it in connection with that.

Mr. Waller: Instead of marking it with the other exhibit number, the other I think has already been stricken, as I recall.

The Court: I didn't order it to be stricken, but I indicated that it would be.

Mr. Waller: I offer this in evidence.

Q. It covers the towns of Greenville and Providence, Kentucky, Manchester, Tennessee, Cowan, Tennessee, Oneida, Tennessee, and Burnsville, North Carolina.

A. Yes sir, that is correct.

Mr. Waller: We offer that in evidence as Defendant's General Exhibit No. 215.

Mr. Wright: If the Court please, I don't see what possible probative value this Exhibit has even for the year 1939, selecting these six theatres?

Mr. Waller: We have covered the over-all situation and, [fol. 2914] for illustration, we are picking out six towns.

Mr. Wright: What does it illustrate?

Mr. Waller: It illustrates that in a number of these towns, there would have been a loss if they hadn't had popcorn sales and screen advertising, which converted a loss into a profit, and I think in one of them there was still a loss.

Mr. Wright: Well, even so, what does it show, if you show that there would have been, how does that bear on any issue in the case, is what I don't understand.

Mr. Waller: If the Government will be kind enough to tell us what the issues in the case were, I would be better able to answer. I understand we are charged with being guilty of local monopolies, therefore, violating the Sherman Act.

The Court: I don't understand they complain of that. I don't understand they complain that local monopoly does that.

Mr. Wright: Even if we did, I don't see what possible relevancy the number of popcorn sales in Greenville, Kentucky in 1939, or the screen advertising carried in the [fol. 2915] theatre at Providence, Kentucky, turned a loss into a profit in the same year, how that would have any relevancy anyway.

Mr. Waller: As I understand, your Honor, the Government claims that we have these monopolies and we were making a whole lot of money because we had monopolies.

Mr. Wright: There is no question about the fact that they would not be in the popcorn and screen advertising business if people didn't come in the theatre to buy popcorn and see the screen advertising; You can't get any money for screen advertising unless you show a picture that attracts the public. It is shown they pick up some additional revenue in the form of screen advertising and in the form of popcorn sales to the people coming in and passing the theatre. But how does that throw any light on the issues of monopolies? That is beyond me.

The Court: The only purpose that I understood the evidence was being offered for, was that a part of the receipts of the business was from the sale of popcorn and [fol. 2916] screen advertising.

Mr. Waller: We are trying to reflect considerable discredit on the Government's evidence; that is the purpose of it. The Government has introduced figures that show, or, as the result of those figures, they say, that it would be proper to draw the inference that we had violated the Sherman Act.

The Court: I disagree with you on that.

Mr. Waller: That is the only thing they could introduce them for.

The Court: It is one circumstance.

Mr. Waller: I meant, one circumstance.

The Court: Haven't you rebutted that, or haven't you explained the nature of the income by evidence that, for the year 1939, as far as the income for that year is concerned, that a certain per cent of it resulted from the sale of popcorn and screen advertising? Why is it necessary to go into individual situations?

Mr. Waller: The Defendant expects to show Your Honor, that no two situations are alike; in some of them, they make [fol. 2917] money, in some of them we lose money. You can't simply take a figure on an income tax return and say that because there is an overall net profit resulting from the income, that they are monopolizing anything.

The Court: It shows the profit coming from the situation as a whole.

Mr. Waller: In Nashville, the Crescent has the Hippadrome where they have skating and various activities, that produces income.

The Court: I think it would be proper for you to show where it came from.

Mr. Waller: I don't think it is incumbent upon us to make the Government's testimony relevant; we are trying to show it is irrelevant.

The Court: No, the Government, in that respect would show the income. If there was any explanation as to where it came from, that would be a matter for the Defendant to show.

Mr. Waller: We would have to show in detail where all of it came from? I think where they show the figures, if [fol. 2918] we can show the figures have no probative value,

I think that is all that is necessary, and that is what we are trying to do with this evidence.

The Court: I agree with you on that; but I don't see how this breakdown shows that, as to these various towns. Let me see that Exhibit. (Examines Exhibit.) For instance, here, in Providence, Kentucky, you have $655.96 income from popcorn sales and screen advertising. But, if I understand the Exhibit correctly, notwithstanding that, you will have a net loss of $1280.00.

Mr. Waller: In other words, we want to show that no two situations are alike; that all these moving picture enterprises are enterprises that depend on the management, private initiative and many factors.

The Court: I think that would be competent and pertinent, if the Government had introduced as to each particular corporation, showing the income from each particular corporation. But the aggregate income of each corporation was introduced. I think it would be proper to show all [fol. 2919] that aggregate income, if you wanted to, was not from the showing of moving pictures.

Mr. Waller: We have shown that.

The Court: I think that is all that is pertinent to the issue, regardless of the individual situations. I sustain the objection.

(Recess.)

Mr. Waller: In connection with the figures as to popcorn sales and screen advertising. Mr. Stengel testified, when he was on the stand before, that those were new sources of revenue and those activities had been started in the past two or three years.

I want to call that to your Honor's attention in connection with the Government's insistence that the revenues of these companies have increased during the past four years.

In other words, the trend of the income tax for each year. [fol. 2920] Mr. Wright, if that is what it is offered for, he also testified he had figures on the popcorn sales and screen advertising for the entire period from 1934 to 1939. If there is going to be a question as to showing the trend, certainly these figures for the one year of 1939 couldn't mean anything.

The Court: The figures for 1939 will be the only figures I have before me.

Mr. Waller:

Q. In case the record is not clear, Mr. Stengel, I will ask you, when was it you started the popcorn sales and what was the trend with reference to increasing or decreasing the number of towns where you sold popcorn?

A. We started popcorn sales, generally, in 1938. From that point on, we tried them and they worked out. We may have had a machine or two in the latter part of 1937. Then we started in 1938 and in the latter part of 1938 and 1939, we put them in almost every theatre—I am speaking now of both Rockwood and Crescent.

Q. What about screen advertising?

A. Screen advertising started in the latter part of 1936. 1937 was the first contract that we had with a guaranteed payment to us each month. Prior to that time the managers [fol. 2921] would, in most cases, trade out the screen advertising for beaver board. We did get some income, but the amount was negligible.

Q. Did the screen advertising start in every town at the same time, or was there any trend on that?

A. The first contract we made with Alexander covered only the Crescent towns, but, of course, there were only a few Rockwood towns. When that deal ran out, we made a deal with MPA Services, with headquarters in New Orleans. And at that time we included Rockwood and its subsidiary companies under one contract, and Crescent under another one.

Q. When was that?

A. I couldn't be sure whether it was 1937 or 1938.

Q. It was either in 1937 or 1938.

A. That is the best of my recollection.

Q. Can you ascertain that exactly?

A. Yes sir, I can do it easily.

Q. Will you undertake to do that at the noon recess?

A. Yes sir.

Q. Now, I questioned you about your figures showing the Saturday business of certain Cherokee and Rockwood Amusement towns. I believe you have a tabulation from which you gave that testimony? I say, you have a tabulation from which you gave that testimony?

A. No, I think it is in evidence.

Q. Oh, has that already been filed? Has that been marked?

[fol. 2922] Mr. Waller: Has that been marked, Mr. Clerk?

The Clerk: Marked for identification.

Mr. Waller: No; this is the one for popcorn and screen advertising. I am asking now about the Saturday business.

A. For Rockwood?

Q. For Rockwood and Cherokee. That tabulation has not been marked, has it, Mr. Clerk?

The Clerk: No.

Mr. Waller: I want to offer that tabulation in evidence, your Honor, as Defendant's General Exhibit No. 216.

Mr. Wright: I would like to cross examine him on it before it is admitted.

By Mr. Waller:

Q. Mr. Stengel, have you prepared a tabulation for any Crescent towns?

A. Yes.

Q. Giving a comparison of Saturdays as to other days in the week where only single features were exhibited on Saturday?

A. Yes.

[fol. 2923] Q. Now, what method or procedure did you follow in making up the tabulation for these Crescent towns, and state what the towns are and how you selected them and how you went about it.

A. In the original tabulation that was prepared and discussed the other day some B theatres were included in that tabulation. In checking back, some of those theatres did not operate during the entire period a full week. For that reason they were eliminated and the tabulation that I now have was prepared on the following towns and for the following theatres. Princess Theatre, Harriman, Tennessee, a six day operation, 29.4 per cent of the business done on Saturday and 14.1 per cent on other days.

Q. Now, before you go into those figures, did you, with reference to those towns, select only Saturdays where a Western picture was shown without any other feature?

A. Yes, that is correct.

Q. In other words, you have on here "Harriman, Tennessee, 31 weeks." Now, what do you mean by 31 weeks?

A. Well, this tabulation was prepared covering the period from July 1, 1937 to June 30th, 1940, and during that period in Harriman, Tennessee thirty one single features were

shown on Saturday as compared with double features on the other Saturdays.

Q. So you haven't included on this tabulation any Saturdays where a double feature was shown?

A. No, we haven't.

[fol. 2924] Q. All right, now, what is your next town?

A. Gallatin, Tennessee, the Roxy Theatre.

Q. And is that a six day operation?

A. It is.

Q. How many weeks during the three year period was a single feature only shown on Saturday?

A. Nineteen.

Q. Now, on all of those occasions where only a single feature was shown on Saturday it was a Western picture, as I understand it?

A. That is correct.

Q. All right, what was the percentage shown on those Saturdays in Gallatin, Tennessee as compared with the other days of the week?

A. 28.8 per cent on Saturday as against 14.2 per cent average for all the other days.

Q. All right, what is your next town and what are the figures?

A. The Diamond Theatre in Bowling Green, Kentucky, a seven day operation, 34.6 per cent of the business on Saturday as against 10.9 per cent average on the other days of the week, and it covered one hundred and fifty six weeks.

Q. Now then, you mean during the entire three year period there were no double features shown on Saturday in that situation?

A. That is correct.

Q. And is that also true of the other two towns that you are going to give?

[fol. 2925] A. Yes sir, Maryville, Tennessee and Alabama City, Alabama.

Q. Now, in those other two towns where no double features were ever shown and only a Western picture shown on Saturday, what do your figures show?

A. For the Capitol Theatre in Maryville, Tennessee, 30.5 per cent is the Saturday business, as against 11.6 per cent average for the other days of the week.

Q. Now, that is a six day operation, is it?

A. That is a six day operation.

Q. All right, what is your next town?

A. The Ritz Theatre at Alabama City, Alabama, a seven day operation and the Saturday business is 28.4 per cent and 10.2 per cent average on the other days of the week.

Q. Now, that was a hundred and fifty six weeks?

A. That is correct.

Q. Now, Mr. Stengel, in preparing these tabulations did you personally supervise and assist in getting the figures from the books?

A. Yes sir, I did. I did some of the work myself and, of course, it required the assistance of four or five people and I couldn't stay with each one during the entire time.

Q. Do you have your adding machine tabulations?

A. I have all the work sheets, yes sir.

Q. Are they subject to inspection by Government counsel?

A. They certainly are.

Mr. Waller: We will offer the tabulation as to the Cres-
[fol. 2926] cent towns as Defendant's Exhibit No. 217.

Mr. Wright: I would like to cross examine him on it before it is admitted.

Mr. Waller: I suggest that before I go on, Mr. Wright be permitted to cross examine him on these exhibits, your Honor.

Cross-examination.

By Mr. Wright:

Q. This last exhibit that you just referred to, the Crescent towns, covers a three year period, does it not?

A. That is right.

Q. And the weeks you tabulated here, there is nothing to show what part of the period those weeks occurred in, in the cases where you listed 31 and 19 weeks, is that right?

A. You mean the dates of each one of those weeks?

Q. Yes.

A. There is nothing on the exhibit, no sir.

Q. Now, on this Saturday business you use a number of devices to stimulate attendance on Saturday, is that correct?

A. I don't understand your question.

Q. I say you are accustomed to using a number of different kinds of devices to stimulate attendance on Saturday at your theatres, is that right?

[fol. 2927] A. That would depend on the individual towns. Generally speaking, in the majority of cases, no.

Q. Well, as to these particular towns you don't know whether the prices on Saturday were made less than they were for the rest of the week, is that right?

A. Whether the prices are constant during the three year period?

Q. No, what the relationship of the Saturday admission price was to the admission price charged during the rest of the week?

Mr. Waller: That would be immaterial. This is dollars and cents. That wouldn't help the Government any,—if you lower the admission price and get more people. We are giving the percentages in dollars and cents and not in number of admissions.

The Court: Well, you are saying that the reason the percentage is high is due entirely to the exhibition of Western pictures.

Mr. Waller: No, not entirely. We think Saturday is the best day and that is the day we do show the Western pictures. We don't say if we showed a Western picture on Thursday we would get the same revenue. We don't insist that. We insist the Saturday crowd wants Western pictures [fol. 2928] and that is the most important day in the week for those theatres.

A. May I look at one of the exhibits, that exhibit that you are talking about?

(Exhibit handed to the witness).

A. I can very easily get the information that you want.

Mr. Wright:

Q. I don't want the information. I want to know whether you know at this time or whether you took into consideration when you prepared the table what the admission price was on Saturday with reference to what it was on the days of the week.

A. Mr. Wright, in preparing any percentage tabulation of the total gross it would not be necessary to take into consideration the admission prices charged.

Q. Well, it is a fact, isn't it, that a lot of these houses here or these theatres that you operate you charge a sub-

stantially lower price on Saturday than you do on any other day of the week?

A. No, it is not a fact.

Q. Well, you don't know what the facts are with respect to these houses that you have undertaken to tabulate, is that right?

A. I wouldn't attempt to answer your question as it pertains to a three year period without being able to tell you the facts as they actually are because in any given town one year we may charge one admission price all through the [fol. 2929] week and another year we may charge an entirely different price.

Q. And the policy may vary from week to week, is that right?

A. No, I wouldn't say that. It never has.

Q. Well, it is a fact, isn't it that the only reason why you use Westerns on Saturdays is because you play at lower admission prices?

A. No, that is not the fact.

Q. They cost you less money than the other pictures, don't they?

A. It depends on the towns you are talking about.

Q. Well, in film rental?

A. No, that is not true. In some cases it is; in some cases it is not.

[fol. 2930] Q. Well, those years, on features that you are talking about, there isn't any attempt here, as I understand it, to segregate such western features that you might have bought from major companies from features that might have come from independents, is that correct?

A. No, sir; a Western is a Western.

Q. So this tabulation probably does include a substantial number of Westerns that were released by the major companies?

A. The percentage of the whole, for any given year, would be at least,—would be less than fifty per cent, I am reasonably sure.

Q. Well, you didn't make any effort at the time you prepared the tabulation to make that segregation to see what the figures show, did you?

A. No, sir, because the purpose of the tabulation was to show the percentage of the gross.

Mr. Waller: There is no contention on the part of the Government that there are not plenty of Westerns available for this territory, is there, Mr. Wright?

Mr. Wright: Certainly there are Westerns available.

[fol. 2931] Mr. Waller: You don't contend we have monopolized the supply of Westerns, do you?

Mr. Wright: Certainly you have monopolized them in so far as the companies which we have their evidence of here in this suit are concerned.

Mr. Wright:

Q. Now, do you know whether on Saturdays there were any give-aways, or Bank Nights, or anything of that sort which might have stimulated the attendance there?

A. It would be a very rare case if it happened in any of those cases.

Q. You don't know whether it did happen or not?

A. Let me see the exhibit, please, sir. (Exhibit handed to witness). I am reasonably sure that there wasn't a Bank Night held on Saturday night in any one of the towns on that tabulation.

Q. And you didn't attempt to investigate that fact at the time you prepared the tabulation, did you?

A. Yes, sir, we did, because we thought there might be some question——

Q. Why didn't you show that fact on the tabulation, then?

A. Sir?

Q. Why didn't you show that fact on the tabulation, then?

[fol. 2932] A. I didn't think it was necessary.

Mr. Waller: I didn't catch the question, Mr. Wright.

Mr. Wright: The fact as to whether or not there were on these Saturdays Bank Nights or give-aways, or any other admission stimulant.

Mr. Waller: That is not a very fair question; you can't show everything in one tabulation.

A. I want to be sure, Mr. Wright, that my answer is understood, that there were not any Give-aways on these particular Saturdays in these particular towns.

Mr. Waller: You said "were not," didn't you, Mr. Stengel?

A. Yes, sir.

Mr. Waller: I want the Court reporter to get it that way.

Mr. Wright?

Q. It is a fact, is it not, Mr. Stengel, that on Saturday you give a greater number of shows than you do any other day of the week?

A. Well, that depends also on the town in question, Mr. Wright.

[fol. 2933] Q. Well, you at least have a matinee, you have two or three shows, whereas in the week day you just have an evening show, isn't that right?

A. Mr. Wright, I believe in every one of the towns which appear on that tabulation you will find both a night show and a matinee show on the week days as well as Saturday.

Q. In preparing the tabulation, did you make any effort to show how many shows you had on Saturday as compared to how many you had on the week days you offered there?

A. Mr. Wright, that is quite hard to show, because on any week day, one week day against any other week day, some have a feature that runs three hours: Take, Gone With the Wind: It ran four hours; we could only run that picture two or three times during the day, as against running an ordinary feature four or five times during the day.

Q. Now, Mr. Stengel, isn't it a fact that during this three-year period which these six features you have given cover here, you normally had more shows on Saturday than you had on any other day of the week?

A. Well, we might have opened at 12:00 o'clock on Saturday instead of opening at one o'clock.

The Court: What difference does it make whether you have more shows, unless the house has the capacity to take care of more shows.

[fol. 2934] Mr. Wright: Well, you would expect a greater revenue on Saturday, if you bring the audience in three times instead of once.

The Court: That is, would you say, if you had three shows with the same number of people as one show.

Mr. Waller: What we are trying to show is that Saturday is the most important day of the week and we capitalize on that by using a Western on that day.

Mr. Wright:

Q. Why is it you don't show Western every day, Mr. Stengel; why do you buy other pictures?

A. Well, Mr. Wright, we have tried it; I have tried Westerns on every day of the week; I have tried them on Sunday; I have tried them on Wednesday; and sometimes they will work and sometimes they won't.

Q. Well, the same thing is true on Saturdays, according to this tabulation, that sometimes the Westerns worked along and sometimes you had to put in another feature with them, isn't that right?

A. No, sir, it doesn't work.

Q. What doesn't work?

A. When you play anything other than a Western picture [fol. 2935] on Saturday, you drive away the business from your theater.

Q. So the purpose, then, of playing—By the way, why didn't you include in the Crescent table, Exhibit No. 217, the same comparison that you included in the Cherokee and Rockwood tables, of the proportion that resulted from single feature programs?

A. Because of the element of time in preparing those tables, Mr. Wright.

Mr. Waller: I take the blame for that, your Honor.

Mr. Wright:

Q. I notice in this Exhibit 216, you show that in Lenoir City, Tennessee that you showed double feature programs 103 Saturdays and a single Western on just one Saturday; now, were you trying to drive away business on the 103 Saturdays you showed other features than Westerns?

A. I will tell you, Mr. Wright, one of the things we tried on Saturdays to get business: We ran a serial Saturday, and the first chapter of a serial has three reels as against two reels, and quite often we will run the last chapter of the serial together with the first chapter of the next serial in order to attract business, and then if we can get some good slap-stick comedy in there, it is not necessary to run an extra feature because of the time of the show; and that [fol. 2936] might have been what happened in that case.

Q. The Saturday business, then, the programs consist not only of where you show Westerns consisted not only of a Western, but a couple of serials, is that right.

A. No, sir, that is not right.

Q. Well, you don't know, with reference to any of these particular single feature programs you have listed here, as to what the entire program was, do you?

A. Yes; I can tell you what it was.

Q. At least, it doesn't appear on the face of the tabulation?

A. No, because it runs constant. In all cases it amounts to a Western, a short subject and a serial.

Q. Well, when is it that you run these serials?

A. We run a serial, which is considered a short subject, each Saturday.

Q. Then, when you used the words "short subject" you are referring to a serial.

A. In the film business the serial, strictly speaking, is considered a short subject; and it is always referred to as a serial, because of the fact that the story isn't complete in the particular two-reel show that you get at one time. They run in 12 episodes, or 15 episodes.

Q. Now, why was it that you happened to select the period [fol. 2937] from July 1st, 1937 to June 30, 1941 for the Crescent Exhibit?

A. Mr. Wright, I don't know that there was any particular reason; we wanted to cover a sufficient period of time so it would be accurate and——

Q. And how did you happen to take the calendar years of 1939 and 1940 for the Cherokee and Rockwood exhibits?

A. Well, that is very easily answered: Cherokee and Rockwood operate on a calendar year, whereas Crescent operates on a fiscal year, which ends June 30th.

Q. I just wondered why you happened to pick two years in one and four in the other.

A. Repeat your question, please?

The Court: He says, Why did you make the tabulation for Cherokee and Rockwood on a two year basis, and the Crescent four.

A. The one we had the other day was on a two-year basis and I believe that one for Crescent was just one year; and we just made it up so we would go far enough back to be representative.

Mr. Wright:

Q. Now, you have the figures, have you not, Mr. Stengel, which you show for the entire Cherokee Amusement Com-[fol. 2938] pany year by year, just what you got out of the Saturday operation of all the theaters, haven't you?

A. Yes.

Q. You have records that will show that?

A. Yes, the daily reports show it.

Q. And the same is true as to the Crescent, there are figures available in the company's office which show what the performance was on Saturday of all of the Crescent houses?

A. Yes.

Q. During all of the year from 1934-1935 on?

A. That is right; of course, from Cherokee we would only have it from the date the company was organized.

Q. I understand; the same is true of that company.

The Court: When was Cherokee organized?

Mr. Wright: The latter part of 1936 or 1937.

A. Probably in 1936.

[fol. 2939] Mr. Wright: Your Honor, I don't think that either of these exhibits on the basis of showing this objective made here, show any other fact than that Saturday is a better day than other days, or was a better day than other days for these particular theatres for them on the periods of time that were covered here, there is nothing in either of these exhibits which will demonstrate in and of itself why the Saturday business was better than other days of the week; the complete programs are not even attempted to be tabulated here, or the inducements which might have resulted in the Saturday business.

The Court: There is no question but that it shows the Saturday business of no other towns, in any other theatres, that are not listed here.

Mr. Wright: I say even as to these houses that are selected, the theatres, there isn't any showing on these tabulations as to why Saturday business was more than any other days, it might have been due to an admission price policy, or it mght have been to an increased turnover on Saturday of the audience.

[fol. 2940] The Court: You will have to consider the exhibit.

Mr. Wright: It might have been due to a better theatre.

The Court: That exhibit will have to be considered in the light of his testimony.

Mr. Wright: I submit it has no probative value whatsoever, either one of these exhibits, to any issue we are trying here.

Mr. Waller: I want to question Mr. Stengel in general——

Mr. Wright: We certainly object to any attempt to do that.

Mr. Waller: Will you wait until I finish?

Mr. Wright: Go ahead.

Mr. Waller: I say it will be a physical impossibility to get up these figures for each and every town covered in this lawsuit, and I would also like to make this observation, that Mr. Wright's extreme concern about having everything in an exhibit that might be relevant, had not been [fol. 2941] manifested in any of the Government's exhibits, and on that standard that he would like to impose on the defendants, I doubt if any of the statistics introduced by the Government would stand.

The Court: Well, overrule the objection.

Mr. Wright:

Q. Now with respect to these exhibits that were offered about Rockwood's popcorn sales for the year 1939, there again you have the records to show and which would show the exact proportion of your gross income from popcorn sales and from screen advertising have you not, for each that Rockwood has been in business.

The Court: Do you have the records that will show that?

A. Yes.

Mr. Wright:

Q. The same is true with respect to Crescent and all these other affiliated companies, isn't that right?

A. All those figures would appear on our books, yes, sir.

Q. I believe you testified before that all of this popcorn was bought from the central office here?

A. No, sir, I did not testify that way. Bought by the [fol. 2942] man who runs the machine in some cases, in some cases it comes from Nashville here, and in other cases

it is bought locally, it depends on the grade of popcorn we can buy and we at all times try to buy the best.

Q. And there isn't any charge made against this popcorn figure for whatever home office manager's expense may be, employed in obtaining the popcorn?

The Court: No.

A. Yes, sir, there is, I was just trying to think out the answer. If popcorn costs us five dollars, that five dollars would go to that theatre.

Q. That is, the charge is made to the theatre at a higher figure to them?

A. This is charged, yes, sir, charged to the theatre at a higher figure to absorb that overhead, where it is bought in Nashville.

Mr. Wright:

Q. You do not conduct any popcorn sale operations apart from the operation of your theatres, do you?

A. Yes, we did but not in those particular figures. I don't know what you mean by that.

The Court: He means, did you sell popcorn to the public outside of your theatres?

[fol. 2943] Mr. Waller: Do you call the Hippodrome a theatre?

Mr. Wright: Let's get that straight, and as I understand, the Hippodrome the income from that goes, that is received from that, that is received by the Auditorium Company, is that right?

A. No, sir that is not right.

Q. What is the Auditorium Company?

A. I think the Hippodrome—the Auditorium Company, operates a theatre down at Shelbyville.

Q. Is there any place you sell popcorn besides the Hippodrome?

Q. Well at the theatres.

Q. Then so far as Rockwood is concerned, in these figures the popcorn sales all occurred in connection with the operation of the Rockwood theatre, is that correct?

A. That is correct.

Q. And this screen advertising you represent and refer to here consisted of advertising that was thrown on the screen in those theatres?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. And the amount of money you can get for the screen [fol. 2944] advertising depends does it not on the number of people that you can get in the theatre?

A. Not in our particular case, no, sir.

Q. Why not?

A. Because we do not sell the screen advertising,—we are guaranteed a certain amount of money, and it so happens our contract runs for several years, and if business goes up or down, it does not affect our income.

Q. You made a contract with this company, which pays you a blanket amount, is that right?

A. No, sir, it does not pay a blanket amount, it pays a fixed amount, a specific amount each month for each theatre that is listed in the contract.

Q. Yes, and I suppose that the amount that is listed for each theatre bears some relation to the capacity of the theatre to draw an audience?

A. That is true. Again it is a horse trading proposition. I tried to sell that for as much as I could get, and they tried to get it down low.

Q. In the last analysis I suppose a deal for that was governed by the ability of those theatres that you were trying to put in the deal, to attract an audience to look at the advertising, rather than some personality factors that might have entered into it by you or by whom you [fol. 2945] were dealing with, is that right?

A. I think on that particular deal, the personality had a good deal to do with it, for the reason that the person I was negotiating with had never seen these theatres and had to take my word that each one of the theatres was as represented.

Q. You were attempting to get additional revenue, you told him to some extent the amount and patronage that he might expect for the service that he was going to buy, isn't that right?

A. No, sir, I inferred it, but I never did tell him. I told him the seating capacity, what the newspaper rate was in the town, what the radio rate was in that section, and attempted to sell it in that manner.

Q. Well in any event, what you sold him was a service

which was a part of the operation of your theatres, isn't that right?

A. No, sir.

The Court: Of course if they hadn't had the theatres they would not have had advertising and popcorn either one.

Mr. Waller: There isn't any dispute about that, Your Honor.

[fol. 2946] Mr. Wright: Your Honor please, this popcorn and screen advertising exhibits, this exhibit, I do not see any basis for it, I do not see what has been said about it here, that it has any probative value in the case, it does not show that this income is derived from anything other than the theatre operations which are in question here, I do not see that in so far as Crescent's ability to exploit the situation, or get an income from popcorn sales and from screen advertising in addition to admissions that were paid by its customers, tends in any way to explain or rebut any income figures that have been put in evidence here.

The Court: Well it would only serve the purpose of explaining it, and after all it is a part of the business of the corporation, and as has been stated, if it hadn't been for the theatres they certainly would not have engaged in screen advertising or in the sale of popcorn.

Mr. Mitchell: May it please the Court, every one of the defendants objected to the introduction of the income tax [fol. 2947] matters here, and with additional objections from time to time, it seems to me that makes them irrelevant for any possible item that the defendants might wish to put in evidence, I do not see how that can be escaped.

The Court: Well I think it is admissible for that, to show how this particular income was derived; in some cases it has been derived from rents and in some cases dividends in other cases, in other cases sales of popcorn and screen advertising, whether or not that will make any material difference, is another proposition.

Mr. Wright: I think it is so trivial that it won't be worth any extended argument.

The Court: I do not think so, on the popcorn proposition. All right, go ahead.

Mr. Waller:

Q. Mr. Stengel, why is it that you, and I am referring to the various corporations with which you are connected, including the Crescent, Rockwood and affiliates, why you show a better income on Saturday.

A. Because through a trial and error method of procedure [fol. 2948] we have found that that is one factor as to more revenue.

Q. Is Saturday the day in most of these towns where there is the biggest crowd of potential theatre goers are available?

A. Yes.

Q. Why is that?

The Court: Country folks come to town.

Mr. Waller:

Q. Have you found by the process of trial and error that the country people like the western pictures?

A. Yes, sir, we have.

Q. Is that true not only in these situations but in the other towns included in the Crescent Amusement Company, Rockwood and affiliates?

A. Yes, sir, that is true. In Nashville of course you have a different situation.

[fol. 2949] Q. Well, I mean the small towns?

A. Yes sir, that is true.

Mr. Wright: If the Court please, I object to his endeavoring to give testimony here on the basis of this tabulation and say that it applies to other situations. If he wants to put in any other situation, they have the figures, they can put them in. I don't think it is proper to give a tabulation on one situation and then say "There are a lot of others that are like it."

The Court: Overruled.

Mr. Waller:

Q. Are there any pictures produced and available for exhibition anywhere in this country, Mr. Stengel, that you cannot get for exhibition in Tennessee and neighboring States, if you want them?

The Court: What is that?

Mr. Waller:

Q. I say, are there any pictures released in this country for exhibition anywhere in the country that you cannot get for exhibition in this territory if you want them?

Mr. Waller: My purpose in asking that question is, I have proved the number of releases in the country and I [fol. 2950] want to show that all of them are available right here in this territory.

Q. Will you answer the question?

A. Yes, we can get any of them. In fact, we have tried to get a number of them that were not generally released in this section, and did play them.

Q. And you did get them?

A. Yes.

Q. Do you know any reason why any independent exhibitor or any other exhibitor in this territory could not get any picture that is released for exhibition anywhere in this country, if he wants it?

A. No, unless there is some particular State's right involved.

Mr. Wright: He is obviously not competent to testify as to why an exhibtor might or might not be able to get any particular picture or group of pictures.

Mr. Waller: I think he is competent. He says he has done it, he has gotten pictures that were not generally offered.

Mr. Wright: This last question he asked him whether there was any reason why any independent exhibitor might [fol. 2951] not have access to certain pictures. There might be dozens of reasons why he couldn't get any particular picture.

Mr. Waller:

Q. Just state what you know about it, what your experience has been in that connection, Mr. Stengel?

A. One of the pictures a few years ago that was not released generally in this section was the picture "Maryling". We played that at the Belmont Theatre. There was a club formed out at the Belmont Theatre some six or eight years ago, I don't remember how long; it was a literary group that wanted certain types of pictures that were not released

by the Eight Distributors who are in this case. And we got those pictures and would run one of them each Sunday night, or probably twice a month; that was done over a period of years. Some of them were in French, or foreign languages, rather, some of them in English. They just ran the scale as to entertainment value.

The Court: What is it that prevents any exhibitor from getting any picture that he wants, if he will pay the price necessary to play it, other than the fact that it might be already sold to some other exhibitor, and the fact that certain producers might have restrictions as to places in [fol. 2952] which their pictures should be played?

A. There wouldn't be any.

Mr. Waller:

Q. Now, Mr. Stengel,——

A. (Continuing) Quite often, we will hear about a picture—not often, but occasionally we will hear about a picture that is foreign made, or may — distributed by some company other than the ones we usually do business with, and we will write and try test booking of the picture somewhere and if it works out, we may play it out in a double play. We have done that.

Mr. Wright: It is beyond me what the relevancy of this is, whether they have gotten foreign pictures in here or any other particular type of picture.

The Court: I don't see where it has any particular bearing on the issues in this case.

Mr. Waller: The reason I am asking the question: We introduced a tabulation which showed the total number of picture releases in the country, and I want to show all of those are available in this territory and there is nothing to keep anybody from getting them.

Mr. Wright: We have already conceded that anybody can open a theatre and throw on the screen an image in [fol. 2953] four or five reels, a picture that moves, there isn't any dispute about that. The only dispute is, whether he can get those which will enable him to charge an admission price to provide an audience sufficient to keep him in business.

(Recess to 1:30 p. m.)

Afternoon Session

Mr. Waller:

Q. Mr. Stengel, during the noon recess did you obtain the dates and figures relating to screen advertising, when it was started and what the trend was?

A. Yes sir.

Q. Will you state those facts?

A. The first screen advertising deal that we made on a guaranteed basis was with the Alexander Film Company and it was dated October 14, 1936 and covered the calendar year of 1937. That was for the Crescent Amusement Company and covers 26 or 27 towns and approximately 46 or 47 theatres. Included in that contract were 6 Rockwood towns, namely: Huntsville, Alabama, Guthrie, Kentucky, [fol. 2954] Tracy City, Tennessee, Lake City, Tennessee, Manchester, Tennessee and Rockwood, Tennessee.

Q. Mr. Stengel, when you say Rockwood towns, as I understand it, you are going outside of Rockwood, proper, into affiliates of Rockwood, also?

A. That is correct. The following year the Crescent Amusement Company executed a contract with Alexander for the same number of theatres at an increase of appproximately 45 per cent as to revenue, and the same 6 Rockwood towns were included in that deal. That contract was dated October 23, 1937 and was for the calendar year 1938.

The Court: Do you have the figures on the contract for 1937, that was executed in 1936?

A. Yes sir.

The Court: How much was it?

A. $15,600.00. Do you want the balance?

The Court: Well, you can give it for the next year if you wish.

A. The next year was $24.000.00.

Mr. Waller:

Q. Will you proceed, Mr. Stengel?

A. On December 14, 1937, Rockwood and its affiliate companies executed a contract with the Motion Picture Screen [fol. 2955] Advertising Company of New Orleans, Louis-

iana and that deal was for the calendar year 1938. It covered 19 towns and 19 theatres, but did not include the 6 Rockwood towns that had always been in the Alexander contract. The following year Rockwood again negotiated a contract with Moving Pictures Advertising Agency, dated November 20, 1938 and was for a two-year period, covering the calendar years 1939 and 1940.

Q. Don't go into 1940, but either give the figures or percentage increase or something to indicate how 1939 compares with the previous years?

A. In 1939, in the deal with Moving Pictures Advertising Company for Rockwood, there were 40 towns and 40 theatres included, and the two figures involved, from the 1938 deal, was for $7500.00 and the next deal for 1939 was $12,500.00. Of course, there were more towns involved there. Now the Crescent Amusement Company, on October 20, 1938, made a deal with Moving Pictures Advertising Company for the calendar year 1939 and it was for 26 or 27 towns and involved 40 or 45 theatres. And that deal amounted to $26,244.00, and the figure of $26,244.00 for the Crescent towns compared with the original deal with Alexander for the 1937 calendar year indicates an increase of 59 per cent in revenue.

[fol. 2956] Q. As I understand it, the figures for 1935, the income tax figures for 1935 do not include this source of revenue, but it does from then on?

A. In 1935 and 1936.

The Court: 1926, too.

Mr. Waller:

Q. 1936?

A. We did not negotiate or use screen advertising in all of the theatres. In some cases, as I explained before, we might have used it on a pre-ad basis or traded it out for supplies that could be used around the theatre.

Q. Mr. Stengal, there have been introduced in evidence since you were last on the stand two letters that you wrote United Artists on behalf of Rockwood Amusements Inc., one dated April 2, 1938, being Defendant's Exhibit No. 198, and the other dated April 7, 1938, being Defendants Exhibit No. 199. Now, in this letter of April 2, 1938 you refer to a request for increased rentals on the picture, "The Advantures of Tom Sawyer", in Rogersville, Tennessee, and

in which you then give certain figures as to other pictures. I ask you, what was the occasion of writing that letter? [fol. 2957] A. May I make a statement before I answer your question?

Q. Yes.

A. The figures that I just gave you in regard to screen advertising were not included in revenue from Lyric Amusement Company, Cumberland Amusement Company or Strand Enterprises.

Q. Now, going on with your letter to United Artists, I will ask you this preliminary question; Did Rockwood, on or about the 1st of January, 1938 acquire the Rogersville Theatre from the Cumberland Amusement Company?

A. Yes sir.

Q. And did you take over the film contracts of the Cumberland Amusement Company for the Rogersville Treatre?

A. Most of them, yes sir.

Q. Did you, among others, take over the United Artists contract?

A. Yes sir.

Q. Now, just state the occasion for writing that letter.

A. I received a letter from United Artists, from Mr. Dave Prince, wherein he asked for an increase in rental on the picture "The Adventures of Tom Sawyer" inasmuch as the company had decided to make the picture and produce it in technicolor, and although we had a definite contract at definite terms, he wanted to know if we wouldn't pay more, so I wrote him back and told him I would be glad to——

Q. In any event, that is your reply to that letter?

A. Yes sir.

Q. Now, in that letter and also in the letter of April [fol. 2958] 7th, 1938, which I will pass to you, you gave certain figures as to what your grosses were on certain United Artists pictures, and what I want to ask you is whether or not you can vouch for those figures? Were they taken off the books at the time you wrote the letter?

A. Yes.

Mr. Wright: How is that material one way or the other? We didn't offer these letters. I don't see what issue we are on now about the reduction of United Artists film rental——

The Court: As I recall, those letters were written United Artists in protest about the prices that were being paid for

pictures at this Rockwood Theatre and giving his grosses on certain pictures.

Mr. Waller: And the record shows that the exhibit was objected to as it was introduced to show figures. I want to establish the figures.

Mr. Wright: Even if the figures are correct, I don't see how this is material in the case, as to what he grossed on any United Artists pictures that were played there.

Mr. Waller: Well, it reflects on this letter from Mr. Miller about this $40.00 offer.

[fol. 2959] The Court: About what?

Mr. Waller: About that $40.00 offer.

The Court: All right. I overrule the objection.

Mr. Waller: If the Court please, there is one or two things I didn't ask Mr. Stengel about when he was last on the witness stand.

The Court: All right, go ahead and ask him.

By Mr. Waller:

Q. There is a letter that has been introduced in the record as Government Exhibit No. 274 from Mr. Ed. Hayes of United Artists to the Crescent Amusement Company, dated January 24, 1940, in which United Artists express regret because a picture by the name or title of "A Star is Born" was played in East Gadsden Theatre ahead of Crescent's run in Gadsden, Alabama. Have you investigated that subject to find out what occurred on that occasion and what the complaint was about?

A. Yes sir.

Q. What was that picture A Star Is Born? Was that a re-issue of some kind?

[fol. 2960] A. Yes, it was a re-issue. It had been exhibited for the first time in Gadsden a year or two prior to the time referred to in your letter.

Q. Then had the Crescent Amusement Company made a deal to play that picture in the downtown theatre or one of its downtown theatres in Gadsden proper?

A. Yes sir. We bought the picture as a re-issue but not knowing that it had been sold to play in a suburban house ahead of our downtown exhibition. Had we known that, we wouldn't have bought it.

Q. Now, was that all there was to that issue that was raised in this letter?

A. That is right.

Q. Did the Crescent Amusement Company ever ask for any clearance over East Gadsden on behalf of its downtown theatres in Gadsden in any contract?

A. No. In all the contracts that we have negotiated we have never asked that any clearance be put in the contract with respect to East Gadsden. However, there is a clause that appears in the Loews contract that subsequent run in Gadsden was to follow sixty days behind first run.

Q. I am not asking about any contracts with the Dixie Theatre in East Gadsden; I am talking about Crescent contracts.

A. I am speaking of Crescent contracts, Mr. Waller.

Q. Go ahead. What does it say?

A. It says that a picture shall play sixty days ahead of [fol. 2961] the subsequent run. We didn't ask for that clause; it was put in there.

Q. Put in by the distributor?

A. That is right.

Q. In other words, that is what you call a booking arrangement?

A. No, that is not a booking arrangement.

Q. Well, what is a booking arrangement—where the distributor specifies or fixes the interval between playing pictures?

A. Well, a booking arrangement——

The Court: That is not a booking arrangement. That is clearance. A booking arrangement is where they are set for a particular date for each particular town.

A. I think what Mr. Waller means, Your Honor,—in the case of Metro, for example, in booking towns like Tracy City or Manchester or very small towns like that, they won't make these pictures available for our use until at least sixty or ninety days after release date.

Q. Well, is that a booking arrangement or clearance?

A. That is a booking arrangement.

The Court: All right.

Mr. Waller:

Q. What I am trying to get at is: Did Crescent Amusement Company have anything to do with any arrangement, whether put in the contract or not put in the contract,

[fol. 2962] whereby East Gadsden was to play after Gadsden proper or after Alabama City?

A. No.

Q. Now, in connection with the Fox franchise I will pass to you telegram dated July 26, 1939, I think it is, and will ask you if the Crescent Amusement Company received that telegram in the ordinary course of business from Fox?

A. Yes sir.

Q. Regardless of whether the year is legible on the face of the telegram, do you know whether it was 1939?

A. Yes sir, I have the original telegram.

Mr. Waller: I would like to read this telegram and offer it in evidence, your Honor.

"Confirming our telephone conversation, this will advise you that the deal as submitted has been okehed and it is satisfactory for you to date product. The franchise will be prepared by the legal department and as soon as this is done I will send it up for your signature. Paul and I both thank you very much for your cooperation in working out this franchise. Regards.

Harry G. Ballance."

We offer that in evidence as Defendant's Exhibit No. 218.

The Court: All right, let it be admitted.

[fol. 2963] By Mr. Waller:

Q. I will now pass to you, Mr. Stengel, a letter addressed to you, on the stationery of Twentieth Century Fox Film Corporation, dated February 15, 1940, signed "Paul" and a sheet of paper on which you will find a number of paragraphs or clauses relating to this Fox franchise. I will ask you if you received that letter and the sheet of paper referred to as an enclosure shortly after the date of the letter, February 15, 1940?

A. These were both received at the same time.

Q. Well, was the sheet of paper referred to an enclosure with the letter?

A. Yes sir. It was attached to the letter.

Mr. Waller: I will ask that that letter and the enclosure be bradded together and we will offer those as Defendant's Exhibit No. 219.

The Court: All right, read the exhibit.

Mr. Waller: (Reading).

"DEAR KERMIT:

"I was under the impression that I had sent you a copy of the different clauses I requested inserted in the franchise as of our discussion while you were in Atlanta as well as exchange of correspondence in the past few months. I thought I had forwarded you a copy of this but in searching my files find that was not [fol. 2964] the case. This is for your information."

The rest of the letter is about another matter, Your Honor.

Q. Now, Paul, was that Mr. Paul Wilson, branch manager of Fox in Atlanta?

A. That is correct.

Q. Now, the enclosure, I notice, includes a repeat run clause with the proviso that the repeat run clause is to become void where a competitive theatre opens in any town. It also contains a clause about re-issues and one or two other clauses. What I want to ask you, Mr. Stengel, is whether or not, when the franchise was approved by the telegram back in July, 1939, the question of those clauses was still open?

A. Yes sir, it was, the clauses referred to there, particularly the repeat run clause and the re-issue clause.

Q. Now, so far as film rental for the pictures and the terms were concerned, did you regard them as foreclosed by the telegram and that matter ended?

A. Yes sir.

Mr. Wright: I think we are getting into——

Mr. Waller:

Q. What was the understanding between the parties as to that?

Mr. Wright: We went all over the negotiations here once as to just what happened with respect to the franchise. [fol. 2965] The Court: Well, Mr. Wilson testified that when they got down here they agreed on the number of pictures and prices that they were to pay and that he went back then and prepared the franchises, as I recall, and the

question of clearance and repeat runs was not taken up except possibly clearance as to some certain particular towns.

Mr. Wright: I don't think that is what happened, your Honor.

The Court: I don't know whether that is what happened or not. That is what I recall that Mr. Wilson said.

[fol. 2966] Mr. Wright: I would like to point this out, that what he said was that he had negotiations with Mr. Stengel and Mr. Sudekum, and then went to the typewriter and wrote up what the agreement was, and what the agreement was is in evidence as a memorandum as Government's Exhibit, I believe 286.

The Court: That is, the agreement so far as it is contained in the memorandum but he don't say that was the entire agreement.

Mr. Wright: Well, if the Court please, I certainly think that that is a fair inference from what he said it was.

The Court: It is not a fair inference from what he said it was, because he expressly said it was his entire agreement.

Mr. Wright? The agreement was set forth with respect to repeat runs in very plain language.

The Court: Well, that may be. That is Exhibit 286?

Mr. Wright: 286, I believe.

[fol. 2967] Mr. Waller: I don't think we need to depend on inferences, your Honor; that is why I am undertaking to prove what happened.

The Court: (To Clerk) See if you can find Exhibit 286, please. That is the most popular exhibit in the record, it seems. You ought to know what that is.

Mr. Waller: There is a duplicate of it.

Mr. Wright: Yes, that is the same thing.

The Court: (Ex. 286 handed to Court by the Clerk) (Court reads the exhibit.) Well, that is as to the price of the repeat run, not when it should be repeated or anything like that.

Mr. Wright: Well, it could hardly be said that the question of repeat run could hardly be left open.

Mr. Waller: I mean the phraseology, your Honor. I will amend my question.

The Court: Yes.

[fol. 2968] A. May I make a statement right there?

The Court: Just wait until he gets through. All right, go ahead and answer it.

A. What was your last question?

The Court: He says he wants to make a statement.

Mr. Waller:

Q. All right, go ahead, Mr. Stengel.

A. I just wanted to tell you that with regard to the telegram that was introduced confirming this deal, it refers to a 'phone conversation that took place between Mr. Ballance and Mr. Sudekum, and I was present in Mr. Sudekum's office at the time discussing it with him, and at that time Mr. Ballance said that he would not put the repeat run clause in the contract or the re-issue clause in the contract; and we accepted the deal, this telegram confirmed the deal, and they told us at the time if we wanted it on the regular contract form it would be all right; in other words, the contract was approved according to the terms and conditions of the standard contract form.

Objected to by the Government:

[fol. 2969] Mr. Waller: I don't insist on it, your Honor, it doesn't make any difference.

The Court: All right.

Mr. Waller:

Q. Now, Mr. Stengel, what is the difference between a re-issue and a repeat run?

A. A re-issue is a picture, generally speaking, that is shown for a second time in a town subsequent to the particular season in which it was originally released.

The Court: Well, do you mean that it is a new film, too, a newly processed film? A re-issue film is a new processed film?

A. As to the celluloid?

Q. Yes, a new copy?

A. It may be or it may not be, according to the print condition.

Q. Well, in any event, your repeat run clause and your re-issue clause are two separate things?

A. That is correct.

Mr. Waller:

Q. Now, you were asked about second runs, Mr. Stengel; I want to get one point clear about that. Do you remember [fol. 2970] negotiating for any second run contracts with Fox, or with anybody else, for towns where there was only one theater in a town?

A. No, sir.

Q. And have your second run negotiations been confined to where you had more than one theater in a town?

A. More than one theater.

Q. I mean in towns where you have more than one theater?

A. Yes, sir; you don't need a second run contract in a town where you just operate one theater.

Q. Now, on page 4776 of the record, on cross-examination by Mr. Wright, the transcript reads this way: "Q. Well, has your buying film got anything to do with your merchandising of the film; what do you mean by merchandizing of the film as distinguished from buying film? A. When we buy film in some of the towns we want two runs. Q. Want too what? A. Want two runs. The problem of zones of clearance between runs doesn't come up". Have you read that transcript since it was written?

A. Yes, sir.

Q. Is that a correct transcript of what your testimony was?

A. No, sir.

Q. What was it that you intended to say, when Mr. Wright [fol. 2971] interrupted you with his question, Want "to what" or "want two what"? Let me pass this transcript to you and ask you to look at it.

A. "We want to run the best pictures available."

Q. Now, is that what you tried to say?

A. Yes, sir.

Q. And what did you say, as you recall it?

A. Yes, sir, that is what I did say, I thought.

Q. Now, is that in both places where the "two runs" occur?

A. That is correct.

Q. You mean "to run?"

A. Yes, sir, instead of "two runs."

Q. Instead of "two runs?"

A. That is correct.

Q. Now, on page 4779 of the transcript, where Mr. Wright was cross-examining you about clearance, this occurs:

"Q. That is right, but as a general proposition when you negotiate these deals, you attempt to get just as much clearance as you can, isn't that right?

"A. Up to 60 days, and possibly, in one or two cases, 90 days, and that is my memorandum——

"Q. Well, after 60 or 90 days it doesn't make much difference to you, does it?

"A. It doesn't make any difference but that is the most we ever asked for." Is that a correct transcription of what your answer was or what you intended to say?

[fol. 2972] A. No, sir.

Q. What did you say, the best of your recollection?

A. "It does make a difference."

The Court: Well, I remembered it the other way; according to my recollection, he said it didn't make any difference after 90 days.

Mr. Waller: Well, he may have said it. I am asking him what he intended to say; I don't know.

The Court: I thought you were saying again that the stenographer's transcript was wrong.

Mr. Waller: Well, that is what Mr. Stengel thought, or else the stenographer is right and Mr. Stengel said something he didn't intend to say, I don't know.

Q. Well, let me ask you again, then, where you say "That is the most we ever asked for," what did you mean by "That is the most we ever asked for"? 60 or 90 days?

The Court: He evidently meant he never asked for clearance of more than ninety days.

[fol. 2973] Mr. Waller:

Q. You didn't mean to say that there wouldn't be any difference between 90 days clearance and three or four months clearance, did you, Mr. Stengel?

The Court: I remember the testimony very well. What I thought he had in mind from the testimony that he gave was that after a clearance of 90 days, if you have a clearance of ninety days, that then any further showing of that picture on any other run wouldn't make any particular difference.

Mr. Waller:

Q. Well, was that what you intended to say or did say, to the best of your recollection?

A. To the best of my recollection, I said "It does make a difference for we don't ask for any more." And I would not have said, "but we don't ask for any more," if I had said "it doesn't make any difference."

Q. In other words, you would not have used the words "but" or phrase "And that is the most we ever ask for"? That is your recollection?

A. That is correct.

The Court: Well, I don't think it makes a great deal of difference.

[fol. 2974] Mr. Waller: I don't think it makes a great deal of difference either, your Honor.

Q. I failed to ask you about whether or not you ever authorized Mr. Castleberry, Mr. Gorman or Mr. Hendren, or anybody else, to say to any independent exhibitor, or to any one else, that an independent would not be able, or would not be permitted to get pictures if Crescent or Rockwood or one of the other independent exhibitors opened a theater in the town?

Mr. Wright: I except; I think that is a conclusion to be drawn from all the evidence.

The Court: I sustain the objection; he would necessarily have to authorize him to do it.

Mr. Waller:

Q. Well, did that ever come to your attention, Mr. Stengel, before this suit was instituted by the Government, that anybody had ever claimed that any of those three men had ever made such a statement to any independent exhibitor?

A. No.

Q. In any town where Crescent Amusement Company or Rockwood were negotiating for the purchase of a theater [fol. 2975] or thinking about building a theater?

A. No; to the best of my recollection, that did not happen.

Q. Did you ever hear it claimed that it happened before this lawsuit?

Q. Yes, sir; I heard it claimed once by an FBI man, about two years ago.

Q. Well, aside from that, did you ever hear it claimed?
A. No, sir.
Q. So far as you knew or were informed, had any such statement been made by any of these men or by any one else purporting to represent any company with which you were connected?
A. No, sir.

Mr. Wright: I didn't catch the last question.

(Question and answer read by reporter.)

Mr. Waller:

Q. Now, as I understand it, you have nothing to do, and never have had anything to do with negotiating films for Muscle Shoals Theaters or Cumberland Amusement Company, is that correct?
A. That is correct.
Q. Among others?
[fol. 2976] A. That is correct.
Q. And in your negotiations for film contracts on behalf of Crescent and on behalf of Rockwood and its affiliates have you ever made a threat or suggestion to any representative of any film company that if you couldn't get his films for some particular town, you wouldn't buy them for other towns?
A. I have not.
Q. As a matter of fact, as far as Rockwood and affiliates are concerned, have you ever made a film deal, or negotiated for a film deal at a time when there was any competition in any of those towns, with the exception of Tim Smith in Newport?
A. I don't believe so; I might have made a deal, while the Empress Theater was still open in Central City; that is about the only one I can remember of.
Q. Now, you testified that when the Newport Amusements, Inc., took over the Windston theater in Newport, Tennessee, where Mr. Baird had been previously making contract, you found that in comparison, particularly with the Parrott and Hendren contracts, that Mr. Baird had good contracts, is that right?
A. Generally speaking, yes, he made good film contracts.
[fol. 2977] Q. I believe you have had submitted to you these playoff sheets, or have had submitted to you these

playoff sheets of Fox, showing the three year franchise with Mr. Baird, the contract Baird had with Fox at the time Newport Amusements Inc., was formed?

A. Yes, sir, I have seen that.

Mr. Waller: We offer these three sheets covering the three year period of the Fox franchise with Mr. Baird, at the Empress theatre—well as defendants' general exhibit number 220.

The Court: What are they, Baird's play-off sheets for Fox's three year contract, prior to the sale?

Mr. Waller: One is after the sale, the others before the sale.

The Court: That would be competent, what is the purpose of the other two?

Mr. Waller: That the play-off is according to the contract made by Baird himself—a three year contract. As I understand the Government has introduced the play-off [fol. 2978] sheets of Parrott and Hendren to show that Cherokee got better deals that when Cherokee was formed, that Cherokee got better film deals than Parrott and Hendren were able to get. We want to show that that is not universal. We say it might have been due to personalities,

Mr. Wright: I do not see where the Parrott and Hendren situation has anything to do with the Newport, Baird situation.

Mr. Waller: We don't think so, I think he is trying to draw a general rule from one situation, and we are trying to show that the general rule can not be drawn from one situation, because here is another case where the independent did have a good contract.

The Court: All right, let it be admitted.

Mr. Waller:

Q. I notice, Mr. Stengel, that on the last year of that Fox franchise, that Mr. Baird negotiated, there is a picture, JESSE JAMES, which was played on a percentage; what sort of a picture was JESSE JAMES in a town like Newport, Ten- [fol. 2979] nessee, as compared with an average run of picture?

A. Through this entire section it was probably the outstanding picture that has been exhibited other than GONE WITH THE WIND, in every town and hamlet; it has played

back at least one time, and in many cases three and four times. It grossed a phenomenal amount of money.

Q. I show you cut off on the K-7 deal, Fox Film Corporation, referring to Newport, Tennessee, and will ask you if this shows the playoff the first year of the new franchise, which was negotiated by you?

A. Yes, sir.

Mr. Waller: We offer that as defendant's exhibit number 221.

Mr. Wright: May I ask what that is supposed to show, as compared with the figures?

Mr. Waller: Let me ask Mr. Stengel?

A. Yes, sir.

Q. In order to clear up the purpose for which the offer is made, when you negotiated for the new Fox franchise, covering the town of Newport, what was the basis of the negotiations, and what was said and done between you and the Fox representative with reference to the town of Newport?

[fol. 2980] A. We tried to buy the pictures for less than Mr. Baird had been paying for them. We finally ended up by paying or agreeing to pay what the pictures had earned —on what the pictures had got out of the town the previous year.

Q. You mean on a percentage basis?

A. That is correct.

Q. Was it Jesse James?

A. I don't think it was.

The Court: What was that?

A. The first deal was a percentage deal, and then the flat rental, and in order to arrive at that, it had to be based on what they did the year before.

Mr. Wright: If Fox had an experience on what they were able to do in Newport, and he was not making as good a deal on the flat rental as before?

Mr. Waller: That is to show you can get just as good a deal as an independent as if you are a circuit.

The Court: All right you may ask him.

Mr. Wright: No cross-examination. Further deponent saith not.

[fol. 2981] NEIL AGNEW, called as a witness in behalf of Defendant, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Waller, for Defendants:

Q. Mr. Agnew with what corporation are you connected and in what capacity?

A. Paramount Pictures Corporation, I am Vice-President in charge of sales.

Q. How long have you held that position?

A. Since June of 1934.

Q. Will you state briefly the nature of your duties and authority in that capacity?

A. Well, I supervise the sales domestically in the United States and Canada of Paramount's motion pictures.

Q. Do you know Mr. Charles M. Ragan?

A. Yes.

Q. What connection does he have with the corporation and what connection did he have in September, 1935?

A. At present he is Assistant Sales Manager, and in 1935 he was Divisional Sales Manager for the Western territory.

Q. Now, what did the Western territory include?

A. The territory including, roughly, Detroit, and West of the Mississippi River—Chicago and West of there.

Q. Well, did it include the Atlanta Exchange territory?

[fol. 2982] A. No.

Q. And did he have anything to do with deals with the Crescent Amusement Company?

A. At that time?

Q. Yes?

A. No.

Q. As between closely neighboring towns in a rural community, where each town desires clearance over the other town, what determines that question; in other words, what determines the question whether Paramount will give clearance to the one town or the other?

A. Well, generally, clearances are established by priority of run going to the town or the situation that gives the most revenue—or the greatest amount of film rental.

Q. Do you undertake to set the towns up so as to get the greatest aggregate revenue from the two or more situations involved?

A. That is the desirable thing, yes, sir.

Q. Now, does the character and size of the theaters and the population of the towns have anything to do with it; are they factors to be considered?

A. They all are, yes.

Q. What was Mr. J. T. Howard's position in September, 1935?

[fol. 2983] A. Manager, I believe, of the Indianapolis Branch—our Indianapolis Exchange.

Q. Since you have come to Nashville to testify in this case, have you seen a letter from Mr. Howard to Mr. Ragan, dated September 20th, 1935, which is Government Exhibit 160 in this case, and the reply of Mr. Ragan to Mr. Howard dated September 24, 1935, which is Government Exhibit 96, both relating to Earlington, Kentucky?

A. Yes, I have seen copies of both of those letters.

Q. Was the question involved in that correspondence referred to you in any way at the time the matter came up, or do you recall?

A. Not that I recall, no.

Mr. Waller: The letter I have reference to is a letter in which Mr. Howard wrote to Mr. Ragan, in effect, that it would be rather an injustice to allow Madisonville clearance over Earlington, and Mr. Ragan's reply, does your Honor remember those letters?

The Court: Yes.

Mr. Waller:

Q. Assuming that it had been Mr. Ragan's opinion that if Madisonville had not been included in a circuit deal with [fol. 2984] the Sudekum circuit, Madisonville would not have been entitled to clearance priority run over Earlington, was that also your——

Mr. Wright: If your Honor please, he has already testified that the matter wasn't taken up with him. Now, I don't see how it would be competent for him to say what—There isn't any showing, first, that he ever had any opinion on the subject, and that he has ever been impressed with an idea that could be the basis of an opinion.

Mr. Waller: He was executive officer over Mr. Ragan at that time, Your Honor; I want to develop it.

The Court: I can't see how that would be competent; in the first place, you are assuming the opinion of one person

in the case and then asking whether or not that would have been his opinion. What difference does that make? It is not a question of what his opinion would have been; it is a question of what happened in this case.

Mr. Waller: If I understand the letter that has been in-
[fol. 2985] troduced, the Government contends that the letter sets forth Mr. Ragan's opinion.

The Court: Well, read the letter.

(Mr. Waller reads the Exhibit referred to.)

The Court: You might ask him if he approved Mr. Ragan's position in that matter as an official of the company, according to its policy?

Mr. Waller: I believe he stated he didn't recall it having been brought to his attention.

The Court: Well, you can ask him if he approves of it now.

Mr. Waller:

Q. Yes, Do you approve of it now?

Mr. Wright: I don't see how that is competent now.

The Court: Let's see what his idea is about it.

A. I am afraid not; I think I might have to disagree with that.

[fol. 2986] Q. Now, why?

A. Well to be consistent on the basis that Madisonville no matter who owned it and operated it, it was a larger situation than the other town, what is it, Earlington; and therefore probably capable of yielding more film rental than Earlington.

Q. Did you take into consideration the facts proven——

The Court: Well I do not see that an official can come in now after this case has already been filed and being tried to try to show now that he does not approve of what was actually the policy of the company at that time.

Mr. Waller: I want to prove that was not the policy.

Mr. Wright: Well that doesn't prove it, that it was not the policy, say you have to prove it, you have to prove what was done, or what was done would not have been approved.

Mr. Waller:

Q. Did Mr. Ragan have anything to do with approving a circuit deal with the Sudekum Circuit in 1935?

A. No.

Q. Was the Indianapolis office under his jurisdiction?
[fol. 2987] A. Yes, it was.

Q. But not the Atlanta Exchange?

A. That is right.

Q. Was Earlington a town that was naturally in the Indianapolis exchange territory?

A. It was served out of Indianapolis, and I presume it would naturally belong there.

Q. Had Madisonville been transferred to the Atlanta exchange?

A. I understand so.

Q. Where a question of clearance is involved, is it usual for a branch manager to serve a theatre served out of his exchange, to favor a theatre served out of his exchange over one that was not served out of his exchange? From another exchange?

A. Well he sometimes shows a greater interest in his own territory, naturally takes up for his own exchange, more so than he would for a town across the border, or another town.

Q. What would be the reason for that?

Mr. Wright: Here we are, getting into a lot of speculation the reason for some action that is five years later, from somebody that had nothing to do with the action that was [fol. 2988] taken, I do not see that question can possibly be competent.

Mr. Waller: I proved also that Mr. Regan, who wrote the letter had nothing to do with the action, Your Honor, and I am trying to show where there are two exchange territories, there are reasons why the Branch Manager in one exchange might champion his own exchange.

The Court: I can see why it would be to his interest of course.

Mr. Waller: That was all I was trying to show.

The Court: Of course.

Mr. Waller:

Q. Now, Mr. Agnew, were you familiar with the negotiations which led up to and culminated in the five year franchise between the Paramount and Crescent Amusement Company for the 1937-38 season?

A. I was familiar with the fact that negotiations were on, not with their details, the facts, of those negotiations.

Q. Did you recommend the franchise to the board of directors of your corporation?

[fol. 2989] A. Yes.

Q. Now why was it that Paramount desired to or was willing to enter into a five year franchise with the Crescent Amusement Company?

A. Well our income from the circuit, from the territory involved, had been rather unsatisfactory. Either we had not sold the Sudekum Circuit for some odd years, or when we did we were not represented entirely rightly, as to terms, numbers of pictures, et cetera, so naturally I was interested in any kind of a franchise that would bring in consistent revenue from those theatres to Paramount.

Q. Well, was a lease of the Paramount theatre in Nashville involved in any way in the transaction?

A. Yes, sir, we made a franchise which ran concurrently with the lease on the theatre to Mr. Sudekum.

Q. Was there any reason that appealed to you as Vice-President of Paramount for making the franchise co-extensive with the lease?

A. Yes. I felt that it was a proper thing to do in the interest of Paramount, the gentlemen who were operating the theatre was an important factor in the Paramount chain of theatres, and I wanted to be sure that that advantage accrued to us as a partner of his in the operation, that [fol. 2990] we should have the film rental deal which ran along with the operating lease of the theatre, so that our interests were more closely knit together.

Q. Now aside from the proposition of the theatre and the proposition that you had been left out, or had not been getting said revenue from the Crescent Amusement Company in your experience is there any difference from the standpoint of box office appeal of Paramount pictures where the pictures are played more or less continuously in a theatre or a group of theatres, or over a group of years, as compared with the situation where those pictures are played one a year or not played that often?

A. Not played the next?

Q. And not played the next, played one year and not the next?

A. Of course there is a difference in favor of the consistently played programme, with the advertising of the stars, personalities, *sieuxrroea, wrx*, has a cumulative value which does not accrue when they are played erratically.

For example, Paramount Pictures played in a Paramount theatre where they are played regularly over the years, are better than comperable theatres or in other theaters, we will say, or in less comperable theatres, where they are played not continuously every year.

Q. Every year?

[fol. 2991] *Q. Every year?*

A. Generally I would say I have noticed in theatres that play any major program consistently and have a greater interest in that program, they are building better, develop better grosses, than in those pictures and those theatres that are interested in playing not all the pictures.

Q. What about selling on a long deal, in comparison with a short deal?

A. It is a fact I would say too, and it is a factor.

Q. Mr. Agnew, is it to the advantage or disadvantage of Paramount as the distributor of motion pictures to have competition amongst the exhibitors?

A. Of course.

Q. Is which?

A. It is an advantage.

Q. It is an advantage?

A. Yes.

Q. What sort of competition do you have reference to? Is there more than one kind of competition?

A. I mean substantial competition as compared with less substantial competition?

A. And again healthy competition, good healthy competition is good, yes, naturally.

Q. You regard that as an advantage.

[fol. 2992] Q. You regard that as an advantage to Paramount?

A. And the industry.

Q. Now in referring to the Paramount franchise that has been referred to as being one with Crescent, and the one with Rockwood and Affiliates, was it your purpose in making those franchises or was it one of your purposes, to prevent competition, to prevent competitors of Crescent and Rockwood from obtaining films and being able to compete with Crescent and Rockwood?

A. Naturally we could not sell them the same run, but it was not the purpose to execute subsequent leases, is that the question?

Q. Yes—was it the purpose and intention of Paramount to suppress competition of independents with Crescent?

A. No.

Q. Are you familiar with the phrase repeat run as used in the motion picture industry?

A. Yes.

Q. Are you familiar with the phrase second run as used in the motion picture industry?

A. I am.

Q. Will you explain the meanings of those phrases? I will let you explain the meanings of those phrases and compare them?

[fol. 2993] A. Well a repeat run could be any other run following the first run picture, it is rather a broad term that can be applied to a picture after the first run is already played, playing it again, that is the term repeat run, naturally. Certain theatres are in the category of repeat runs generally interpreted today I think to mean with reference to certain pictures consistently have a regular program second run is exactly what it says, second run, the run that follows the first run.

[fol. 2994] Q. Now, can the phrase "second run" be used in more than one sense, that is, with reference to whether it is a different theatre or the same theatre?

A. Yes, it can be used in both senses.

Q. Mr. Agnew, is it a practice for office memoranda, on spot booking, for forms to be made up in the branch offices of Paramount where pictures are sold which are not included in any definite written contract, or which are not sold pursuant to any definite written contract?

A. Well, it is is a requirement to support every dealing of pictures with a memorandum contract.

Q. Why is that?

A. A part of the routine operation.

Q. Simply an accounting proposition?

A. It is required for the home office, yes.

Q. In a situation where Paramount has the first run account in a town and there are two second run houses, each of which wants a second run contract, what determines whether Paramount will prefer the one or the other second run house? In other words, what considerations do you take into account in such a situation?

A. What is the distinction between the two second run houses?

Q. One of the second run houses is owned and operated by your first run account, and the other is a competitor?

[fol. 2995] A. Generally, we prefer to sell the second run to the man who plays the pictures first run: advertising advantages particularly we feel that a man who was interested in the operation of both won't seek to injure his first run by a policy which the other man might or might not be so considerate about. Then, there is the advantage of advertising; we feel that as long as a man operates first run, if he is to repeat the picture in a second run house, will perhaps go a little further in advertising that picture or the program itself. That is not without exception, but that is the general policy.

Q. In a relatively small town, under 10,000 population, where there are competing theatres, where Paramount has a first run deal with one of those theatres, would you ordinarily be willing to sell the competitor only a few of top-notch pictures to play second run in the competing house?

A. No generally, it would be desirable, if those pictures are to be repeated, to sell them to the man who played them first run.

Q. Is that for the same reason you just explained?

A. Generally so.

Q. If you want to sell a second run account or second run deal, do you insist on more than a few pictures in such a situation?

A. Yes. If we elected to sell him at all, in a small town.

[fol. 2996] Q. From the time you have been connected with Paramount until the present time, have you ever had a conversation or communication of any kind with anyone in regard to preventing competitors of the Crescent Amusement Company, or any of the other defendant Exhibitors in this case, from obtaining pictures?

A. No sir.

Q. Have you ever had an understanding or agreement of any kind with any of the defendant Exhibitors, as to preventing competitors from obtaining pictures or choice pictures?

A. No.

The Court: Other than the contracts show.

A. None whatever.

Mr. Waller:

Q. Have you ever had a contract with any of the defendant Exhibitors which had any purpose other than the normal and usual licensing of pictures to the exhibitor for the actual exhibition in their theatres?

A. Not to my knowledge.

Q. Have you ever included in any of those contracts any provision as to clearance which had any purpose or intent other than to protect the value of the copyright to both licensor and licensee in the usual and normal way?

A. Not to my knowledge.

[fol. 2997] Q. Have you ever approved a contract or franchise between Paramount and any of the defendant Exhibitors in this case, with the knowledge or suspicion that any purpose of it was to suppress competition of any exhibitors who were competing with these defendant exhibitors?

A. None.

By Mr. Raftery:

Q. How long have you been in this business?

A. Mr. Raftery, about twenty-one years, I should say.

Q. How long?

A. About twenty-one years.

Q. Can you cite me an example now of a town where you sold to both towns, an eight thousand population town and a three thousand population town, where you sold clearance to the 3,000 population town over the 8,000 population town?

A. No, I know of none.

Q. You have heard the term "shotgun theatres"?

A. I have been in some of them.

Q. If you had a shotgun theatre, in a competitive situation, as against a regular theatre, which theatre would you prefer to sell Paramount pictures to?

A. To the better theatre.

Q. Do you ever like to have your pictures shown in a shotgun theatre?

[fol. 2998] A. No.

Q. On any run?

A. No sir.

Q. Your preference is not to?

A. Naturally.

Q. You spoke something about competition. Has there been destructive competition in the motion picture business in many situations?

A. Not to my knowledge.

Q. Have you heard the term over-seating?

A. Yes.

Q. What does over-seating mean?

A. The term simply means when there are too many chairs, too many seats profitably to operate in the town.

Q. What generally happens, when you have over-seating, to the distributor?

A. His film rental usually suffers because he has to assume a share of the excess overheads of those theatres.

Q. And the losses of the exhibitor?

A. The same thing.

Q. If there are too many theatres in any competitive situation, what generally happens to the distributor?

A. He loses normal income and besides the assumption of the overheads and part of the losses of the operation.

[fol. 2999] Q. That is when the term adjustment becomes a habit, does it not?

A. That is a chronic adjustment situation, yes.

Q. And it is your chronic headache?

A. Yes.

Cross-examination.

By Mr. Wright:

Q. Mr. Agnew, you referred to the desirability of good clean, healthy competition. Can you point out to me where any such condition, that competition has existed for the past four or five years, give me an example of what you mean?

A. By competition?

Q. By clean, healthy competition?

A. Yes, I think I can. The competition that exists in Atlanta between Fox and Paramount Theatres and Loews Theatres and all the others in the neighborhood.

Q. Can you give me an example of such competition in Tennessee?

A. Well, I am not familiar with the situation in Tennessee with respect to any one town.

Q. Are you familiar with the situation as to the Sudekum [fol. 3000] circuit?

A. I don't know.

Q. Do you know whether there is any competition in that circuit or not?

A. I understand there is, but I am not familiar with the details of it.

Q. You don't know where it is or what kind of competition?

A. I don't know, I have not been in the Sudekum towns, I am not familiar sufficiently to express an opinion.

[fol. 3001] Q. So that any remarks you have made here have been directed entirely to situations other than those in which the Sudekum Circuit is involved?

A. I can't speak of the Sudekum Circuit because I am not familiar with the towns.

Q. Now, I think Mr. Raftery asked you about selling new theatres as against old theatres.

Mr. Raftery: I never mentioned it. I never mentioned it. I said a shotgun theatre against a regular theatre.

The Court: He said an up to date theatre.

Mr. Raftery: They both might be old.

By Mr. Wright:

Q. Can you give us your distinction of a shotgun theatre, as you use the term, Mr. Agnew?

A. Well, again it is a broad term. It means, of course, a less desirable theatre in the industry. I think a good example would be a small, frame theatre, a fire trap and an unsanitary theatre.

Q. Is it purely a comparative term depending on the local situation?

A. No, only to a degree.

Q. Well, in any event, where you have one theatre that is better than another one the respective merits of the [fol. 3002] theatres as pieces of physical equipment necessarily determines which theatre you sell your pictures to?

A. It is a factor.

Q. Only one of a great many?

A. It is a very important factor.

Q. Frequently in making deals you sell your pictures to theatres which are, or to a theatre which may not be as good from a physical standpoint as another theatre?

A. Sometimes but infrequently.

Q. Did you ever hear of the old customer theory?

A. I have heard of old customers but I never heard it referred to as a theory, no.

Q. Is that also one of the factors which determines where you place your product, whether you have an old customer that has been using it, or not?

A. Yes, that is an important factor.

Q. Now, I believe you stated in deciding which town was to have clearance over another you would ordinarily give the clearance to the town which produced the most revenue?

A. That is right.

Q. Now, there is one clearance situation involved here that was taken up with you specifically and I believe that was the situation of Huntingdon and McKenzie. Do you recall that?

A. No.

Q. You don't recall Mr. Morgan having discussed with you the fact that the exhibitor at McKenzie, Tennessee was [fol. 3003] complaining bitterly because you, Paramount, had given Huntingdon clearance over McKenzie when you made the franchise, when you had formerly given McKenzie clearance over Huntingdon?

A. No, I don't believe I recall the names of the towns.

Q. You don't remember that ever having come up?

A. Not at all, no. It might have but I don't recall any part of it.

Q. Well, if it did come up, of course, the first thing you would do would be to look at the relative revenue produced by the towns, is that right?

A. That would be one of the first things, yes, of course.

Q. And if it appeared that in the year preceding the switch in clearance McKenzie had paid your company film revenue that was almost twice as great as that you got from Huntingdon, why, your natural inclination would be not to disturb the clearance, is that right?

A. Depending on the potential income from the other town. In other words, not necessarily. We might have a situation where we did get more income from one situation than another but by reversing them we could bring about a more satisfactory situation. That could happen. I don't know about this particular situation.

Q. You don't remember what happened there at all or why you finally agreed to the change?

A. No, I don't recall its ever having been discussed with me.

Q. How did you happen to be familiar with the situation in Earlington and Madisonville?

[fol. 3004] A. I wasn't until it was discussed here in Nashville.

Q. Down here before you testified?

A. Yes sir.

Q. Your attention wasn't called then to the Huntingdon-McKenzie situation at all?

A. No.

Q. Now, you say Mr. Ragan is now your assistant; he is assistant to the salesmanager?

A. Mr. Ragan, yes.

Q. And that represents a promotion, does it not, over the job he had when he was western district manager?

A. It does.

Q. Western division manager. And you didn't mean to give the impression, did you, that when Mr. Ragan wrote the letter that is in evidence here he didn't know anything about it or wasn't familiar with the Sudekum negotiations, did you?

A. O, no. I didn't say that, I am sure.

Q. And inasmuch as they affected part of his territory he necessarily was advised of what was going on there?

A. Yes sir.

Q. When was the first time, Mr. Agnew, that the repeat run option in the franchise that was made with the Sudekum Circuit now in effect was called to your attention?

A. I am not sure about that but I should say in connection with this trial. I don't think it ever came to my attention previously.

Q. Well, how long ago was that—within the last few [fol. 3005] weeks, you mean?

A. Yes.

Q. Never discussed with you at any time before that?

A. If I have I don't remember it. I think not.

Q. And you undertook to define a repeat run and a second run. Now, it is a fact, isn't it, that under certain circumstances they may mean the same thing—where the repeat run is the second run in a town it is a second run?

A. It could be, but usually referred to though specifically as the second run.

Q. It may be the second run?

A. Yes sir.

By the Court:

Q. Let me ask you this, if this difference exists; in a second run there is a definite obligation to play a certain number of films on the part of the exhibitor, whereas in a repeat run there is no definite obligation but the exhibitor merely has the right if he chooses to exercise it, is that right?

A. Generally so, your Honor. I think more and more in the last two or three years repeat runs have come to mean specific pictures. Previous to that a repeat run was just what it says, any run after the first run. It is a loose term but I should say today we generally, film men referring to a repeat run would mean repeat run on certain pictures.

Q. Where the exhibitor has the right to choose the pictures?

A. Not necessarily.

[fol. 3006] By Mr. Wright:

Q. Well, in any event, where a repeat was incorporated in an option the particular pictures that could be played would be determined by the terms of the particular option in which it was incorporated, is that right?

A. Yes sir, that is right.

Q. Do you recall when it was that you submitted this Sudekum franchise to your directors for approval?

[fol. 3007] A. Will you please repeat the question?

Q. I said, do you recall when it was you submitted the Sudekum franchise to your directors for approval?

A. In 1935, I should venture to say—No, in 1936; some time in the fall of 1936, I believe.

Q. Well, the franchise, or rather, putting in the three documents—they are all one, I believe—covering Crescent, Rockwood, all dated in July, 1938, as of November 20th, 1937.

A. Well, that is a record, and it speaks for itself.

Q. Well, I was just wondering. Well, was it submitted in 1938 or 1937?

A. I would say in the fall of 1937, it seems to me; at some time in the beginning of the theatrical season 1937, I suppose.

Q. In any event, at the time it was finally approved, in 1938, it had been your policy to discourage the making of franchises generally, isn't that right?

A. Discourage the making of franchises?

Q. Yes?

A. We didn't make many franchises in the past few years; I will say in six years or so, we haven't encouraged the making of franchises because we didn't feel, and don't feel, that they are to our advantage.

[fol. 3008] Q. And this Sudekum deal here was an exception to the general policy?

A. We haven't got a policy with respect to that; we analyze the situation on its own; but in this case we thought it was desirable, of course.

Q. But the general policy you were pursuing at that time was to discourage the making of franchises, was it not?

A. I don't think that is quite correct. We encouraged the making of certain franchises, but they were few. As a general thing we don't make franchises, and we haven't been making them for some years past, with a few exceptions.

Q. Well, why was it that you don't ordinarily make any franchises?

A. Well, for the reason that we are unable to forecast the terms, and the economic conditions, particularly in our business, changes have come about in the past few years; our pictures have been reduced from 32 pictures to, this year 8. We don't know what the pictures are going to cost us, or how many there will be in the deals we are making, and it is very difficult to establish the terms; that is the basic reason we don't make franchises.

Q. Isn't it also true that it is a basic arrangement that you regard it as a one-sided arrangement favoring the exhibitor.

[fol. 3009] A. No, we don't feel it is a one-sided arrangement favoring the exhibitor, or we wouldn't make them.

Q. Do you remember giving testimony, Mr. Agnew, in the form of a deposition that was taken on March 27, 1940, in the case of the United States against Paramount Pictures?

A. I don't remember the date; I remember giving the deposition.

Q. I will read you some of the questions and answers and ask you if you recall having given those as your testimony; at page 1524——

Mr. Waller: Is this for the purpose of contradicting the witness?

Mr. Wright: It is just to refresh his recollection.

Mr. Waller: We object to it, unless it is to contradict what he has stated on the witness-stand. What he has stated in another case wouldn't have anything to do with this case.

The Court: It might have a whole lot to do with it. Let's see what it is.

[fol. 3010] Mr. Wright: (Reading):

"Q. Have you more or less franchises in effect today than you had ten years ago?

A. I should say less. As a general rule I discourage the making of franchises.

Q. That was when you became general sales manager?

A. And for a long time before that.

Q. And why is that?

A. Because I don't think you can adequately forecast the quality of pictures or economic conditions sufficiently to be able to write an equitable franchise. And I don't like a franchise that does not carry the terms. I think it is a one-sided arrangement."

The Court: Franchise what?

Mr. Wright: "Franchise that does not carry the terms." (Reading further:)

"Q. One sided in whose favor?

A. In favor of the exhibitor.

Q. Well, that depends pretty much on the terms of the franchise, doesn't it?

A. Well, I said a franchise that doesn't carry the terms is a one-sided agreement. Franchises have been [fol. 3011] made without terms—terms negotiable or to be arbitrated."

Q. That is exactly the type of franchise you have here for the first run and subsequent run, as far as in Nashville, is that right?

Mr. Raftery: Objected to; Nashville is not involved.

The Court: Sustained.

Mr. Wright: In the franchises made here each one is made subject to the performance of the Nashville franchise; the Rockwood and Crescent franchises must also stay in effect; it is all made a part of one deal.

Mr. Raftery: If your Honor please, the Court excluded Nashville for obvious reasons. In that theater United Artists, Metro and Columbia products are shown; not a stick is shown in these other theaters. So we object to that.

Mr. Waller: There is no issue in this case as to franchises without terms. The franchise in this case, in regard to these towns does have very definite and specific terms; and what Mr. Wright has been reading is a very different proposition.

[fol. 3012] Mr. Wright: (Reading:)

"Q. Simply giving the exhibitor the first call of pictures?

A. That is right. As a distributor I think that is a one-way street.

Q. Well, has your policy been there since you have been general sales manager, merely to discourage the making of franchises without rental terms or to discourage the making of franchises generally?

A. I discourage both kinds.

Q. And what is the reason for discouraging the making of franchises which contain rental terms?

A. The reason is that the exhibitor, if he thinks he is hurt, can always come in and complain and ask for adjustments. If you are hurt, he doesn't tell you about it."

Q. Do you recall that?

A. I recall that very distinctly, and in effect I would like to repeat it here again; those are my views now.

Q. You were willing to make the franchise with the Sudekum circuit because of what you regarded as exceptional circumstances with the company at that date?

A. Certainly; exactly.

Q. Now, Mr. Raftery, I believe, asked you if you could [fol. 3013] name any towns which were smaller than another, which was a town of 3,000 which took clearance over a town of 9037——

Mr. Raftery: No, that is not accurate. Repeat it just as it was: Mr. Agnew, can you name a town in your 20 years experience in this business, where you sold both situations,

a town of 3,000 and a town of 8,000, where you sold clearance in the 3,000 over the 8,000?

A. I said I didn't recall any situation.

Mr. Wright:

Q. Now, can you recall a town where you sold a town of 3,000 and another of 8,000?

A. Do I recall a situation where we sold a town of 3,000 and a town of 8,000?

Q. Yes, where it is four miles away from it?

A. Not any rural towns that I can recall.

Q. Well, before coming here you didn't make any effort to refresh your recollection as to what you might have done or might not have done in towns of 3,000 and towns of 8,000, isn't that correct?

A. It is not a matter of recollection; it is a matter of procedure and custom; we would sell a town of 8,000 first and if we could sell the town of 3,000 four miles away, we would certainly do it, and following the town of 8,000.

[fol. 3014] Q. I will repeat the question: Can you give me an example of two towns which you sell where one is 8,000 and one is 3,000 and they are both close together, out of your experience?

A. I don't recall any rural situations like that; many suburban towns, but I don't think we sold——

Q. If you had made a study of that particular franchise situation, you could undoubtedly find a number of situations, could you not, where you give a smaller town clearance over a larger town, is that right?

A. I haven't.

Q. Well, do you know of this situation, where Paramount has a house that takes clearance over much larger towns, in Maine?

Mr. Raftery: Paramount in its own theater contract?

A. No, I do not.

Mr. Wright

Q. Do you know of that situation?

A. No, none at all.

Q. As a matter of fact, you are not able to testify here at all as to any particular clearance situation that you might have, without reference to what your records show?

A. That is essentially true, yes.

[fol. 3015] Q. Now, Mr. Agnew, will you then tell us if you were general manager, while you then were general salesmanager, the contracts that have been made with Interstate Circuit and Consolidated theaters, the theatres in Texas, have all been approved by you, have they not?

Mr. Armistead: I do not see, may it please the Court, what that has to do with the issues involved in this case. That case has been disposed of in the Interstate case, I do not understand the purpose of the question at all.

Mr. Wright: I think if we get an answer it will clarify it?

A. I will be glad to answer that for you, the Interstate Circuit and Consolidated and others, has a franchise with us for our pictures where they are in that circuit, the Paramount did not have yearly deals. The terms are sometimes determined after the picture is played.

Mr. Wright:

Q. Then the deals were made in 1935 and 1936, under discussion, did you approve them, they were approved by you, were they not?

Mr. Raftery: That is objected to. Mr. Agnew has just testified as to the Interstate Circuit and the Paramount, and [fol. 3016] the Paramount Partners have been given God's blessing in the consent decree by the same Mr. Wright, and I am objecting to any questions about it.

Mr. Wright: And the United Artists were interested in it as you all.

Mr. Raftery: We say this is part of the conspiracy of the Government and the Big Five to get us in, and we object to it.

Mr. Waller: That has nothing to do with this case.

Mr. Wright: That is what I thought, if he had ever participated in any agreement, and it was a rather swe-ping question, that did not have much place in the case.

. . . . . .

[fol. 3017] The Court: I will sustain the objection. Go ahead.

Mr. Wright: That is all.

Mr. Waller: I would like to have the letter of Mr. Morgan to Mr. Agnew, that was referred to by Government Counsel,

I have asked for that letter referred to by Government counsel, and it was passed to me by Government counsel, but it appears to be Government exhibit number——

Mr. Wright: It is a letter from Mr. Morgan to Mr. Unger, which refers to a letter written by Mr. Moore to Mr. Agnew. That letter we did not have the original, Paramount was asked to produce the original.

Mr. Waller: This letter is to Mr. Unger, not to Mr. Agnew.

Mr. Wright: The letter to Mr. Agnew was from Mr. Moore.

Mr. Waller:

Q. Mr. Agnew, where there is no clearance at all set out in the contracts relating to neighboring towns, is it necessary for the distributor to arrange and to make an arrange-
[fol. 3018] ment as between those towns?

A. Well proper routing of the print is involved normally in that question, I said we would sell the larger town, or we would play the larger town first.

Q. In other words, the same principle applies where there is no clearance set out in the contracts?

A. Generally so, yes.

Q. And then a distributor such as Paramount generally prefers that there be no clearance in such a situation?

A. And they set up their own booking arrangements.

Q. Set up their own booking arrangements?

A. That is generally so, yes.

Q. Where there are two towns and each one is demanding clearance over the other, then do you have to decide that question?

A. You do.

Q. By taking into consideration the pictures and the bookings?

A. That is right.

Q. Is there a difference between a repeat run or repeat run unless there is a repeat run clause in the contract—in other words, a repeat run is simply a phrase put in the contract, is that correct?

[fol. 3019] The Court: Well, what this court is concerned with repeat run, is repeat run expressed in these contracts.

Mr. Waller:

Q. You can have a contract about a repeat run?

A. Yes.

Q. You were asked about a franchise in general the fact that Paramount has made a number of franchises with theatre owners, having one or two theatres?

A. Yes, s-.

Q. In the last few years, have you decreased the number of those franchises for the reasons given Mr. Wright?

A. I think not. You see that the old franchise holders had been able to renew their franchises.

Q. Well, in any event, have you changed your policy for the reason given to Mr. Wright?

A. We have not denied any of the old franchise holders, is all I know.

Q. You have regarded the country as on an economic up-swing, have you not?

A. I do right now.

Q. With rising costs of production and fewer pictures?

A. Those are factors in our reluctance to renew franchises.

Q. And in the case of the Crescent Amusement Company, [fol. 3020] you were the one that wanted the five year term?

A. We did.

The Court: He wanted to make it co-extensive with his lease.

A. Exactly.

Further deponent saith not.

* * * * * * *

[fol. 3021] Mr. Waller: Your Honor, we would like to file some evidence we have, some statistics, documentary evidence, along the line the Government has introduced, and we feel that we should introduce some also. The first exhibit will be defendant's exhibit number 222, which is Fox play-off sheet for Earlington, Kentucky, for 1935-36, and the Fox play-off sheet for Madisonville, Kentucky, for 1936-1937. Your Honor will recall——

The Court: Yes, I recall about it, let it be admitted.

STIPULATIONS RE CERTAIN DOCUMENTARY EVIDENCE

Mr. Waller: Now we have some stipulations in regard to Paramount. These are tabulations, I think we can introduce them as exhibits, they have been submitted to coun-

sel as I understand by Mr. Morgan who is here in behalf of Paramount. The first one is the revenue from Madisonville and Earlington, Kentucky, and the admission price at the two locations for the seasons 1935-36, to 1939-40, inclusive, that will be defendants' exhibit No. 223.

The next one is the Paramount film rentals received in [fol. 3022] Hopkinsville, Kentucky in 1935-36 and by Crescent in 1936-37, from Anderson, 1937-38 from Crescent, both first and second run, and that will be Defendants' Exhibit No. 224.

The next one gives the Paramount film rentals from Brownsville, Tennessee, commencing with the 1934-35 season where Lawing was the exhibitor, and the succeeding five seasons in which Crescent was the exhibitor. That will be Defendants' Exhibit No. 225.

The next one will be a sheet showing the revenue received by Paramount from Columbia, Tennessee, and Mt. Pleasant, Tennessee, Columbia being a Crescent town, and Mt Pleasant the town where Mr. Page operates a theatre, giving the figures for 1932-33 to 1938-39 inclusive, that will be Defendant's Exhibit No. 226.

Next one is the second run contract between Paramount and the Dixie Theatre, East Gadsden, Alabama, dated twelve, twenty-six, thirty-nine, signed by Tex Ruffner as the Exhibitor and F. C. Goodner, salesman. The purpose is to show the contents of that contract, and to show that Mr. Currey, the Government's witness, did not know what he was talking about.

[fol. 3023] Mr. Wright: I do not see how this shows that.

Mr. Waller: Read his testimony, and I think you will see it. That will be a P exhibit I think, Mr. Wasson.

The Court: Go ahead with the defendants' exhibit numbers.

Mr. Waller: That will be Defendant's Exhibit No. 227.

The next one is the second run contract between Paramount and Crescent Amusement Company covering the Princess, Capitol and Gadsden theatres in Gadsden, Alabama.

Mr. Wright: In this first contract introduced, do you know whether it was performed or not?

Mr. Waller: I don't know whether it was performed or not.

Mr. Wright: I think we should find out.

Mr. Waller: I will agree that it was performed.

Mr. Wright: Well if it was not?

The Court: Let it be admitted subject to the objection [fol. 3024] and finding out whether it was performed.

Mr. Waller: I will agree either way that they want it, if they will tell us which way, we will stipulate right now.

The Court: You must be relying on it pretty heavily.

Mr. Waller: It is not introduced for that purpose.

The Court: All right.

Mr. Waller: The next one will be contract between Paramount and Crescent that I have just referred to, covering the following season S-11, dated January 8, 1940. That will be defendant's Exhibit No. 228.

[fol. 3025] Mr. Waller: The next tabulation or next Exhibit I have here is in three parts which I would like to have braded together, showing the revenue of Loew's from the Princess Theatre, "first run," Gadsden, Alabama; Ritz Theatre, Alabama City, with the caption, "second run," and the Dixie Theatre, Gadsden, Alabama, captioned as "Subsequent Run," covering 1938-39, 1939-40 and 1940-41 seasons.

In that connection the proof shows that Crescent had no contract with Loew's for Alabama City for the 1939-40 season, and the contract for the Princess Theatre was made after the end of the playing season. Is that correct, Mr. Wright?

Mr. Wright: That is my understanding. Of course, unlike the other play-off sheets that has been offered, this doesn't show when the pictures that are listed here were released or played at the other theatres, which I think is quite an important element in determining what their value may be.

Mr. Waller: We have no objection to that information being supplied.

[fol. 3026] Mr. Wright: We would like to see that on a regular play-off sheet of Loew's.

Mr. Waller: We didn't make them up. This is the way we are getting ours.

Mr. Wright: What is the purpose, what are they supposed to show?

Mr. Waller: The purpose is to show that the revenue of the Ritz Theatre at Alabama City was substantially more than the revenue from the Dixie Theatre at East Gadsden, Alabama.

Mr. Wright: Considering the fact that the pictures were played earlier at both houses, I can't see that that is particularly strange. I think the play date should appear there to show how much earlier they were played.

Mr. Waller: I think the evidence already shows they were played earlier. We don't dispute that.

The Court: As I understand it, this is a matter of stipulation?

Mr. Wright: Well, I am just looking at it now.

Mr. Waller: If he doesn't want to stipulate that, I will [fol. 3027] get the play dates. There has been no definite agreement about it.

Mr. Wright: We can work that out later.

Mr. Waller: Now, I have 6 of the play-off sheets, copies of which were furnished us. They were filed by Fox, in response to Government Interrogatory, covering 1934-35 1935-36, and 1936-37 seasons at Providence, Kentucky, which was at that time a so-called independent town, in which Mr. Beymer was the exhibitor, and the play-off sheets for the same three seasons at Fayetteville, Tennessee, which was a so-called Crescent town. Providence, Kentucky is a considerably larger town than Fayetteville, Tennessee, but never-the-less gots its pictures much cheaper. The only purpose in offering this is to show there is no such thing, your Honor, as comparable situations, based on populations of towns.

Mr. Wright: I thought when Mr. Waller offered the exhibit, he had come around to the idea that there were comparable situations. If he is not offering them as comparable situations, I don't see that what he is offering is comparable at all.

[fol. 3028] The Court: He is offering them as comparable situations, but comparable from the reverse.

Mr. Wright: Would you mind stating the population of the two towns?

Mr. Waller: Providence, Kentucky is about 4700, and Fayetteville about 4,000. I don't know exactly but the Exhibits will show.

Mr. Wright: This sheet here shows Crescent. Should it not be Cumberland?

Mr. Waller: I think that is wrong. It has got Crescent, but it ought to be Cumberland.

The Court: You had better be sure what it is before you put it in the record.

Mr. Waller: It is the same type the Government put in. I think it should be corrected before it is put in.

The only other evidence we have, I think, we would like to introduce Section IV, and read into the record, Section IV of the Amended and Supplemental Complaint filed by the Government in the Paramount case, in the District Court of the Southern District of New York on November 14, 1940, and headed "Growth of the Defendants", in which——

Mr. Wright: I don't suppose there is any doubt about the Court being judicially able to notice the complaint.

[fol. 3029] Mr. Waller: That is all right, but I want this in the record, copied in, for the purpose of the record. In other words, it shows, your Honor——

The Court: I don't know whether I will take judicial notice of a pleading filed in a case in another district court; I may be able to, I am not sure about that.

Mr. Waller: In any event, you will stipulate it, won't you, Mr. Wright?

The Court: I can take judicial notice of the orders and decrees of another Court.

Mr. Wright: The complaint has been widely circulated and is available to anybody who wants it to look at. I would like to know what the purpose of reading it into the record is, or what is being attempted in the way of proof by it.

Mr. Waller: The purpose is, that the Supreme Court has held that in considering a Sherman Act case, the relative positions of the different units of the industry must be considered and the state of the particular industry which is under examination, and these allegations are pretty full [fol. 3030] as to the theatres operated by these distributors, the pictures distributed by them, the gross assets, the possible gross earnings of these companies and other statistics, which we think would be relevant to be considered by the Court in examining the question of whether or not the Sherman Act has been violated in this case.

The Court: Well, the statements in a pleading of those facts would not necessarily be evidence.

Mr. Waller: I was asking Mr. Wright to stipulate that those facts are approximately correct, the ones which they set forth in such great detail in this complaint, I assume that they are correct.

Mr. Wright: Well, I assume that those facts that are in the complaint are all correct, or were correct at the time

the allegations were made. I don't see, though, what those allegations have to do with the issues in this suit.

Mr. Waller: Will you stipulate, subject to their competency?

Mr. Raftery: May it please the Court, as Counsel for Universal and United Artists, we join in the offer of that complaint, because the plaintiff in that complaint was the plaintiff in this suit, the same party. We offer them as [fol. 3031] admissions of the Plaintiff.

Mr. Waller: I don't know whether that rule applies against the Government or not. I don't want to rely on it. I am asking Mr. Wright to stipulate, subject to exception for materiality; is that correct?

Mr. Wright: You speak of the relative size of the Companies: I would have to look it over before I would stipulate it shows anything, but the relative size of the companies.

Mr. Waller: Except hearing from Mr. Wright on this stipulation, I think we are through.

Here are the population figures for Providence, Kentucky, and Fayetteville, Tennessee: In 1937, Providence had a population of 4,397; Fayetteville, 3,822. By the 1940 census, Providence had a population of 4,742; Fayetteville, 4,684.

That is all, subject to hearing from Mr. Wright on the stipulation.

The Court: All right. Defendants Rest.

Defendants here rested their case.

* * * * * * * *

[fol. 3032] Mr. Waller: What is your answer on the amended and supplemental complaint?

Mr. Wright: With reference to the amended and supplemental complaint, I offered Mr. Waller a choice of one or two stipulations or both. We will stipulate that the Court may take judicial notice of every allegation that is contained in the amended and supplemental complaint that was filed in connection with the suit in New York styled United States vs. Paramount Pictures, Inc. We will also stipulate that all the facts in the complaint are true. We will not make a partial stipulation that those facts that Mr. Waller may wish to use are true.

[fol. 3033] Mr. Raftery: We won't stipulate as to the truth of what is in there, but we will stipulate the first stipulation, as far as the defendants distributors are concerned.

The Court: That I might take judicial notice of the allegations in the complaint? Is that satisfactory?

Mr. Waller: It is not satisfactory but we much prefer that one to the other.

The Court: All right. Let it be admitted.

* * * * * * *

[fol. 3034] [Stamp:] Filed Deft. Exhibit No. 58, J. A. Willingham, Testimony, July 22, 1941. L. B. Ormes, Clerk. By S. E. Wasson, Chief D. C. On motion of Robt. L. Wright, Gov't. Atty., to strike this Exhibit—The Court granted same—Exhibit # 58 stricken. This 7-22-41 8. E. D., C. D. C.

DEFENDANT'S EXHIBIT 58

Brownsville, Tenn., playoff of MGM product as follows:

Southland Theatre—C. G. Lawing (owner)

1932-33 Product	
39 features	676.27
81 short sub.	248.00
17 news reels	42.50
	966.77
1933-34 Product	
40 features	823.80
96 short sub.	286.00
6 news reels	15.00
	1124.80
1934-35 Product	
41 features	765.69
32 trailers	64.00
60 short sub.	202.00
	1086.69

Capitol Theatre—Crescent Amusement Co.

1935-36 Product	
46 features	1021.95
46 trailers	69.00
85 shorts	246.00
104 issues news	260.00
	1596.95
1936-37 Product	
42 features	1002.20
42 trailers	63.00
84 short sub.	193.00
4 reissues	80.00
4 trailers	6.00
104 news reels	260.00
	1604.20
1937-38 Product	
43 features	1084.88
43 trailers	64.50
98 short sub.	236.00
104 news reels	260.00
	1645.38
1938-39 Product	
49 features	1201.17
49 trailers	73.50
87 short sub.	196.00
104 news reels	260.00
	1730.67

[fol. 3035a] Stamp: Filed (1). Dept. Exhibit #136. Paul S. Wilson—Testimony. Aug. 21, 1941. L. B. Ormes, Clerk. By, L. E. Wasson, Chief, D. [redacted]

DEFENDANT'S EXHIBIT 136

Independent Theatres

The following list covers towns where franchises have been sold—

Town	Theatre	Exhibitor	Period Covered
Albany, Ga.	Albany	A. C. Gortatowsky	1936-37 1937-38 1938-39 1939-40 1940-41 1941-42
Scottsboro, Ala.	Bocanita	J. A. Snodgrass	1936-37 1937-38 1938-39 1939-40 1940-41 1941-42 1942-43
Monticello, Fla.	Katherine	Katherine Johnson	1938-39 1939-40 1940-41
Alexander City, Ala.	Strand	Mack Jackson	1937-38 1938-39 1939-40
Carrollton, Ga.	Carroll	Carrollton Theatre Co. (Oscar Oldknow)	1936-37 1937-38 1938-39
Claxton, Ga.	Italian Garden	S. G. Tos	1937-38 1938-39 1939-40
Commerce, Ga.	Roxy	Mrs. P. M. Wise	1936-37 1937-38 1938-39
Cordele, Ga.	Woods	Frank J. Wood	1937-38 1938-39
Covington, Ga.	Strand	Mrs. M. Osman	1936-37 1937-38 1938-39
Chattanooga, Tenn.	Grand Amuse.	M. Lebovitz	1938-39 1939-40
Cullman, Ala.	Strand	Wm. R. Griffin	1936-37 1937-38 1938-39
Fernandina, Fla.	Ritz	Mrs. D. B. White	1937-38 1938-39 1939-40
Gallatin, Tenn.	Palace	W. F. Roth, Jr.	1936-37 1937-38 1938-39
Hartwell, Ga.	Emily	Mrs. W. T. Yarbrough	1936-37 1937-38 1938-39
Wrightsville, Ga.	Dixie	Dixie Amusement Co.	1937-38 1938-39
Jackson, Ga.	Dixie		1937-38 1938-39
Jacksonville, Ala.	Princess	J. L. Townley	1939-40 1937-38 1938-39
Leesburg, Fla.	Palace	Earle Fain	1936-37 1937-38 1938-39 1939-40
Newport, Tenn.	Winston	J. W. Baird	1936-37 1937-38 1938-39 1939-40
Statesboro, Ga.	Georgia	H. H. Macon	1936-37 1937-38 1938-39 1939-40
Summerville, Ga.	Royal	C. W. Maxey	1936-37 1937-38 1938-39 1939-40
Sylvania, Ga.	Strand	W. H. Karrh	1936-37 1937-38 1938-39 1939-40
Metter, Ga.	Dixie	W. H. Karrh	1937-38 1938-39 1939-40
Tallassee, Ala.	Roxy	Sam H. Thornhill	1937-38 1938-39
Tarpon Springs, Fla.	Royal	Nick Marlemes	1936-37 1937-38 1938-39
Thomaston, Ga.	Silvertown	Ed Beach	1936-37 1937-38 1938-39
Titusville, Fla.	Magnolia	Thomas S. Brandon	1936-37 1937-38 1938-39
Winder, Ga.	Strand	Mrs. P. M. Wise	1936-37 1937-38 1938-39
Swainsboro, Ga.	Dixie	W. M. Karrh	

[fol. 3035-b] Filed (2). Dept. Exhibit #136. Paul S. Wilson, Testimony. Aug. 21, 1941. L. B. Ormes, Clerk. By, L. E. Wasson, Chief, D. C.

Independent Circuits

The following list covers towns where franchises have been sold—

Circuit	Headquarters	No. Theatres	Period Covered
Martin Theatres	Columbus, Ga.	35	1936-37 1937-38 1938-39 1939-40 1940-41
Nat Williams	Thomasville, Ga.	4	1936-37 1937-38 1938-39 1939-40 1940-41 1941-42
Wometco Theatres	Miami, Fla.	20	1937-38 1938-39 1939-40 1940-41 1941-42 1942-43 1943-44
Independent Theatres (S. H. Borisky)	Chattanooga, Tenn.	6	1938-39 1939-40
Pal Amusement Company (J. T. Douglas)	Vidalia, Ga.	5	1936-37 1937-38 1938-39
L. J. Duncan	West Point, Ga.	13	1936-37 1937-38 1938-39
O. C. Lam	Rome, Ga.	7	1937-38 1938-39 1939-40
Manning & Wink	Marietta, Ga.	6	1937-38 1938-39 1939-40
F. O. Mullin	Haines City, Fla.	6	1937-38 1938-39 1939-40

[fol. 3035-c] Stamp: Filed (3). Dept. Exhibit #136. Paul S. Wilson, Testimony. Aug. 21, 1941. L. B. Ormes, Clerk. By L. E. Wasson, Chief, D. C.

Circuit Accounts

Circuit	Headquarters	No. Theatres	Period Covered
Lucas & Jenkins	Atlanta, Ga.	11	1935-36 1936-37 1937-38 1938-39 1939-40 1940-41
Florida State Theatres	Jacksonville, Fla.	43	1936-37 1937-38 1938-39 1939-40 1940-41 1941-42
Wilby Circuit	Atlanta, Ga.	17	1937-38 1938-39 1939-40

[fol. 3036] Stamp: Filed and Marked for Identification. Defts. Gen. Exhibit No. 215. Kermit Stengel, Testimony. Aug. 28, 1941. L. B. Ormes, Clerk. By L. E. Wasson, Chief, D. C.

DEFENDANT'S EXHIBIT 215

Theatre Operations—Year Ending Dec. 31, 1939

Number of Weeks Operated	52	52	52	17	52	19½
	Palace Greenville, Ky.	Lido Providence, Ky.	Lyric Manchester, Tenn.	Rex Cowan, Tenn.	Capitol Oneida, Tenn.	Yancey Burnsville, N. C.
Net Profit on Popcorn Sales	$ 905.99	147.76	88.90	147.26	252.21	278.66
Net Profit on Screen Advertising	570.00	508.20	439.65	91.80	290.40	91.80
Total Profit on Popcorn Sales & Screen Advertising	$1475.99	655.96	528.55	239.06	542.61	370.46
Net Profit or Loss from Theatre Operations	1019.27**	1936.79**	3113.34	254.97**	149.76	769.56**
Total Net Profit or Loss from All Sources	$456.72	1280.83**	3641.89	15.91**	692.37	399.10**

** These figures indicate a Loss.

Remarks:

Lyric Theatre, Manchester, Tenn.; we receive only 50% of the net profit on popcorn from this operation.

[fol. 3037] Stamp: Filed Defts. Gen. Exhibit No. 216. Kermit Stengel, Testimony: Aug. 28, 1941. L. B. Ormes, Clerk. By L. E. Wasson, Chief, D. C.

DEFENDANT'S EXHIBIT 216

Percent Comparison of Saturday, or Western Feature Operation, as Against Average Business of Other Days in Week
(Period covered—Calendar Years 1939 and 1940)

						Saturday Programs	
	Town	Theatre		Saturday	Other Days	Double Feature Program	Single Feature Program
Cherokee Amusements, Inc.	Oneida, Tenn.	Capitol	(7)*	39%	10.2%	103 (39%)	1 (30.2%)
	Spruce Pine, N. C.	Carolina	(6)*	44%	11.2%	101 (39.5%)	3 (39.3%)
	Lenoir City, Tenn.	Grand	(6)*	35%	13%	103 (35.7%)	1 (32.1%)
Rockwood Amusements, Inc.	McKenzie, Tenn.	McKenzie	(7)*	40%	10%	76 (39.5%)	15 (40.8%)
	Central City, Ky.	State	(7)*	36%	10.7%		104 (36%)
	Guthrie, Ky.	Lyric	(7)*	28%	12%	34 (28.6%)	70 (28.5%)
	Rogersville, Tenn.	Rogersville	(6)*	40%	12.2%	85 (38.9%)	19 (40.2%)

* Figures in parentheses indicate number of days per week theatre operates.

[fol. 3038–3041b] Stamp: Filed Deft's. Exhibit No. 217. Kermit Stengel, Testimony. Aug. 28, 1941. L. B. Ormes, Clerk. By L. E. Wasson, Chief, D. C.

DEFENDANT'S EXHIBIT 217

Comparison of Percent of Saturdays as to Other Week Days Where Only *Single Features* Were Exhibited on Saturday. Covering the Period From July 1, 1937 to June 30, 1940.

Town	Theatre		% Saturday	% Other Days	No. of Weeks
Harriman, Tenn.	Princess	(6)	29.4%	14.1%	31
Gallatin, Tenn.	Roxy	(6)	28.8%	14.2%	19
Bowling Green, Ky.	Diamond	(7)	34.6%	10.9%	156
Maryville, Tenn.	Capitol	(6)	30.5%	11.6%	156
Alabama City, Ala.	Ritz	(7)	28.4%	10.2%	156

* Figures in parenthesis indicate number of days per week theatre operates.

[fol. 3042] DEFENDANT'S EXHIBIT 223

Total Revenue Received by Paramount Pictures from the Liquidation of Feature Contracts for the Towns and Seasons Set Forth Below, Including the Exhibition of Re-issues and Repeat Runs.

Season	Madisonville, Ky.	Earlington, Ky.
1935–36	$1734.00	$ 552.50
1936–37	$ 12.50 (No deal this season —one picture spot-booked)	$1342.16
1937–38	$1513.70	$1226.20
1938–39	$1904.38	$ 475.00 (Estimated original revenue)
		$ 152.49 (Actually played before selling out)
1939–40	$2031.00	$ 585.61

* * * * *

Minimum Adult Evening Admission Prices as Specified on the Above Listed Feature Contracts for the Towns and Seasons Set Forth Below.

Season	Madisonville, Ky.	Earlington, Ky.
1935–36	$ .25	$ .15
1936–37	No deal	$ .15
1937–38	$ .25	$ .27
1938–39	$ .25	$ .15

[fol. 3043] DEFENDANT'S EXHIBIT 224

Total Revenue Received by Paramount Pictures from the Liquidation of Feature Contracts for Hopkinsville, Kentucky during the Seasons set forth below, including the Exhibition of Re-issues and Repeat Runs.

Season	
1935–36	$2190.00—Crescent
1936–37	$2438.38—Anderson
1937–38	$2661.85—1st. Run—Crescent
1937–38	$ 771.00—2nd. Run—Crescent

[fol. 3044-3048] DEFENDANT'S EXHIBIT 225

Total Revenue Received by Paramount Pictures from the Liquidation of Feature Contracts for Bornawsville, Tennessee during the Seasons set forth below, including the Exhibition of Re-issues and Repeat Runs.

Season		
1934-35	$ 581.00	Lawing
1935-36	$ 785.00	Crescent
1936-37	$ 383.50	Crescent—Spot-booked in conjunction with deal for 1937-38
1937-38	$ 618.50	Crescent
1938-39	$1041.82	Crescent
1939-40	$1345.95	Crescent

[fol. 3049] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE

Civil Action No. 54

UNITED STATES OF AMERICA, Plaintiff,

vs.

CRESCENT AMUSEMENT COMPANY, INCORPORATED, et al., Defendants

FINDINGS AND CONCLUSIONS—Filed March 3, 1943

The above entitled cause came on for hearing before the Court on July 7, 1941; appearances for plaintiff, United States of America were Horace Frierson, Jr., United States District Attorney, O. W. Hughes, Assistant United States Disfrict Attorney, Thurman Arnold, Assistant Attorney General, Robert L. Wright, Allen A. Dobey, J. Stephen Doyle, John F. Claggett, Special Assistants to the Attorney General, Albert Boggers, J. Frank Cunningham and Seymour Simon, Special Attorneys. Appearances for the defendants, Crescent Amusement Company, Inc., Anthony Sudekum, Kermit Stengel, R. E. Baulch, Kentucky Amusements, Inc., Lyric Amusement Company, Nu Strand Company, Rockwood Amusements, Inc., Cumberland Amusement Co., Strand Enterprise Corporation, Cherokee Amusement Company, Inc., Armistead, Waller, Davis & Lansden, Attorneys, Nashville; Muscle Shoals Theatres, Inc., and Louis Rosenbaum, W. H. Mitchell, Attorney, Florence, Alabama; Universal Pictures Company, Inc., Universal Film Exchanges, Inc., and United Artists Corporation,

Arthur F. Driscoll, Edward C. Raftery and Benjamin Pepper, Attorneys, New York City, J. D. Mosby and Cornelius, McKinney & Gilbert, Attorneys, Nashville, Tennessee; Columbia Pictures Corporation, Louis D. Frolick, New York City; Cornelius, McKinney & Gilbert, and J. D. Mosby, Attorneys, Nashville, Tennessee.

[fol. 3050] The cause was submitted upon the pleadings, evidence, exhibits, argument and briefs of counsel for plaintiff and defendants, and after due consideration thereof the Court enters its findings of fact and conclusions of law as follows:

Findings

A—Distributor Defendants and Co-Conspirators.

1. Columbia Pictures Corporation is a distributor of motion pictures with its principal offices in New York City. It is engaged in the production and distribution of motion pictures but has no theatres. It serves the area here involved with films from exchanges at Atlanta, Memphis and Indianapolis. During the 1934-1935 season it released 35 feature pictures, 6 of which were designated as "A Features". For the 1935-1936 season 37 feature pictures were released, of which 5 were designated as "A-Features". During the 1936-1937 season it released 39 feature pictures and designated 7 as "A-Features". In the 1937-1938 season 40 feature pictures were released, of which 11 were designated as "A-Features", and during the 1938-1939 season it released 36 feature pictures, of which 8 were designated as "A-Features".

2. United Artists Corporation is engaged only in the distribution of motion pictures, with its principal office in New York City. It serves the area here involved with films from exchanges in Atlanta, Cincinnati, New Orleans and St. Louis. The pictures released are produced by various individuals and corporations. The corporation secures the approval of the producer for each contract for the exhibition of his features. Consequently it made a separate contract for each producer's feature pictures in contrast to other major distributors which ordinarily made a single contract with exhibitors for all features released during the [fol. 3051] season. During the 1934-1935 season it released 22 feature pictures, and during the 1935-1936 season 15 pic-

tures were released. For the 1936-1937 season the number of features released was 19; for the 1937-1938 season the number of features released was 23; for the 1938-1939 season the number released was 15. Most of these pictures have been features of high quality and have been played for a week or more in a first-run theatre in Birmingham or Memphis.

3. Universal Film Exchanges, Inc., is a distributing corporation with its principal office in New York City. It serves the area here involved with films produced by an affiliated corporation from exchanges in Atlanta, Indianapolis, and Memphis.

During the 1934-1935 season Universal released 33 features, 9 of which were exhibited in a first-run theatre in Memphis for a week or more. During the 1935-1936 season it released 22 features, 6 of which played in a first-run theatre in Birmingham or Memphis for a week or more. For the 1936-1937 season it released 34 features, 6 of which played in a first-run theatre in Birmingham or Memphis for a week or more. For the 1937-1938 season 40 features were released, 8 of which were exhibited in a first-run theatre in Memphis or Birmingham for a week or more. During the 1938-1939 season 41 features were released, 5 of which played in a first-run theatre in Birmingham or Memphis for a week or more.

4. Twentieth Century-Fox Film Corporation has its principal office in New York City. It is engaged directly in the production and distribution of motion pictures and has a substantial stock interest in National Theatres Corporation which operates a large circuit of theatres. The area here involved is served with films from exchanges in Atlanta, Memphis and Indianapolis.

During the 1934-1935 season this distributor released 49 features, and during the 1935-1936 season 58 features were released. For the 1936-1937 season 62 pictures were released and during the 1937-1938 and 1938-1939 season it released 50 and 57 pictures, respectively.

[fol. 3052] 5. Loew's Incorporated is engaged in the distribution of motion pictures and is also interested, either directly or through subsidiaries, in production and exhibition. Its principal office is in New York City, and the area

here involved is served with films from exchanges in Memphis, Atlanta, Indianapolis, and New Orleans.

During the 1934-1935 season it released 44 feature pictures 26 of which played in a first-run theatre in Birmingham or Memphis for a week or more. For the 1935-1936 season it released 46 features, of which 26 played in a first-run theatre in Memphis or Birmingham for a week or more. During the 1936-1937 season 53 features were released, 32 of which exhibited a week or more in a first-run theatre in Memphis or Birmingham. In the season of 1937-1938, 45 pictures were released, 37 of which were played for a week or more in a first-run theatre in Memphis or Birmingham, and during the 1938-1939 season 49 feature pictures were released, 35 of which played a week or more in a first-run theatre in Memphis or Birmingham.

6. Paramount Pictures, Inc., is a distributing corporation and it is also engaged, either directly or through subsidiaries, in production and exhibition. It distributes pictures in certain states through a wholly owned subsidiary, Paramount Film Distributing Corporation. Its principal office is in New York City and it serves the area here involved with films out of exchanges in Atlanta, Memphis, Indianapolis and Cincinnati. It is interested in a substantial number of theatres in larger cities including the Paramount Theatre in Nashville, and owns a half interest in numerous theatre circuits operating in many cities of the South, and other parts of the United States.

[fol. 3053] During the 1934-1935 season it released 52 feature pictures, 27 of which were exhibited in a first-run theatre in Memphis or Birmingham for a period of a week or more. For the 1935-1936 season 71 feature pictures were released, 33 of which played at a first-run theatre in Memphis or Birmingham, for a week or more. During the 1936-1937 season 74 pictures were released, 28 of which were exhibited for a week or more at a first-run theatre in Birmingham or Memphis. During the 1937-1938 season this distributor released 56 pictures, 21 of which were exhibited in a first-run theatre in Memphis or Birmingham for a week or more. And during the 1938-1939 season 60 pictures were released, 17 of which were exhibited in Memphis or Birmingham at a first-run theatre for a week or more.

7. RKO Radio Pictures, Inc., is a distributing and producing corporation with its principal office in New York City.

It is also affiliated with corporations engaged in exhibition. The area here involved is served with pictures out of exchanges in Atlanta and Memphis. During the 1934-1935 season it released 43 feature pictures, 25 out of which played in a first-run theatre in Memphis or Birmingham for a week or more. For the 1935-1936 season 38 pictures were released, of which 13 played in a first-run theatre in Memphis or Birmingham for a week or more. During the 1936-1937 season this distributor released 42 pictures, out of which 19 were exhibited at a first-run theatre in Memphis or Birmingham for a week or more. During the 1937-1938 season 49 pictures were released of which 14 were exhibited for a week or more by a first-run theatre in Birmingham or Memphis. During the 1938-1939 season 45 pictures were released, out of which 13 played a first-run theatre in Memphis or Birmingham for a week or more.

8. Warner Brothers, Pictures, Incorporated, is interested, either directly or through subsidiaries, in the production, distribution, and exhibition of motion pictures. It distributes pictures through a wholly owned subsidiary, [fol. 3054] Vitagraph, Inc., the principal office of which is in New York City. It serves the area here involved with films out of exchanges at Memphis and Atlanta. It also operates a large circuit of theatres located principally in the larger cities.

During the 1934-1935 season this distributor released 50 pictures, 40 of which were exhibited for a week or more at a first-run theatre in Memphis or Birmingham. For the 1935-1936 season 55 pictures were released, of which 35 were exhibited in Memphis or Birmingham at a first-run theatre for a week or more. During the 1936-1937 season this distributor released 61 pictures, of which 29 were exhibited at a first-run theatre in Memphis or Birmingham for a week or more. For the 1937-1938 season 57 pictures were released, out of which 28 were exhibited for a week or more in a first-run theatre in Birmingham or Memphis. During the 1938-1939 season 52 pictures were released, of which 31 were exhibited for a week or more at a first-run theatre in Memphis or Birmingham.

9. Most feature pictures are licensed at or near the beginning of the season during which they are to be released and before they have been made. In the selling season of each year, (spring and summer), the distribtuor's salesmen

approach exhibitors with data concerning the number and quality of features the distributor intends to release during the succeeding motion picture season, which generally begins on September 1st of each year, and terminates on the August 31st following. Annual license contracts are then entered into for the exhibition of the features to be released during the season, which fix the rentals to be paid, run on which the films are to be played, clearance, if any, which the exhibitor's theatre takes over other theatres, and minimum admission prices at which the films are to be shown.

As the films are released, that is, made available for exhibition in theatres, prints are sent to the various exchanges from New York, New Jersey, or California and [fol. 3055] delivered to the exhibitors for exhibition in accordance with their contracts. Although the films are referred to in the trade as having been bought, the contract is always one of license rather than sale.

The exhibitor ordinarily returns the print to the distributor's exchange after each exhibition, where it is repaired or reconditioned when necessary, and supplied to other theatres, each print serving a large number of theatres. Prints in many instances move across state lines in the course of their transportation from exchanges to theatres since many theatres are located in states other than those in which the exchanges are situated. Payment of film rental is generally made throughout the season as the films are used, with final settlement at the end of each season. The distributor's license contracts are generally negotiated by salesmen or exchange managers and district managers, on behalf of the distributor, but are always subject to approval by the New York office. The ordinary course of business is to have the exhibitor sign an application, which is then forwarded to New York for approval or rejection. If approved, it is signed by the distributor and returned to the exhibitor.

10. About ninety per cent of the total film rental paid by the exhibitor defendants during the five years preceding the filing of this suit was paid to the eight major distributors.

B-Exhibitor Defendants

Crescent

11. The principal exhibitor defendant, Crescent Amusement Company, is a theatre-operating corporation organ-

ized in 1911, a majority of the stock of which is owned by the defendant Anthony Sudekum, its president, his wife, Nettie Sudekum, his brother, Harry Sudekum, and his two sons-in-law, the defendants Kermit Stongel and R. E. [fol. 3056] Baulch. Baulch is secretary and treasurer of the company, and Stengel is employed by it as an assistant to Mr. Sudekum.

The following tabulation shows the number and location of the theatres owned by the Crescent outside of Nashville on August 11, 1934, and August 11, 1939, the date on which this suit was filed, and indicates the extent of Crescent's expansion during that period.

Town	1930 Population	Number on 8/11/34	1940 Population	Number on 8/11/39
Alabama City, Ala.	8,544	1	.....	1
Bowling Green, Ky.	12,348	3	14,585	3
Brownsville, Tenn.	3,204	0	4,012	1
Clarksville, Tenn.	9,242	2	11,831	2
Cleveland, Tenn.	9,136	1	11,351	2
Columbia, Tenn.	7,882	1	10,579	2
Decatur, Ala.	15,593	2	16,604	2
Dyersburg, Tenn.	8,733	2	10,034	2
Earlington, Ky.	3,309	0	2,858	2
Franklin, Ky.	3,656	0	3,940	1
Gadsden, Ala.	24,042	2	36,975	3
Gallatin, Tenn.	3,050	0	4,829	1
Greeneville, Tenn.	5,544	1	6,784	3
Harriman, Tenn.	4,588	1	5,620	2
Hopkinsville, Ky.	10,746	2	11,724	3
Lebanon, Tenn.	4,656	1	5,950	1
Madison, Tenn.	.....	0	900	1
Madisonville, Ky.	6,908	2	8,209	2
Maryville, Tenn.	4,958	2	5,609	3
Morristown, Tenn.	7,305	1	8,050	2
Murfreesboro, Tenn.	7,993	1	9,495	1
Paris, Tenn.	8,164	1	6,395	2
Princeton, Ky.	4,764	0	5,389	1
Springfield, Tenn.	5,577	1	6,688	2
Union City, Tenn.	5,865	2	7,256	4
[fol. 3057]				
		Number on 8/11/34		Number on 8/11/39
Total		29		49

12. On August 11, 1934, Crescent had competition in only six of its towns outside of Nashville, Cleveland, Tennessee, Maryville, Tennessee, Greenville, Tennessee, Union City, Tennessee, Gadsden, Alabama, and Madisonville, Kentucky, (competitive with Roxy Theatre in Earlington). In 1935 the competition at Cleveland was bought out and the competition at Union City was eliminated with the organization of Strand Enterprises, Inc. In 1936 the opposition at Gadsden was also bought out, and in the same year the competition at Greenville and Maryville was elimi-

nated with the organization of Cherokee. In August 1939, Crescent's competition at Earlington was bought out.

On August 11, 1939, Crescent had competition in only three towns outside of Nashville. These were Gallatin and Harriman, Tennessee, and Franklin, Kentucky, in each of which a single independent theatre was then operated.

Since the filing of this suit, Crescent has bought out the competitor who was operating at Harriman on August 11, 1939, (Tim Smith) but his theatre is now operated by another independent. A competitor who opened in Paris in 1940 (Diggs) was bought out by Crescent the same year. Additional theatres have been opened by Crescent since August 11, 1931, at Lebanon and Murfreesboro, Tennessee and Decatur, Alabama.

13. Crescent has owned half of the capital stock of Cumberland Amusement Company, Lyric Amusement Company and Strand Enterprises, Inc., since their respective dates of organization.

On August 11, 1939, Crescent also owned a half interest in the following theatre-operating corporations not directly involved in this suit: Nu-Strand Corporation, which owned one-half interest in three theatres at Kingsport, Tennessee, which were leased to and operated by a Paramount affiliate, [fol. 3058] Kingsul, Inc.; Lewisburg Theatres, Inc., operating one theatre at Lewisburg; and Auditorium Company, operating one theatre at Shelbyville, Tennessee. On the same date, Sudekum owned all of the stock of the Hartselle Theatre Corporation, Inc., operating theatres at Hartselle, Alabama, and Rusellville, Alabama.

Muscle Shoals

14. Muscle Shoals Theatres, Inc., was organized in 1924 and Sudekum was its president from its organization to its dissolution in 1937. Sixty-two and one-half per cent of its stock was owned by Crescent and the remaining thirty-seven and one-half per cent by the defendant, Louis Rosenbaum. Pursuant to an arrangement made in 1937 between Rosenbaum and Sudekum, Crescent transferred its stock to Rosenbaum, who then transferred fifty per cent to Mrs. Sudekum. The corporation was then dissolved, and business was continued as a partnership between Rosenbaum and Mrs. Sudekum, operated under the name of Muscle Shoals Theatres. Rosenbaum acted as manager of the

theatres controlled by Muscle Shoals before and after the corporation was dissolved. On August 11, 1934, Muscle Shoals owned four theatres in Florence, Sheffield, and Tuscumbia, Alabama, adjacent cities with the total population of approximately 30,000 and one theatre in Athens, Alabama. (4342). There was no competition in any of the Muscle Shoals towns on that date.

On August 11, 1939, Muscle Shoals had competition in Athens, Alabama, where it had acquired a second theatre in June 1939. Its competitor in Athens, Alabama, was bought out in December 1939, and Muscle Shoals has had no theatre competition since that time.

[fol. 3059] Lyric

15. Lyric Amusement Company was organized in 1928, and Sudekum has been its president since at least August 11, 1934. On that date it operated the only two theatres in Huntsville, (13,050) Alabama. On August 11, 1939, it was operating the only three theatres in Huntsville. It had no theatre competition in Huntsville on either date. There has been no change in its situation since August 11, 1939.

Cumberland

16. Cumberland Amusement Company was organized in 1928 and Sudekum has been its president since at least August 11, 1934. On that date Cumberland operated seven theatres in seven Tennessee towns, whose 1930 population varied from 2100 to 4000. There was no theatre competition in any of these towns.

On August 11, 1939, Cumberland owned thirteen theatres in ten Tennessee towns, whose 1940 populations varied from 1500 to 5300 and it had competition in only one of these towns—McMinville, in which a competing theatre had been opened in June 1939. In October 1940 Cumberland opened a second theatre in Tullahoma, Tennessee.

Strand

17. Strand Enterprises, Inc., was organized in 1935 and either Baulch or Stengel has been its vice president and secretary since its organization. On August 11, 1939, it owned twenty-one theatres in seventeen towns in Arkansas, western Tennessee, Mississippi and Western Kentucky, only four of which exceeded 3,000 in population and none of which was larger than 4,300.

Rockwood

18. Rockwood Amusement Company was organized in February 1936 and the defendant Stengel has always been its president. The capital stock of this company (1,000 [fol. 3060] shares of no par value) was issued to Stengel in return for two theatres at Rockwood and Tracy City, Tennessee, respectively. The equipment for the Tracy City theatre was given to Stengel by Sudekum. Rockwood's working capital was principally supplied by loans from Sudekum, supplemented by additional loans from Ruffin and Muscle Shoals. Its executive office has always been in the same building as that occupied by the Crescent executive office and this space was first donated by and later leased from Crescent.

19. On August 11, 1939, Rockwood operated directly eight theatres in eight towns in Tennessee and four theatres in four towns in Kentucky, all with 1940 populations of less than 3,000, except Rockwood, Tennessee, (3,981) Central City, Kentucky, (4,199) and Providence, Kentucky, (4,397). On that date it had no theatre competition in any of these towns.

On the same date, (August 11, 1939) Rockwood owned a half interest in the following theatre operating corporations in each of which Stengel was an officer: Cherokee Amusement Company, Ruffin Amusements, Inc., Chickasaw Amusement Company, Kentucky Amusement Company, Inc., Dickson Theatres, Inc., Lawrenceburg Theatres, Inc., and Mid-State Theatres, Inc.

The only change in the Rockwood situation since August 11, 1939, has been the acquisition of an additional theatre at Clinton, Tennessee.

20. The following tabulation indicates the location and extent of the theatre operations of other corporations in which Rockwood owned an interest on August 11, 1939. (Ex. 343).

[fol. 3061]

Name of Corporation	Town	1940 Population	No. of Theatres Operated
Ruffin Amusements, Inc.	Hickman, Ky.	2268	2
Ruffin Amusements, Inc.	Covington, Tenn.	3513	1
Ruffin Amusements, Inc.	Greenfield, Tenn.	1509	1
Ruffin Amusements, Inc.	Halls, Tennessee	1511	1
Ruffin Amusements, Inc.	Martin, Tenn.	3587	1
Ruffin Amusements, Inc.	Newbern, Tenn.	1740	1
Chickasaw Amusement Co.	Alamo, Tenn.	1137	1
Chickasaw Amusement Co.	Milan, Tenn.	3035	1
Chickasaw Amusement Co.	Benton, Ky.	1906	1
Kentucky Amusement Co., Inc.	Elizabethtown, Ky.	3667	1
Dickson Theatres, Inc.	Dickson, Tenn.	3504	1
Lawrenceburg Theatres, Inc.	Lawrenceburg, Tenn.	3807	1
Mid-State Theatres, Inc.	Tompkinsville, Ky.	1438	1

Since August 11, 1939, Mid-State has acquired additional theatres in Cookeville, Tennessee, (4,364), Carthage, Tennessee, (1,512) and Burksville, Kentucky, (1,092).

Cherokee

21. Cherokee Amusements, Inc., was organized in August 1936. On August 11, 1939, it owned eleven theatres in seven towns in east Tennessee and three theatres in three towns in North Carolina. On that date there was no theatre competition in any of the towns in which Cherokee operated. The only towns which had a population of more than 3,000, were Erwin, (3,350), La Follette, (4,010), and Lenoir City, (4,373), Tennessee. Cherokee acquired an additional theatre at Jellico, Tennessee, in January 1941.

Newport

22. Newport Amusement Company was organized in February 1937, and since its organization half of its capital stock has been owned by Cherokee, and Stengel has been one of its officers. On August 11, 1939, it operated theatres in Newport, Tennessee, (3,575), and Copperhill, Tennessee, (1,005). There has been no change in its situation since that date.

[fol. 3062] 23. On August 11, 1934, the defendant exhibitors and their affiliates operated in thirty-two towns in Tennessee, (excluding Nashville) Kentucky, and Alabama, in six of which they had competition. On August 11, 1939, the defendant exhibitors and their affiliates, with the exception of Strand, heretofore dismissed as a defendant, operated in seventy-eight towns in Tennessee, (excluding Nashville) Kentucky, Alabama, and North Carolina, in five of

which they had competition, and the only towns in which they have competition today outside of Nashville, are Gadsden, Alabama, Harriman, Gallatin and McMinville, Tennessee, and Franklin, Kentucky. In two of these towns—Gadsden, Alabama, and Harriman, Tennessee, the independent theatres have opened since the filing of this suit and two more—Franklin, Kentucky and Gallatin, Tennessee—are towns which Crescent entered less than two years before the filing of this suit.

Of the forty-five towns in Tennessee listed in the 1940 census as having populations between 2,500 and 10,000, Crescent and its affiliates now operate theatres in all but nine. The independents operating in three of those nine towns have already been approached by Sudekum emissaries with the suggestion that they sell to one of the defendant exhibitors.

C—Elimination of Competition

24. In 1928 Crescent and C. A. Crute relieved themselves of the necessity of continuing to compete with each other in Huntsville, Alabama, by organizing Lyric whose capital stock was divided between them and transferring their respective theatres to it. In the same year, Crescent commenced the construction of a theatre in Fayetteville, Tenn., in which the old Cumberland Theatre Company was then operating. This threatened competition was forestalled by [fol. 3063] the organization of Cumberland Amusement Company, Inc., to which Crescent transferred its new theatre in Fayetteville, and Cumberland Theatre Company transferred the theatres it was then operating in Fayetteville, McMinville, Tullahoma and Franklin, Tennessee. The Capital stock of the new company was divided between Crescent and the owners of the Cumberland Theatre Company, and the latter were thereby not only relieved of competition from Crescent in Fayetteville, but protected against Crescent competition in their other three towns. In 1935 Haynes was operating in opposition to Crescent in Union City, Tennessee, Crescent disposed of this competition by joining with Haynes in the organization of Strand, which was formed for the purpose of expanding into smaller towns in West Tennessee, Mississippi and Arkansas.

25. In 1936 Crescent and Parrott and Hendren were competing in Greenville and Maryville, Tennessee, after having

invaded each other's towns. Crescent eliminated this competition by an arrangement under which Parrott and Hendren transferred their Greenville and Maryville theatres to Crescent and their six theatres in Erwin, La Follette, Lenoir City, and Sweetwater to Cherokee, a newly formed corporation whose capital stock was divided between Parrott and Hendren and Rockwood. Through this arrangement, Parrott and Hendren protected themselves against Crescent competition in their other towns and secured the benefits which accompany affiliation with a circuit as powerful as Crescent.

Crescent paid a total of $25,000.00 to Parrott and Hendren for their three theatres at Maryville and Greenville, Tennessee, which were transferred outright to Crescent, and for a one-half interest in their six theatres in Erwin, La Follette, Lenoir City and Sweetwater. As a part of the deal, Parrott and Hendren agreed that Cherokee would pay Sudekum a salary of $200.00 a week for his advice and as- [fol. 3064] sistance in running the business. Sudekum did not become an officer of the corporation, but Stengel did and in 1938 Stengel took over the film buying for the theatres but received no salary from Cherokee at any time. However, in accordance with the agreement made with Hendren, Sudekum got $10,400.00 each year ($200.00 a week) from Cherokee for his advice. For his $25,000.00 investment Sudekum thus received stock of a par value of $25,000.00, one-half of the $50,000.00 stock issued by Cherokee, the three theatres in Maryville and Greenville outright, and a salary of $10,400.00 a year.

26. In 1937 W. F. Ruffin and Chickasaw Amusement Company, a subsidiary of Rockwood, were operating in the same general area. Ruffin's theatres were in Martin, Covington and Newborn, Tennessee, and Chickasaw's were in Milan and Humboldt, Tennessee. In 1937 Ruffin's theatres were transferred to Ruffin Amusement Company, whose capital stock was divided between Ruffin and Rockwood, and shortly thereafter, Ruffin was sold a half interest in Chickasaw. In the same year, J. W. Baird, of Newport, Tennessee, in order to avoid Crescent competition, transferred his theatre in Newport to Newport Amusement Company, whose capital stock was divided between Baird and Cherokee.

27. Muscle Shoals operates in Northwestern Alabama; Crescent and its subsidiaries, Cumberland and Lyric operate in south central Kentucky, Northeastern Alabama and Tennessee. Rockwood and its subsidiaries operate in the smaller towns in the same area where Crescent operates, except that Cherokee operates in three of the larger towns in East Tennessee and in three towns in North Carolina.

[fol. 3065] 28. The defendant exhibitors and their affiliates have never been in competition with each other, although most of them have expanded into new towns since their respective organizations. This is accounted for by the common control centered in the defendant, Sudekum, which makes any express agreement, dividing territory between the defendants, unnecessary, but nevertheless effectively prevents any competition between the units comprising the Sudekum Circuit.

29. The mutual interest which Sudekum, Rosenbaum and Stengel had in protecting their territories from competition, is demonstrated by the agreements which were made by them when theatres were taken over. For example, the agreement made by Rosenbaum with respect to the Athens take-over provides that Buchanan would stay out not only of Alabama, but Tennessee, as well, for five years. Rosenbaum was not then operating any theatres in Tennessee, and never had operated a theatre in Tennessee, and the plain purpose of including Tennessee in the agreement was simply to protect the Tennessee interests of the defendant exhibitors and their affiliates.

30. Crescent also went out of its way to protect its affiliates as well as itself from competition as is indicated by the following agreements not to compete with Crescent or its affiliates, which Crescent secured in acquiring competing theatres.

On April 10, 1936, Bobbie Farley Crawford and Jack Crawford sold the Gadsden Theatre, Gadsden, Alabama, to Crescent Amusement Company; the Crawfords agreed that for a period of ten years they "will not engage in the motion picture show business, or other show business, or the vaudeville business, or any affiliated business connected therewith, either directly or indirectly, as proprietor, servant, agent, employee, stockholder, or otherwise, in any way, shape, form or fashion, in any city or town wherein the

Crescent Amusement Company or any of its affiliated or [fol. 3066] subsidiary companies are now engaged in a similar or like business * * * that they will not be employed by, and will not directly or indirectly work for, and will not be associated with others in any way in the operation of any picture show, vaudeville, or similar or affiliated business for a period of ten years from the date hereof, in the towns and places within the terms of the foregoing covenant * * * they will not engage in, or carry on, any picture show business, or vaudeville or affiliated business, either directly or indirectly, in the city of Gadsden * * *".

On April 21, 1936, C. G. Lawing and wife, Elon Lawing, sold to the Crescent Amusement Company, the Southland Theatre, Brownsville, Tennessee, and Gem Theatre, Paris, Tennessee. The Lawings agreed not to "operate any type or kind of moving picture show or vaudeville show, or own stock or be interested directly or indirectly in any moving picture show, or vaudeville show in any of the towns and counties in the States of Tennessee, Alabama, and Kentucky, where The Crescent Amusement Company, or its subsidiaries now own show houses, stock, or interest in moving picture shows or vaudeville shows, for a period of five years * * *".

On November 28, 1938, V. R. Anderson, F. L. May and C. P. Taylor, first parties, sold the Crescent Amusement Company, second party, the Kentucky Theatre, Hopkinsville, Kentucky. Anderson, May and Taylor agreed "not to engage in the picture show business either directly or indirectly, in any town, or city in the States of Kentucky, Tennessee or Alabama, in which said second party is directly or indirectly, interested in any theatre. Said party of the second part agrees that it will not either directly or indirectly, engage in the theatre business in any town in the State of Kentucky in which said first parties are directly or indirectly, interested in any theatre business."

[fol. 3067] On June 15, 1939, Roxy Amusement Company, J. D. Henry, Joe Wiley and Edward B. Wiley sold the Crescent Amusement Company the Roxy Theatre, Union City, Tennessee. The first named parties agreed that "they will not re-enter the moving picture business either directly or indirectly for a period of twenty-five years (25) from and after this date in any of the towns or cities in the States

of Tennessee, Arkansas, Alabama, Kentucky and North Carolina, in which the Crescent Amusement Company, its subsidiaries, associates and/or partners are now engaged in the moving picture theatre business. That is to say, the parties of the first part severally and jointly agree that they will not go into said business as a corporation or individually and will not enter any partnership or own stock in any corporation that is engaged in the moving picture business within said restricted territory for a period of twenty-five (25) years; and the said J. Dee Henry will not suffer or permit any member of his immediate family to engage in such business, or own any interest in such business within the limit of the territory aforesaid for a period of twenty-five (25) years."

On July 21, 1939, Roxy Theatre Company, Inc., and E. W. Dozier sold the Crescent Amusement Company the Roxy Theatre at Earlington, Kentucky. Dozier and Roxy Theatre Company, Inc. agreed that they "will not compete with the Crescent Amusement Company, or any of its subsidiaries or affiliates, in Earlington, Kentucky, or in any other town in which the Crescent Amusement Company, its subsidiaries or affiliates, now operate a moving picture theatre, for a period of ten years from August 1, 1939, and each of them agree that they will not directly or indirectly become interested in any company which may compete with the said the Crescent Amusement Company, or any of its subsidiaries or affiliates."

Each of these agreements not to compete with Crescent or its affiliates in other towns extended far beyond the [fol. 3068] protection of the business being sold, and demonstrated a clear intention to monopolize theatre operation wherever they or their affiliates secured a foothold.

31. In addition to the aforementioned agreements, the following non-competitive agreements, more narrowly limited in area, were taken from the exhibitors indicated at the time their theatres were acquired: (1) John Dee Henry (5 years in Hickman, Kentucky) R. M. Gutschalk, (5 years in Marshall, North Carolina) Walter Beymer, (5 years in Webster County, Kentucky) Cherokee Theatre Company, Copperhill, Tennessee, (10 years in Copperhill) J. E. Taylor, (10 years in Mitchell County, North Carolina); Tim W. Smith, (5 years in Roane County, Tennessee); B. F. Diggs, (15 years in Henry and adjacent counties,

Tennessee, and not to lease Gem Theatre building for theatre purposes for 15 years); Lodge 76, Free and Accepted Masons, (during such time in Hardin County, Kentucky, as Sudekum or Stengel are engaged in exhibition business).

32. Stengel admitted that in negotiating film contracts for Rockwood, he ordinarily negotiates contracts for its affiliates. Nor is there any doubt that Crescent and Rockwood and Rockwood's affiliates have jointly negotiated and executed contracts with the various distributors. The joint negotiation of Fox and Warner franchises is discussed under the heading of Franchises. The following are instances in which the record shows proof of concerted action by them.

Columbia: Crescent did not play any of Columbia's 1936-37 product and did not buy any of its 1937-1938 product until April and May 1939, when it made deals for Nashville and Bowling Green, Kentucky. Neither Rockwood nor its affiliates licensed the 1936-1937 or 1937-1938 product except for Guthrie, Kentucky, (1936-1937) and Elizabethtown, Kentucky, (1937-1938). On May 3, 1939, a deal, negotiated by Sudekum, was made for the exhibition of the 1938-1939 product in nine Crescent towns and ten Rockwood and [fol. 3069] Cherokee towns, (Ex. 3, 4, and 5).

Fox: On September 9, 1937, a two-year deal for the 1937-1938 and 1938-1939 product was made for towns acquired after the execution of the Crescent 1936 franchise; this deal included two Crescent towns, four Rockwood towns, five Cherokee towns, one Hartselle town, and one Mid-State town. (Ex. 15).

Loew's: On November 4, 1937, Kessnich, Loew's southern district manager, wrote Connors, Loew's eastern and southern sales manager, stating that he had "closed a deal with Tony Sudekum for his 22 situations and for the Sudekum Junior Circuit of 24 situations" (Ex. 170). The deal referred to (1937-38 season,) was finally approved on November 23, 1937, (Ex. 36). The situations referred to as the "Sudekum Junior Circuit" consisted of towns operated by Mid-State, Cherokee, Rockwood, Ruffin, Hartselle, Newport, Dickson, and Chickasaw. Contracts for the exhibition of Loew's 1938-1939 product in twenty-two Crescent towns, the four Muscle Shoals towns, two Mid-State towns, eight

Rockwood towns, seven Cherokee towns, one Lyric town, one Newport town, one Hartselle town, three Chickasaw towns, four Ruffin towns, and one Dickson town were all made on November 8, 1938 (Ex. 337).

Paramount: Beginning with the 1937-1938 season, Crescent and Rockwood and all of its affiliates were included in the five-year franchise dated July 28, 1938, as of November 1, 1937, (Ex. P. 24, P. 29, P. 30). These negotiations were carried on during a long period of time by Stengel, as well as Sudekum, on behalf of Crescent, and that Sudekum did not confine himself to the Crescent situations is shown by his insistence that Huntingdon, a Rockwood town, be granted clearance over McKenzie (Ex. 151).

R. K. O. The 1937-1938 RKO product was bought on November 23, 1937, for twenty-six Crescent towns, twelve Rockwood towns, one Cherokee town, and four Ruffin towns (Ex. 20). The RKO 1938-1939 product was bought [fol. 3070] on December 20, 1938 for twenty-three Crescent towns, seven Rockwood towns, one Lawrenceburg town, two Newport towns, and six Cherokee towns (Ex. 21).

United Artists: In licensing United Artists pictures, Crescent was accustomed to make single contracts of all its theatres, and after Rockwood was organized, its towns were included in these deals (Ex. 259). Crescent did not buy the 1937-38 product of United Artists and did not make a deal for the 1938-39 pictures until April 1939. Rockwood likewise did not buy the 1937-38 product and all of it and its subsidiaries' towns were included in the 1938-39 and 1939-40 contracts with Crescent. (Ex. 259, U. A. 1).

Universal: On December 28, 1938, Universal's 1938-39 product was licensed for twenty-four Crescent situations, and on the same date Stengel made a deal for the same product for two Mid-State towns, six Rockwood towns, five Cherokee towns, three Hartselle towns, and one Newport situation (Ex. 10). On December 29, 1938, the same season's product was licensed for the Crescent, Rockwood, Ruffin, Dickson, and Chickasaw situations in west Tennessee, which were served out of the Memphis exchange. (Ex. 10).

33. Film deals for Muscle Shoals have frequently been made by Rosenbaum independently of the Crescent deals.

With respect to some important deals, however, the Muscle Shoals negotiations have taken place in conjunction with Sudekum and Stengel. Rosenbaum admitted that he discussed the Muscle Shoals film deals with Sudekum when he came to Nashville. Rosenbaum testified that his theatres had never been put in with Sudekum's in a film deal, but the defendants themselves introduced a letter to Rosenbaum reciting the terms of a joint deal with Fox for Muscle Shoals and Crescent. (Def. Ex. 47).

In the fall of 1939 and winter of 1940, Sudekum, Stengel and Rosenbaum jointly negotiated with Loew's with regard to a proposed five-year franchise commencing with the 1939-40 season, (Ex. 177). All three of them met with representatives of Loew's to discuss the proposed franchise, and on one occasion Stengel and Rosenbaum met with Avey, Loew's [fol. 3071] Atlanta exchange manager in Florence, for the purpose of continuing their negotiations. No agreement upon a franchise was ever reached. Sudekum and Stengel finally did license Loew's 1939-40 product in January 1941 for some of their situations (Ex. 178, L. 7, L. 13, 300), and Rosenbaum licensed the 1939-40 product on November 25, 1940, (three months after the end of the season), when he entered into a contract with Loew's for Athens, Alabama, (Ex. L. 19).

Although its 1939-40 product was not licensed by Sudekum, Stengel or Rosenbaum until long after the end of the 1939-40 season, Loew's refused to license that product during the period, when the films were being released, to competing exhibitors in Gallatin, Tennessee, and Gadsden, Athens, and Decatur, Alabama, who had been attempting to secure it (Ex. 40, 41, 83, 84, 87, 89, 142, 178, 190, L. 7, L. 14).

In July 1938, the same month in which the Crescent-Rockwood franchise with Paramount was finally approved, an application for a three-year deal (1936-37, 1937-38, and 1938-39) which Muscle Shoals had made in October 1936 was also approved, (Ex. 218).

Crescent and Rockwood did not play United Artists' product in 1937-38. Muscle Shoals did not buy that distributor's 1938-39 product until April 1939, the month in which Crescent and Rockwood also made a deal for that product (Ex. U. A. 7). Nor did Crescent and Rockwood license that product until United Artists had rejected an application from a competitor of Muscle Shoals at Athens.

34. Sudekum has admittedly done the film buying for Lyric since Crute's death, and Lyric was included in the current five-year Paramount franchise (Ex. P. 24), the current four-year franchise with Warner (Ex. W. 14) and the current three-year franchise with Fox (Ex. F. 8).

35. In addition to the joint negotiation and execution [fol. 3072] of licensing agreements, the conduct of the respective businesses operated by the defendant exhibitors has been closely related.

Rockwood has been operating as a virtual branch of the Crescent business under the immediate supervision of Stengel, Sudekum's son-in-law. Rockwood's executive offices have always been in the same building as that occupied by the Crescent executive offices and this space was first donated by, and later leased from Crescent. Sudekum contributed the equipment for one of the two theatres with which that corporation started in business. He gave Stengel the half interests in the Dickson Theatres Corporation and Chickasaw Amusement Company that Rockwood now owns. Individual theatres were also transferred from Crescent subsidiaries to Rockwood, such as the Court theatre in Huntingdon, Tennessee, transferred from Strand to Rockwood in January 1937, (Ex. 290), and the Rogersville theatre at Rogersville from Cumberland to Rockwood in December 1937.

36. The distributors paid little attention to the separate corporate entities of Crescent and Rockwood in licensing films. On February 2, 1937, Rockwood licensed 36 of the Loew's 1936-37 releases for exhibition in Earlington, Kentucky, (Ex. 335). On December 1, 1936, Rockwood licensed 28 of the RKO 1936-37 releases for exhibition in Earlington, Kentucky, (Ex. 19), and on January 11, 1937, it licensed 40 of the Fox 1936-37 releases for exhibition in Earlington, Kentucky (Ex. 14). These agreements were made when Stengel was unsuccessfully attempting to lease Dozier's theatre in Earlington for Rockwood. Crescent then opened a theatre there in opposition to Dozier which apparently used the films licensed under the Rockwood contracts, as Rockwood never did operate a theatre in Earlington.

Sudekum, having supplied the necessary capital and motion picture experience to operate Rockwood successfully,

quite naturally wrote Oscar Morgan, Paramount southern district manager, in June 1937, that he owned a half interest [fol. 3073] in Cherokee, (Ex. 268), although Rockwood was the nominal owner of the half interest which Sudekum had paid for. Sudekum's explanation of this letter from the witness stand, that he spoke of owning this one-half interest as his in the same way that he would speak of owning something held by his wife, tends to further establish the obvious fact that Stengel and his Rockwood Company were nominal owners of Sudekum's interest in the Rockwood theatres, or so-called Sudekum Junior Circuit, just as his wife was the nominal owner of his interest in Muscle Shoals.

37. Sudekum and various Crescent employees took part in the negotiations leading to a number of Rockwood acquisitions, and Sudekum took part in the negotiations which led to the sale of Buchanan's theatre in Athens, Alabama, to Muscle Shoals.

Rosenbaum stated that he made only occasional visits to Nashville "every other month," "maybe three or four times a year". When confronted with evidence of the fact that during the year 1936, he had claimed an income tax deduction of $280.00 for "traveling on business to Nashville each month", he could not explain the discrepancy between this statement in his tax return and his prior testimony that he had gone to Nashvile only "once every two months, maybe three or four times a year."

He did attempt to reconcile his previous testimony that the objects of his trips to Nashville were personal rather than on Muscle Shoals business by saying that the purpose of the monthly business trips in 1936 was to persuade Mr. Sudekum to let him increase his interest in the business, which was done in 1937, just before the corporation was dissolved. No doubt at the same time that he discussed the business of Muscle Shoals with Mr. Sudekum, he discussed the advisability of increasing his own participation, but the fact remains that he did visit Nashville at regular intervals for the express purpose of consulting with Sudekum with respect to the conduct of the Muscle Shoals business.

[fol. 3074] 38. In the summer of 1935, Crescent opened the Capitol Theatre in Brownsville, Tennessee, in opposition to Lawing who had been operating the Southland Theatre

in that town since 1932; the Southland had been operated on a 15-cent and 25-cent admission price policy; Crescent operated its Capitol Theatre on 10-cent and 15-cent policy.

Shortly after Crescent opened in Brownsville, Lawing opened a tent show in Paris, Tennessee, a Crescent town which had only one theatre, and continued to operate the tent show until November 1935, when he converted a building in Paris into a theatre, (The Gem.)

39. When Lawing opened in Paris, he was able to get Paramount's 1934-35 product first run (Ex. p. 13), as Crescent did not license the Paramount product for any of its towns that season (Ex. 262). He was given no opportunity to license Paramount's 1935-36 product, however, and on August 22, 1935, Paramount licensed that season's product to Crescent for exhibition in Paris and 18 other towns (Ex. 263). Crescent paid Paramount $28,747.00 for the pictures it played during that season. (Ex. 266a).

Lawing also got the Fox 1935-36 product first run in Paris (Ex. F. 1, R. 766). This was because Crescent broke with Fox in the fall of 1935 on the 1935-36 product and bought it only for a few situations in April 1936, at the time it got together with Fox on a three-year deal for the entire circuit, commencing with the 1936-37 product (Ex. 205).

In addition to the Paramount 1934-35 product and the Fox 1935-36 product, Lawing was able to spotbook a few RKO pictures for Paris. He was unable to secure any other major product nor would any of the distributors sell him a second run; the ostensible ground of refusal was that the town was too small for a second run.

But the Crescent was allowed to repeat pictures which had played Lawing's theatre in Brownsville, a much smaller town.

[fol. 3075] 40. Lawing played Paramount's 1934-35 product in the Southland Theatre in Brownsville, (Ex. p. 14,). During the regular 1935-36 selling season, Lawing asked William Bugie, Paramount's Memphis exchange manager, and Scott Lett, a Paramount salesmen in Memphis, for a deal on the 1935-36 product, and was told that they could not negotiate for Brownsville at that time. On August 22, 1935, Paramount licensed its 1935-36 product to the Cres-

cent Theatre in Brownsville as part of the 19 town deal referred to above, (Ex. 263, 266a).

41. In July 1934, Lawing licensed Warner's 1934-35 product for exhibition in the Southland Theatre (Ex. W. 1). Early in 1935, Lawing attempted on several occasions to speak to Ochs, Warner's Memphis exchange manager, and Byron Adams, a salesman in Warner's Memphis exchange, about a deal on their 1935-36 product, but they refused to discuss the matter with him. One of them told him that their hands were tied in any situation Crescent had gone into. Warner's 1935-36 product was played in Brownsville by Crescent (Ex. 339).

42. Lawing played the Fox 1934-35 product in Brownsville and licensed their 1935-36 product on January 1935 (Ex. F. 3). It was not until February 11, 1935, that Crescent asked for the 1935-36 product for Brownsville (Ex. 47), and Wilson, at that time Fox Memphis exchange manager, replied on February 15, 1935, stating that the product had already been sold to Lawing. (Ex. 48).

43. Lawing played Loew's pictures every season from the time he opened the Southland Theatre until the 1935-36 season. (Ex. 293, 294, 295,). He played all but five of the features released by Loew's between September 1, 1932 and August 31, 1933, (Ex. 293), and every feature released by Loew's between September 1, 1933, and August 31, 1934, except one which he paid for but did not play (Ex. 294). Prior to August 1, 1935, he had played 27 features under his 1934-35 Metro contract (Ex. 295), which in view of the contract provision that he was not to commence playing the [fol. 3076] pictures licensed under it until December 15, 1934, was an average of almost four pictures a month. In view of this record, Willingham, Loew's Memphis exchange manager, was not exaggerating when he wrote C. E. Kessnich, Loew's southern district manager, on July 2, 1935, that Lawing "has been playing our product ever since he has been running the theatre there (Brownsville) 100%". (Ex. 163).

In the spring and early summer of 1935, Lawing spoke to Mock, a salesman in Loew's Memphis exchange, and Willingham, several times about licensing their 1935-36 product. After telling him on each occasion that they could not sell him under the circumstances until they had permission

from New York to do so, they did finally take an application from him in July 1935. Lawing testified that after taking his application, Willingham and Mock told him that they had heard nothing more from New York regarding it and as soon as they did, they would notify him. His application was finally returned, unapproved, on December 5, 1935, with a letter which gave no reason for the rejection. Loew's 1935-36 product was licensed to Crescent on December 26, 1935, for first run exhibition in Brownsville, and at approximately the same time Loew's licensed that season's product to Crescent for exhibition in 16 other towns (Ex. 334) Crescent paid Loew's $40,006.08 for exhibiting its 1935-36 product, (Ex. 337a).

44. On April 3, 1935, Sudekum told Avey, Loew's Atlanta exchange manager, that he expected to make a deal with Loew's for its 1935-36 product, and asked him to advise Kessnich, the southern district manager, that Crescent wanted Loew's product for Brownsville (Ex. 175). Prior to July 2, 1935 Miss Brockett, the Crescent booker, told Willingham that Sudekum wanted Loew's to hold its 1935-36 product for the new Crescent theatre in Brownsville, and it was because of this request that Willingham refrained from negotiating with Lawing for that product until July 1935. Early in July 1935, Kessnich, after discussing the [fol. 3077] matter with Willingham, directed him to sell Loew's 1935-36 product to Lawing. Willingham then accepted Lawing's application and submitted it to Kessnich on July 30, 1935, with the recommendation that it be approved, because according to Willingham, it was very much to the company's advantage to continue doing business with Lawing. On the same date, (July 30, 1935,) Willingham wrote Connors, Loew's eastern and southern salesmanager, concerning the acceptance of the Lawing application as follows:

> "*Brownsville, Tenn. Southland Theatre.* Mr. Mock secured a deal in this situation several weeks ago which the writer rejected. Went back into the town and improved the deal, so that it is acceptable, placing six pictures in the top bracket instead of three and secured a slight increase on the lower bracket pictures. This deal is being forwarded you with special recommendation as Brownsville is a Tony Sudekum town. Mr. Lawing

has been buying our product for years and Mr. Sudekum came into his town and built an opposition house. In as much as he was in the town first and has always played our product, we believe it nothing but right that we continue to serve him. However, wish to go on record now that if anything comes up with reference to selling the balance of the Sudekum towns that I will not be held responsible for the selling of this contract. In the event you do not think we have used good judgment, please reject the deal. We might add Mr. Kessnich on his last visit to Memphis, told us to go ahead and sell this contract as Mr. Lawing was entitled to our product. (Ex. 166)."

On August 1, 1935, Harold Postman, Loew's contract clerk in the New York Office, wrote Willingham, acknowledging receipt of the Lawing application and stating that Kessnich had suggested that action on the application be withheld for a few days (Ex. 172). On August 20, 1935, Postman again wrote Willingham, returning, unapproved, the Lawing application with the explanation that Kessnich had suggested that Willingham hold the application on his desk until they knew whether or not they were going to make a deal with Crescent (Ex. 173). On November 26, 1935, Willingham sent the Lawing application back to Kessnich with the suggestion that in dealing with Sudekum he compare what Sudekum would pay with what Lawing was willing to pay for the 1935-36 product, (Ex. 168).

On December 5, 1935, the same day that Lawing's appli- [fol. 3078] cation was rejected, Willingham wrote Sudekum that Metro had taken its product away from its old customer in Brownsville to give it to Crescent and it, therefore, deserved to have its pictures played in all of the Crescent towns (Ex. 46).

On January 22, 1936, Willingham wrote Postman with reference to a deal with Lawing for his Strand Theatre at Whiteville, Tennessee, as follows:

"As you know, this exhibitor operates the Southland Theatre, Brownsville, Tennessee. He has been using our product in Brownsville ever since he has been in business and paid excellent rentals. However, we refused to sell him the 1935-36 product in Brownsville this season because Mr. Tony Sudekum has opened a

theatre in Brownsville and we had to sell our product to Mr. Sudekum." (Ex. 167).

Connors took the stand for the defendants and undertook to explain this sell-away. When asked why he overruled Willingham's recommendation that the 1935-36 product be licensed to Lawing in Brownsville, he answered that Willingham had advised him that Lawing claimed he could not pay as much for the 1935-36 product as he had previously been paying (referring to Willingham's letter of May 28, 1935, which was introduced as Def. Ex. 51), and that Lawing's application called for less money than he felt Loew's product was worth in Brownsville. This could not possibly have been Connor's reason for rejecting Lawing's application, however, because, first, there is nothing to show that Connors ever told anyone Lawing's offer was inadequate, and second, Lawing's offer, as a matter of fact, was as good as, if not better than, the deal Loew's accepted from Crescent. Connors further explained, in justification for his decision overruling Willingham's recommendation, that he new that Lawing's theatre was not as modern as the new Crescent Theatre, and he felt that Metro could get more money from the new theatre. This was also an afterthought, as there is no suggestion in the voluminous correspondence regarding this situation introduced in evidence by both sides that the relative merits of the theatres entered into his decision, nor was there any necessity for [fol. 3079] Connors to speculate about what he could get from the two theatres because he had both offers before him, and by the simple process of comparing the two offers, he would have ascertained that from the standpoint of Loew's, the Lawing deal was as good as, if not better than, the Crescent offer.

45. In replying to Willingham's letter of May 28, 1935, (Def. Ex. 51), which advised Connors of Lawing's statement that he could not pay as much for Metro product as he had the previous year because of the competition with which he was faced, Connors suggested that it might be advisable to sell Crescent, if Willingham was unable to secure a satisfactory deal from Lawing. He further suggested that Willingham and Kessnich jointly decide to which theatre the product should be licensed (Def. Ex. 52). Kessnich subsequently instructed Willingham to sell the

product to Lawing (Exs. 164 and 166). Connors gave no explanation of why this decision to sell Lawing, made after the newer and better Crescent Theatre was already in Brownsville, was later reversed. Nor was Kessnich called to explain why, after directing Willingham to sell Lawing early in July, 1935, he directed Postman on August 1, 1935, to withhold action on Lawing's application, and on August 20, 1935, to return Lawing's application, unapproved, to Willingham.

Willingham also testified, but did not undertake to support the reasons advanced by Connors for not selling Lawing. On redirect examination, he admitted that he wrote Kessnich on July 1, 1936, (just after Lawing had sold out to Sudekum and the controversy as to which theatre to sell had been finally terminated, and three years before the controversy generated by this law suit started), as follows:

> "I know Mr. Lawing personally and know this is the party Mr. Sudekum sat down on top of in Brownsville, Tennessee, and finally ran him out of town. Mr. Lawing is a very good theatre operator, but cannot buck such opposition as Sudekum."

Thus, as far as the disposition of Loew's 1935-36 product [fol. 3080] in Brownsville, Tennessee, is concerned, the record shows that it was licensed to Crescent although Lawing offered Loew's at least as good a deal as the Crescent deal and was Loew's old customer in Brownsville.

46. Crescent eliminated all theatre competition in both Paris and Brownsville by acquiring Lawing's theatres in both towns, in April 1936, at a figure which represented the value of Lawing's equipment and improvements to the buildings. Immediately after acquiring them Crescent closed both theatres.

Before purchasing his theatres, Crescent required Lawing to agree that he would not operate a theatre for a period of five years in any town in Tennessee, Alabama, and Kentucky in which Crescent or any of its subsidiaries then owned theatres.

47. In 1932, E. W. Dozier, who owned half of the capital stock of the Capital Amusement Company, owner and operator of the Capitol Theatre in Madisonville, Kentucky sold his stock to Crescent, which already owned the other

half of the stock, and the charter of the Capitol Amusement Company was thereupon surrendered and the theatre transferred to Crescent. Dozier agreed not to go into the theatre business in Madisonville, Kentucky, for a period of ten years. Madisonville, Kentucky, according to the 1940 census, has a population of 8209. It is three or four miles from Earlington, Kentucky, which, according to the 1940 census, has a population of 2858. The population of those two towns, according to the 1930 census, was 6908 and 2309, respectively. Shortly after making the sale, E. W. Dozier, opened up a theatre in Earlington known as the Roxy. A theatre had previously been operated in this building, but it had been closed for some time. Dozier operated the Roxy Theatre from May 12, 1932 until August 1, 1939 when he sold it to Crescent. In the meantime, Crescent had built, (at a cost, including equipment, of over $23,000.00) a new up-to-date theatre in Earlington known as the Earl, which was opened in April 1937. This theatre was erected after [fol. 3081] Dozier had come to Nashville and interested Rockwood in leasing the Roxy Theatre for a ten-year period at a monthly rental of $185.00 (his basic rent was $35.00), but had backed out of the deal for the reason, as Dozier testified, that he did not like Rockwood's financial statement.

In the fall of 1936, Dozier heard rumors that Crescent intended to open a theatre in Earlington. Earlington was not big enough for two theatres, and because he feared that he would be unable to survive against Crescent competition, Dozier offered to sell his theatre to Crescent if they were determined to enter Earlington. Shortly thereafter Stengel offered to lease the Roxy Theatre and told Dozier that unless he agreed to lease his theatre to Rockwood, Crescent would buy a lot and build a theatre. In December 1936, Stengel threatened to build a theatre in Earlington and put Dozier out of business unless he leased his theatre to Rockwood. Dozier refused to lease his theatre to Rockwood, and Crescent built a theatre in Earlington, (The Earl) which opened in April 1937.

48. During the 1933-34 and 1934-35 seasons, Crescent did not license Paramount products and Dozier played Paramount pictures ahead of Madisonville. In April 1935, Dozier entered into a contract for Paramount's 1935-36 product which provided that Dozier was to have clearance

over Madisonville, but the length of the clearance was to be decided by the N. R. A. Clearance Board at Indianapolis.

On August 22, 1935, Paramount licensed its 1935-36 product to Crescent for Madisonville with clearance over Earlington, provided Madisonville played within 60 days of national release. This was the same date on which Paramount licensed its 1935-36 product to Crescent for Brownsville and Paris and 16 other situations. (Ex. 263)

Dozier was not consulted by Paramount about its contract with Crescent giving Madisonville clearance over Earlington, although it was in direct conflict with his agreement with Paramount. He had heard, however, that Crescent had made a deal with Paramount for the 1935-36 product in Madisonville with clearance over Earlington [fol. 3082] and wrote Charles Reagan, Paramount's western district sales manager and to the Paramount exchange in Indianapolis to find out what, if anything, had happened. Dozier was especially alarmed because Madisonville had played one 1935-36 release "Every Night at Eight" September 11 and 12, when he had it booked for September 14, 15, and 16) and Madisonville had also played two short subjects ahead of Earlington. Finally, on September 23, J. T. Howard, Paramount exchange manager at Indianapolis, wrote Dozier that the Atlanta office had sold Madisonville and that the first he knew of it was when he received word from the home office.

In December 1935, Paramount entered into a "superceding contract" with Dozier for its 1935-36 product reducing the film rentals called for by the contract dated April 3, 1935, (Ex. P. 16) approximately 75 per cent. At the time the "superceding contract" was negotiated, Duff Newman, a Paramount salesman, told Dozier he was being allowed the reduction because of the difference in the value of pictures to him after Paramount had sold Madisonville first run.

On October 14, 1935, Howard wrote David Prince, Paramount Atlanta exchange manager, concerning this sell-away and stated that Dozier had been banking on Paramount product as the backbone of his business, that he had been a very splendid account, and that the Earlington deal for the 1935-36 product totalled more money than the Madisonville deal would. Prince answered this letter on October 16, 1935, calling to Howard's attention the fact that although the business Howard got out of Madisonville did not com-

pare favorably with what he got out of Earlington, the Sudekum business involved some $40,000.00, or $45,000.00, for the Atlanta exchange and the company got a lot more money in the long run.

On September 20, 1935, Howard wrote Reagan, his superior, complaining about giving Madisonville clearance over Earlington on the 1935-36 product. He pointed out that it [fol. 3083] was unjust to give Madisonville clearance over Earlington because the total revenue on the S-7 (1935-36) deal for Madisonville was $1,590.00, whereas the Earlington total was $1,660.00. Further the Earlington short subject prices were from 50 cents to $2.50 per subject higher in the Earlington deal than in the Madisonville one (Ex. 160). Reagan answered Howard's letter on September 24, 1935, as follows (Ex. 196):

"DEAR MR. HOWARD:

This will acknowledge receipt of your letter of September 20th, regarding Madisonville and Earlington, Kentucky.

If Madisonville were the only town involved in the Sudekum deal I agree with you that they would not be entitled to any protection over Earlington. However that is not the case. We have finally been successful in closing a deal with the Sudekum Circuit, which we have been unable to sell for a number of years because of an old argument the Theatre Department had with Mr. Sudekum: but, since there is much more involved than just Madisonville, the Company is desirous of securing the film rental we have not had for several years from the Sudekum towns, and it was necessary to include in the Madisonville deal the Earlington protection."

Paramount was out of the Crescent towns again for the 1936-37 season (Ex. 264) but Dozier's Paramount contract for the 1936-37 season provided that if Paramount should sell Madisonville, the contract was to be superseded and his film rentals reduced. Dozier told the Paramount salesman (Duff Newman) that he wanted a contract with clearance over Madisonville, but Newman refused to sell him such a contract, or even discuss terms with him, and told him that if Paramount did not sell Madisonville, he would play ahead of it, but that if they did sell Madisonville, he would have

to play after that town, in which event his film rentals would be reduced.

The next season (1937-38) Dozier was able to make a contract with Paramount on July 16, 1937, which gave him clearance over Madisonville without any qualification, as it then appeared that Paramount would be out of the [fol. 3084] Crescent towns again during that season. In the fall of 1937 negotiations commenced between Paramount and Crescent on a long-term franchise, and on October 1, 1937, O. A. Morgan, Paramount southern district manager, wrote to E. J. Barnard, Paramount Indianapolis exchange manager, advising him not to do anything about the 1938-39 deal for Earlington without consulting Reagan, because although Sudekum was satisfied to permit Paramount to perform its contract with Dozier for the 1937-38 season, they did not want to do anything to interfere with their negotiations with Sudekum during the next four seasons.

In the spring of 1938 Dozier spoke to Barnard and told him he wanted to license Paramount's 1938-39 product on a run ahead of Madisonville as he had in 1937-38. Barnard told him that they had sold Crescent a franchise and the only way they could sell him for the 1938-39 season was after Madisonville. This franchise, dated July 28, 1938, as of November 1, 1937, gave Crescent's Madisonville Theatre fourteen days' clearance over Earlington commencing with the 1938-39 product. Dozier's Paramount contract for the 1938-39 season accordingly provided that he was to play fourteen days after Madisonville. He was given no opportunity to even negotiate for the playing position which he had in the 1936-37 and 1937-38 seasons.

Paramount had refused to give Dozier a franchise in 1937. In February 1937, Barnard advised Dozier, in response to his inquiry, that Paramount did not look favorably upon franchises as a matter of policy, but that he would communicate with his home office (Ex. 57). Later, on March 2, 1937, Barnard wrote Dozier that the home office as a matter of policy did not wish to enter into a franchise in a situation the size of Earlington (Ex. 59). Despite this stated Paramount policy, the franchise which Paramount entered into with Rockwood covers twenty-three towns which are smaller than Earlington. (Ex. P. 30.)

49. Prior to January 1936, Dozier spoke to either Mr.

that they didn't know whether they were going to get to-
[fol. 3085] gether with Crescent on a 1935-36 deal and in the event they did not, Dozier could negotiate for that product. Shortly after January 1, 1936, Dozier went to Indianapolis and saw George Landis, Fox branch manager, who sold him the 1935-36 Fox product. At that time, Fox had not made a deal with Crescent, and did not make a deal for any 1935-36 product until April 1936, when a franchise was negotiated covering the 1936-37, 1937-38, and 1938-39 seasons (Ex. 13, F. 10). The 1936-37 season's product was then licensed to Crescent without giving Dozier an opportunity to negotiate for it.

50. Dozier sold his theatre to Crescent in August 1939 because, with the loss of his run on Paramount pictures, he was unable to secure a sufficient number of good pictures on a run ahead of Madisonville to make his operation profitable. The price at which Dozier sold the Roxy Theatre to Crescent represented only the value of the equipment and improvements to the theatre. Sudekum refused to buy the Roxy unless Dozier also sold Crescent the Alhambra Theatre in Hopkinsville, which Dozier owned and had been renting to Crescent, and the Alhambra was, therefore sold to Crescent as a part of the same deal. Crescent required Dozier to agree that he would not compete with it or any of its affiliates in any of their towns for a period of ten years.

Immediately after acquiring the Roxy Theatre, Crescent closed the Earl Theatre and later reopened the Earl and closed the Roxy. Only one theatre has been operated in Earlington since Crescent's acquisition of the Roxy.

51. William P. Miller operated the Palace Theatre in Rogersville, Tennessee, from 1917 to 1938. The town has never been large enough for two theatres; nevertheless in October 1936, Cumberland opened the Rogersville Theatre in opposition to Miller's Palace Theatre.

Miller had been operating the Palace Theatre on a 10 and 25-cent admission policy; after a short while, the Rogersville Theatre commenced to double feature on Saturday and
[fol. 3086] to operate 10-cent nights, and later the Rogersville cut its Saturday prices for both matinee and evening performances to 10 cents.

52. In the 1934-35 season Miller played 15 out of 22 United Artists releases, and in the 1935-36 season he played

On July 1, 1936, Miller offered in writing to license twenty-seven of the 1936-37 United Artists releases at a total rental of $486.00, (Ex. 66). The United Artists salesman who took this offer, (Crosswell) submitted it to his company with a recommendation stating that the exhibitor had been a satisfactory account in the past, that he had played off promptly and was financially responsible (Ex. 220). On July 30, 1936, Richardson, United Artists branch manager at Atlanta, wrote Miller rejecting his offer and giving as the reason, that the rentals by Miller were not high enough. (Ex. 67).

On August 27, 1936, Miller wrote the United Artists exchange at Atlanta calling to their attention the fact that their salesman had failed to call on him after the rejection of his offer of July 1, and notifying them that he was interested in licensing United Artists' 1936-37 product. (Ex. 68). United Artists' answer to this letter dated September 9, 1936, stated that they were not in a position to negotiate with Miller for Rogersville, and, therefore, there was no necessity for sending a salesman to see him. (Ex. 69). The unwillingness of United Artists to continue doing business with Miller is explained by the report of J. Emenheiser, salesman in the United Artists exchange in Atlanta, concerning his negotiations with Cumberland. This report, dated September 16, 1936, reads as follows (Ex. 221):

> "In Rogersville Hill has opened a new theatre and we will have to play with Hill because this is the only spot of his entire fifteen towns where there is any opposition at all, and Hill has demanded that we approve all contracts or none."

[fol. 3067] It was further explained by Richardson, himself, who, when called by the defendants and examined as to the reasons why United Artists licensed its 1936-37 product to the Rogersville Theatre, testified in substance that this was done so that it could make a deal with Cumberland for the other towns in which that circuit operated. In determining who should get the product in Rogersville, he testified that he compared what Miller offered for Rogersville with the amount of the Cumberland circuit deal (in the neighborhood of $11,000.00), and decided that the product should be licensed to Cumberland in Rogersville; at the same time United Artists licensed its 1936-37 product to Cumberland for all of the towns in which it operated.

When the 1937-38 buying season came around, Miller tried again to negotiate for United Artists. On August 14, 1937, he wrote United Artists reviewing his experience the previous season in losing United Artists product and offering to license the 1937-38 product on the following basis: 12 pictures at $40.00 against 40 per cent of the gross and 12 pictures at $26.00 and the remainder at $13.00 with a score charge of $3.00 per picture (Ex. 71,). In spite of this offer, United Artists licensed its 1937-38 pictures to the Rogersville Theatre on October 15, 1937, on the following terms: 13 at $32.50, 2 at $27.50, 2 at $25.00, 1 at $20.00, 2 at $17.50 (Ex. U. A. 1).

On August 19, 1937, Prince, United Artists Atlanta exchange manager, wrote his salesman, Barnes about the offer that Miller had made for the 1937-38 product and advised Barnes as follows: (Ex. 222,).

> "I am attaching a copy of a letter I am writing to W. P. Miller of Rogersville, Tennessee.

In Miller's letter he writes in part as follows:

> "If United Artists product is open for 1937-38, I would like to try to make a deal with you for them. I can offer you without knowing what you will have, the following deal: 12 pictures at $40.00 plus $3.00 recording charge against 40% of the gross receipts, 12 pictures at $26.00 plus $3.00 recording charge and the remainder at $13.00 plus $3.00 recording charge.
>
> [fol. 3088] "If you can make a deal with Hill of Tullahoma for the Cumberland Amusement Company houses and leave out Rogersville, we will really be better off. However, if it can't be done that way, then I would like to see the deal from Hill including all the Hill situations."

On September 28, 1937, Prince again wrote Barnes to the effect that another salesman, Lynn Dunn, had taken applications from Cumberland for Rogersville, but stated that the film rentals called for by the deal were not nearly as high as those offered by Miller and that he would, therefore, hold up the application until Barnes was able to make a deal for the whole circuit, (Ex. 223).

Prince, when called by the defendants to explain this transaction, testified that he accepted the Cumberland deal for Rogersville rather than Miller's offer because he felt

that the latter offer was made in a desperate attempt to get pictures and was so high that Miller would have been unable to perform it. Miller realized when he wrote United Artists there was little chance of his offer being accepted and consequently offered a larger price for the seasons product than he would have under other circumstances. Miller regarded his letter as a bait and not a bona fide business proposition.

53. Miller played Fox pictures in the 1934-35 and 1935-36 seasons. Fox sold Miller its 1936-37 product for a theatre he operated in Sneedville, where there was no opposition, and at that time the Fox representative told Miller he did not believe he could offer him their product for Rogersville, as, if they sold him there, they might lose the business of quite a few theatres. After this conversation, Miller went to the Fox exchange in Atlanta, but was not offered any pictures. On October 3, 1936, Paul Wilson, Fox Atlanta exchange manager, wrote Miller that on a previous trip into east Tennessee, the Fox salesman, Fairchild, had tried to get Rogersville to tell Miller they were negotiating with the Hill circuit on the 1936-37 product, and that since then they had made a deal with that circuit. Fox sold Miller its 1937-38 product on November 20, 1937, as it did not make a deal with Cumberland on the 1937-38 product until April 1, 1938, (Ex. 15) four months after Cumberland had transferred the theatre to Rockwood.

[fol. 3989] 54. Miller played the Warner 1936-37 product and on May 29, 1937, signed an application for Warner's 1937-38 product. He did not hear anything further from Warner, and on September 3, 1937, wrote their Atlanta exchange asking what had happened to his application, and was advised on September 6, 1937, by the branch manager, Vetgesslich, that it had been rejected, as Warner "had made a deal with the entire Sudekum Circuit, which covers your town." After Miller submitted this application, he was never requested by any representative of Warner to increase the prices called for by his offer.

An examination of Miller's application for the Warner 1937-38 product shows that it called for a total guaranteed rental on feature pictures which was $35.00 less than the rental called for by the Cumberland contract. However, it called for 18 pictures at a percentage against a guarantee, and if these pictures had paid anything above the

guarantee, the contract would have equaled or exceeded the Cumberland deal.

55. In April 1937, Miller commenced writing to RKO requesting an opportunity to negotiate for the licensing of their 1937-38 product. Salley, an RKO salesman employed in Atlanta, called on Miller sometime after July 1937, and offered to license one-half of RKO's 1937-38 product to him. Salley's excuse for not offering Miller all the product was that to do so would knock RKO out of a deal where they would make more money. Miller was then playing RKO pictures in Rogersville and had exhibited RKO pictures for some time.

Salley, when called by the defense to give his version of the negotiations, attempted to give the impression that it was entirely satisfactory with Miller for RKO to license half of its product to the Rogersville theatre, and that as a matter of fact, Miller was happy to be able to license only half the RKO product, instead of all of it as he had in previous seasons. Under the circumstances Miller no doubt was very glad to get half of the RKO product which was better than he had been able to do with most of the other distributors, and it is clear that Miller agreed to take half the RKO product only because Salley told him that that was all he could have. Miller tried to buy all of the product, but [fol. 3090] Salley told him that one-half was the "best he could do." Further, Salley's salesman's report for September 24, 1937, indicates that half of its product was all RKO was willing to license to Miller. It read as follows:

> "Referring to Mr. Miller, Rogersville, Tennessee, Called here enroute and Miller very anxious to close with for new product. Account of Hill Circuit being opposition will probably split product between two houses. Will definitely close."

56. Miller licensed Universal's 1936-37 product on April 2, 1937. On July 28, 1937, Cumberland licensed Universal's 1937-38 product for all of its situations (Ex. 9).

57. In 1937, Potts, the Crescent manager in Morristown, contacted Miller in Rogersville and told him that the town was too small for two theatres and advised him to make a deal with Cumberland. He suggested that if Miller wrote him a letter setting forth a proposition, he would forward

it to Sudekum. During July or August 1938, Castleberry called on Miller and suggested that he sell his theatre to Rockwood. Miller told him that he was willing to sell. One of the principal reasons for Miller's willingness to sell his theatre was the difficulty he encountered as well as difficulty he anticipated, in securing suitable pictures for exhibition in his theatre. In August 1938 Stengel and Baulch called on Miller, and an agreement for the sale of the Palace Theatre to Rockwood and Miller's employment as manager of the Rogersville Theatre was reached. As soon as Rockwood acquired the Palace Theatre, they closed it, and only one theatre has been operated in Rogersville since that time.

58. Y. D. Moore had operated the McKenzie Theatre at McKenzie since 1929. About 1935, Castleberry told him that Crescent contemplated some expansion in that part of the state, and might be interested in McKenzie. Castleberry stated that when Crescent "came into a situation they preferred to purchase the interest of the exhibitor that was there," and that a man in Brownsville who refused to sell had later sold for less "than he had been offered."

In the early part of 1936, Stengel told Moore that because of his personal friendship with Moore's brother, he would forget McKenzie as a theatre possibility if Moore would keep them advised of any threatened competition in [fol. 3091] that territory. Moore then spent $8,000.00 in improving his theatre.

In March 1939, Moore learned that Stengel had leased a building in McKenzie and immediately went to Nashville to see him. He made a deal with Stengel, subject to acceptance by Mr. Sudekum, for $9,200.00, which represented the value of the theatre equipment and lease, with nothing for goodwill or the business itself.

Rockwood operated Moore's theatre for two years and then opened a new theatre. This new theatre was not built on the property Rockwood had leased just prior to taking over Moore's theatre, because, as Stengel testified, that property was not deep enough for theatre purposes.

59. McKenzie and Huntingdon are eleven miles apart. The former had a 1940 population of 2,000, the latter a 1940 population of 1,432. The Court Theatre in Hunting-

don was transferred from Strand to Rockwood in January 1937. On July 14, 1937, Moore bought the Paramount 1937-38 product with clearance over Huntingdon, the same as he had in previous seasons. On August 19, 1938, Morgan wrote Stengel stating that Paramount had granted McKenzie clearance over Huntingdon on July 14, 1937, which was before Stengel ever discussed giving Huntingdon protection over McKenzie with Morgan, and therefore there was nothing that Paramount could do on the 1937-38 product. But the next four years' product was licensed to Huntingdon with clearance over McKenzie under the franchise between Rockwood and Paramount, dated July 28, 1938, as of November 1, 1937, and Moore was not given an opportunity to negotiate for the run he had formerly enjoyed.

A comparison of the Moore Paramount deal for the 1937-38 season, when he had clearance over Huntingdon, with the Huntingdon deals for 1937-38 and 1938-39, shows that Paramount could not have reversed the runs in these two towns because it was getting more money out of Huntingdon.

1937-38		1938-39	
McKenzie (Ex. P. 39)		McKenzie (Ex. P. 10)	
5 at $28 vs 40%		5 at $28	) Score
8 at $28	) Score	8 at $18	) $3 per
8 at $22	) $3 per	27 at $10	) picture
Balance at $10	) Picture		
Huntingdon (Ex. P. 29)		Huntingdon (Ex. P. 29)	
4 at 40%	) Score	4 at 40%	) Score
8 at $12	) $1.50	8 at $13.50	) $1.50
10 at $10	) per	10 at $12.50	) per
18 at $8	) picture	18 at $ 8.00	) picture

[fol. 3092] The total amount of the McKenzie 1937-38 deal on the flat rental pictures was $652.00, plus $120.00 score charge, or $772.00, while the Huntington 1938-39 total on flat rental pictures was only $377.00, plus $54.00 score charge, or $431.00.

The Huntington deal for the 1938-39 season was only $37.00 higher than the 1937-38 deal when it did not have clearance over McKenzie, and this increase was not in payment for the switch in runs because it represented the identical season-to-season increase called for by the franchise in other Rockwood situations where no change in clearance was involved. Insofar as Huntington and McKenzie are

concerned, Paramount lost money by switching the runs. Why then did the change occur? This is answered by Morgan's letter to Unger, Paramount's southern division sales manager, on August 6, 1938, in which he said:

> "With further reference to your letter of July 28, regarding the letter that Mr. Y. D. Moore, of McKenzie, Tennessee, wrote to Mr. Agnew. I have discussed the matter several times with Mr. Sudekum, and he insists that Huntington have protection over McKenzie."

60. J. A. Taylor owned the Piedmont Theatre at Spruce Pine, North Carolina. It was operated by R. H. Gutschalk until June 12, 1937, at which time Taylor commenced to operate the theatre itself. In 1936 Taylor met Fred Gorman of Cherokee who stated that he was affiliated with Sudekum, and that unless they could buy Taylor's theatre, they would build a theatre in Spruce Pine, which they could afford to operate at a loss for five years if necessary. Gor- [fol. 3093] man warned Taylor that he represented a big Company with big buying power and that they could buy film cheaper and operate cheaper than he could.

About thirty days later Gorman came back and told Taylor that they were definitely going to build a theatre in Spruce Pine, unless Taylor would sell his theatre to them, and on this occasion he repeated in substance the threats he had previously made. He also showed Taylor an agreement they had with Gutschalk to buy the remainder of his lease, and said that before the lease expired they could build a new theatre and close the Piedmont. Taylor refused to sell his theatre and said that if they attempted to operate the Piedmont under Gutschalk's lease, he would declare the lease in default.

Cherokee proceeded to build a new theatre which it opened in December 1937. About three days after the Cherokee Theatre (Carolina) was opened, Taylor called upon Gorman at Erwin, Tennessee, and offered to sell him the Piedmont Theatre. Cherokee purchased Taylor's equipment for $4,000.00, which was the amount he had spent in remodeling the theatre when he took it over from Gutschalk. The bill of sale dated December 21, 1937, contains a provision that Taylor will not re-enter the theatre business in Mitchell County, North Carolina, for a period of ten years (ex. 22).

61. Taylor's Piedmont Theatre in Spruce Pine, North Carolina, licensed Paramount Pictures for both the 1936-37 and 1937-38 seasons.

In negotiating the Rockwood franchise in the fall of 1937, Paramount did not include Spruce Pine as far as its 1937-38 product was concerned because that product had already been licensed to and was then being played by Taylor. It did agree, however, to take its product away from Taylor commencing with the 1938-39 season and to include Spruce Pine in the Rockwood franchise for the last four seasons. Paramount agreed to this without giving the Piedmont Theatre an opportunity to negotiate for the product, although the Piedmont Theatre was then its old customer in Spruce Pine, and whether an exhibitor had played Paramount pictures in the past is one of the factors Para- [fol. 3094] mount considers in determining to which exhibitor in a competitive situation the company should license its product. When Paramount agreed to include Spruce Pine in the last four seasons of the Rockwood franchise, Cherokee was not then operating a theatre in the town. It is clear, therefore, that the agreement to include Spruce Pine was made prior to the time that Taylor sold out, as that sale did not occur until after the Carolina was opened.

62. In June 1937 Andy Anderson, F. M. May and Cecil Taylor opened the Kentucky Theatre in Hopkinsville, Kentucky. A theatre had been operated by Crescent prior to 1930 in the building in which the Kentucky was located. Before opening the Kentucky Theatre, Anderson and his associates remodeled the entire building and reequipped the theatre at a cost of $15,000.00. At the time they opened the Kentucky Theatre, Crescent operated two other houses in Hopkinsville—the Alhambra, which had 900 seats, and the Princess, which had from 500 to 600 seats.

Before the Kentucky opened, the Alhambra charged 35 cents for some pictures on Sunday and Monday, and 25 cents the rest of the time. The Princess charged 15 and 20 cents. After the Kentucky opened, Crescent cut its admission prices and thereafter pursued no steady admission-price policy—its prices varied from week to week and even from day to day. The Alhambra ran several Metro pictures at a matinee admission price of 20 cents and an evening price of 25 cents, but on a two-for-one basis, which

made the matinee admission 10 cents and the evening 12½ cents per person. It also played some Warner pictures at a matinee price of 14 cents and an evening price of 23 cents, but on a two-for-one policy. The Kentucky opened at an admission price of 25 cents, which was not varied except that it was increased on big pictures.

63. Anderson was able to get Paramount's 1936-37 product first-run in Hopkinsville, because Crescent did not make a deal with Paramount for the 1936-37 season. On October [fol. 3095] 7, 1937, Anderson wrote Paramount offering to negotiate for its 1937-38 product for first-run exhibition in Hopkinsville. On October 11, 1937, L. C. Lowe, (Paramount salesman) wrote Anderson in response to his request that Paramount product was not available to him because they had made a deal with Sudekum for his circuit. On October 12, 1937, Anderson wired Paramount asking whether its second-run product was available. On October 14, 1937, Cecil House, Atlanta branch manager for Paramount, wrote Anderson in answer to his wire that they were unable to offer second-run service to him.

The deal with Sudekum referred to by Lowe, was the franchise dated July 28, 1938, as of November 1, 1937. Clause 8(e) of that franchise gave Crescent the option of playing an additional or repeat run on any picture it played first-run in Hopkinsville and all of the other towns outside Nashville where a first run was licensed. By this option Crescent was able to prevent Anderson from obtaining any second-run feature although it made no commitment to use them itself.

During the 1937-38 season, Crescent played several Paramount pictures second run in Hopkinsville under this option, and in the Paramount memoranda justifying these bookings, the branch manager, House, referred to this option as a second-run option.

64. On October 13, 1937, Anderson wired Loew's inquiring whether its 1937-38 product was available for Hopkinsville first or second run. The wire was acknowledged on that date by the secretary to Avey, Loew's Atlanta exchange manager, who stated the telegram would be brought to Avey's attention upon his return to Atlanta. Loew's made no deal with Crescent for Hopkinsville until November 23, 1937, (Ex. 336) and Anderson heard nothing more from Avey until November 30, 1937, when in response to

Anderson's letter of November 29, 1937, requesting an answer to his previous wire, Avey wrote that Loew's first-run product had already been sold in Hopkinsville (Exs. 109 and 110). On December 1, 1937, Anderson wrote Avey asking if second-run product was available, (Ex. 111). [fol. 3096] Anderson received no answer to this inquiry and on December 24, 1937, wrote Loew's again, asking about second-run product, (Ex. 112). On December 29, 1937, Avey replied to this letter that a Loew's salesman, C. F. McGuire, would call upon Anderson shortly after the first of the year (Ex. 113). At about the end of January, 1938, McGuire did call upon Anderson in Hopkinsville, but he said that he had just driven up from Nashville and didn't know anything about the Hopkinsville situation and, therefore, could not quote any figures or talk about any contracts.

On February 11, 1938, Anderson again wrote Avey requesting information as to what Loew's had decided with regard to his request for a second-run contract, (Ex. 114). On February 16, 1938, Avey replied that McGuire had advised him that Anderson had more product under contract than he had playing time for and that the prices he could afford to pay would barely cover the handling charge of the films (Ex. 115). This was immediately denied by Anderson in a letter to Avey of February 17, advising him that the Kentucky Theatre did not have enough product to last until the end of the year, and that McGuire had quoted him no prices (Ex. 116).

On March 11, 1938, Anderson wrote Avey asking for a reply to his letter of February 17, 1938 (Ex. 117). On March 12, 1938, Avey wrote Anderson that he had just returned from his vacation and had found Anderson's letter of February 17 and that in view of the circumstances, he thought it advisable for McGuire or himself to again call on Anderson (Ex. 118).

In April 1938, Avey came to Hopkinsville to see Anderson. The latter wanted to buy the 1937-38 second-run but Avey told him that they would not let him have that unless he first played the 1936-37 product second-run, and Anderson thereupon signed a contract for those 1936-37 Loew's pictures which had not already played a second-run in Hopkinsville.

On May 4, 1938, Anderson wrote Avey calling to his at-
[fol. 3097] tention the fact that Crescent was exhibiting Metro pictures at the Alhambra at 25 cents on a two-for-one policy, which made the admission actually 12½ cents (Ex. 120). Avey replied thanking Anderson for calling this to his attention (Ex. 121). Nevertheless, Crescent did not discontinue its cut-rate admission policy on Loew's pictures after the receipt of Anderson's letter. This was in spite of the fact that Anderson's contract with Loew's for the 1936-37 product second-run called for a minimum evening adult admission price of 25 cents (Ex. L. 15), which he maintained.

65. Schrader, a salesman from the Indianapolis office sold Anderson a second-run of Warner's 1937-38 product. He later tried to get Anderson to release this product to Sudekum because he said Sudekum had bought it out of Atlanta, but Anderson refused to do so. On October 17, 1938, Anderson wrote Dave Alterman, a Warner salesman at Atlanta, and asked him if the 1938-39 product would be available for a second-run. He never received an answer to that letter, nor was he ever offered Warner's 1938-39 product for second-run exhibition at Hopkinsville.

66. On November 29, 1937, Anderson wrote the RKO exchange in Indianapolis, inquiring whether any of its product was available first or second-run (Ex. 137). On December 4, 1937, RKO wrote Anderson in reply that its product in Hopkinsville was sold first and second-run to Sudekum (Ex. 138). On that date, only nine RKO 1937-38 features had been licensed to Crescent for a second-run showing. Eight more were not licensed by Crescent until the year 1938 and the other 33 features released by RKO during the 1937-38 season were never exhibited second-run in Hopkinsville (Ex. RKO 4).

In November 1938 Anderson, May and Taylor sold the Kentucky Theatre to Crescent for $15,000.00. The sales agreement provided that Crescent and Anderson would not open a theatre in any town in which the other was directly or indirectly interested for a period of ten years.

Crescent closed the Kentucky Theatre as soon as it acquired the house.

[fol. 3098] 67. Tim Smith opened the Palace Theatre in Morristown, Tennessee, on March 26, 1937. Sudekum's

Morristown manager, (Potts) fought the repeal of a building ordinance which prevented the use of the building Smith was going into for theatrical purposes. Potts also attempted to get Sudekum to arrange to have the state fire marshal declare the building unsafe for theatrical purposes unless certain expensive improvements were made, but there is nothing in the record to show that Sudekum complied with this request. Potts also suggested an attempt be made to secure a lease on the building Smith was planning to use.

Shortly after Smith commenced to build his theatre in Morristown, and on several occasions thereafter, he was approached by Castleberry and Thomas, another Crescent employee, who suggested that he sell out to Crescent.

At the time the Palace Theatre was opened, Crescent was operating only one theatre in Morristown, the Princess. Crescent opened a second theatre—The Ritz—in August, 1928, although prior to that time Sudekum had told Smith that he did not believe that either Morristown or Harriman was large enough for two theatres. Smith had been operating the Palace on a 20 cent admission price. Crescent opened the Ritz at a 15 cent admission price, and Smith closed the Palace four months after the Ritz opened.

68. Smith opened the Palace Theatre in Harriman, Tennessee, on June 17, 1938, and closed it on December 13, 1938. Crescent operated two theatres in Harriman, one of them at a lower admission price than Smith was charging. Crescent had been operating for a number of years prior to 1934 and had no competition. Shortly after the first of the year 1939, the Princess Theatre which was operated by Crescent, was burned. Immediately thereafter Smith re-opened his theatre. Crescent rented a store which it converted into a theatre, having a seating capacity of 375, and began to rebuild the Princess. It rebuilt the [fol. 3099] Princess, with a seating capacity of 854, at a cost of over $88,000.00. Crescent continued to operate its second theatre. Smith operated his theatre until he sold his equipment on February 10, 1940, to Crescent. Smith's theatre and Crescent's second theatre had about the same seating capacity. Crescent's B house was superior to Smith's except that Smith had newer booth and sound equipment. There was no satisfactory evidence that Smith was unable to obtain product. As a part of the sales agree-

ment between Smith and Crescent, the former was to convert his old theatre into a store and continue to pay the rent to his landlord until the expiration of his lease which had a few years longer to run. He failed to do so, however, and it is being operated at the present time as a theatre in competition with Crescent by the owners of the building, who did not testify in the case and is presumably able to obtain a satisfactory product.

69. J. W. Baird had been operating a theatre in Newport since 1929. He had purchased this theatre from Parrott & Ausmus. Baird abandoned that theatre and built the Winston Theatre and opened it in 1935. It was a modern and up-to-date theatre. In 1937 Baird learned that Crescent had bought a lot in Newport for the purpose of constructing a theatre. He thereupon got in touch with Sudekum to see if they could get together. Sudekum referred him to Parrott & Hendren and they decided to form a corporation known as the Newport Amusements, Inc., which is not a defendant in this case. Baird sold a half interest in the corporation to the Cherokee Amusements, Inc., and he kept the other half, and rented to the corporation his theatre and equipment. Tim W. Smith leased a store building in Newport, the landlord converted it into a theatre, and Smith installed the equipment and opened his theatre on September 2, 1938. It had a seating capacity of 415. About the time Smith entered the town, Newport Amusements [fol. 3100] opened up a second theatre called the Park, with a seating capacity of 317. This theatre now operates part time. Smith had paid very little on his equipment when he closed in November, 1938, and the vendors repossessed same. He had paid very little on his rent and he left other obligations unpaid. The equipment for which he had paid was removed to his home in Knoxville, Tennessee, and stored in his attic. Smith was unsuccessful in his operation from the very beginning. While he testified generally as to his inability to obtain desirable pictures, his willingness to testify to whatever he thought Government counsel wanted him to say was very evident from his manner and demeanor on the witness stand, and on cross-examination he gave the impression of being unwilling to make answers which might be harmful to the Government's case. His testimony is of little value on any issue in the case.

70. In August 1937 Smith tried to license some Paramount features. Although Crescent was not playing and had not then licensed any of the Paramount 1936-37 features (some of which were then almost a year old) Paramount refused to license these pictures to Smith and permitted him to play only a few of its 1935-36 features which had previously been rejected by Crescent. (Ex. 91) In February 1938 Smith again asked Paramount to permit him to play some pictures in Morristown either first or second-run. (Ex. 92.) He was advised that Paramount could not make any pictures available to him because its "service had been sold to another exhibitor in Morristown for both first and second-runs." (Ex. 93.) At that time Paramount had already licensed its 1937-38 product to Crescent and given Crescent an option to play its 1936-37 product first-run under the Paramount franchise, (Ex. p. 24) which has already been referred to as far as the 1936-37 first-run product is concerned. Crescent chose to play only sixteen pictures, and it did not commence those sixteen until December 1937 and did not complete playing [fol. 3101] them until 1939. (Ex. P, 26). One reason Smith was advised that Paramount pictures were not available to him second-run was because of the repeat-run option in the same franchise. This is clearly indicated by the following portion of Morgan's letter to Unger of November 11, 1938, which was in response to a letter from Unger to Morgan, written after Smith had complained to the Department of Justice, directing Morgan to make some pictures available for Smith (Ex. 152):

> "Now as regards the last paragraph of your letter about second runs, following shows the population of each town:
>
> | | |
> |---|---|
> | Morristown | 5875 |
> | Harriman | 5000 |
> | Newport | 2753 |
>
> In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8, of the Crescent Amusement Company franchise, provides he can repeat any featu at a certain given price."

Although the 1937-38 product was thus tied up on both first and second run, Crescent played only four pictures second-run, and the first one of these was played after the close of the 1937-38 season. (Ex. p. 27)

71. On August 20, 1938, Smith signed applications for the following Warner product:

1. 40 of the 1937-38 releases and 52 of the 1938-39 releases for first run exhibition in Newport, Tennessee (Ex. W. 11).

2. 26 of the 1937-38 releases and 36 of the 1938-39 releases for second-run exhibition in Morristown (Ex. W. 9).

3. 36 of the 1937-38 releases and 26 of the 1938-39 releases for second-run exhibition in Harriman (Ex. W. 10).

On September 12, 1938 McCoy, Warner Atlanta exchange manager, wrote Smith that his contract application had [fol. 3102] been rejected, and that Rudolph, a Warner salesman, would contact him in the near future (Ex. 102).

On October 13, 1938, Warner licensed 26 of its 1938-39 releases to Newport Amusements for first run exhibition in Newport at a rental of $10.00 each (Ex. W. 12).

In Morristown, where the Smith application called for a commitment of 26 pictures from the 1937-38 product and 36 from the 1938-39 product, Crescent played only 8 of the 1938-39 releases on a second run showing under a spot booking arrangement, and played none of the 1937-38 releases (Ex. 341, 342.)

In Harriman, Tennessee, where Smith's application called for a commitment of 36 of the 1937-38 releases and 26 of the 1938-39 releases for second run exhibition, Crescent played none of the 1937-38 or 1938-39 features second run. (Ex. 341, 342.)

72. Smith was able to license Fox product for second run exhibition in Morristown, but Fox refused to sell him second run pictures in either Harriman or Newport.

73. Smith closed his theatres at Morristown and Newport. On February 8, 1940 he sold his equipment in the Palace Theatre in Harriman, Tennessee, to Crescent, and

at the same time dismissed an anti-trust suit that he had filed alleging a conspiracy to deprive him of films.

74. In March 1939 Max Buchanan leased a building in Athens, Alabama, from Bruce Nelson for use as a motion picture theatre. Rosenbaum attempted to interfere with Buchanan's negotiations with Nelson by calling on the latter and telling him that Muscle Shoals had licensed practically all of the good pictures, and Buchanan would probably be unable to pay the rent called for by his lease. He suggested to Nelson that he thought he might be able to persuade someone in Florence, Alabama, to lease Nelson's building.

Buchanan opened his theatre, the Bama, on May 8, 1939. At the time the Bama opened, Muscle Shoals was operating only one theatre in Athens, the Ritz; but shortly after the construction of the Bama commenced, Muscle Shoals started to construct a second theatre, the Plaza, [fol. 3103] which opened on June 6, 1939. The Ritz was extensively remodeled just before the Bama opened.

When Rosenbaum learned that a new theatre was about to be opened in Athens, the adult admission prices at the Ritz were reduced from 25 and 35 cents to 15 cents, and when the Plaza opened, it charged an adult admission price of 10 cents. Before the Bama opened, the Ritz seldom played double feature programs. In the first four and one-half months after Rosenbaum learned that the Bama was about to open, the Ritz played 26 double feature programs.

75. In October 1938 Muscle Shoals submitted an offer for the 1938-39 product of United Artists for the towns of Tuscumbia, Sheffield, Florence and Athens, with the understanding that all of the pictures included in the application were to be licensed to Muscle Shoals, or none of them. This deal was not accepted by the home office, and in November, 1938, Rosenbaum advised Prince, United Artists Atlanta exchange manager, that unless the deal was approved by a certain date, the offer would be automatically withdrawn. Muscle Shoals' application was not accepted until after the deadline set by Rosenbaum and he refused to reinstate his offer. Prince, the United Artists district manager, called Rosenbaum on several occasions after that in an attempt to secure a deal from him without success.

In March 1939 Buchanan called on Prince and advised

him that he was about to open a theatre in Athens. Prince told him that the 1938-39 United Artists product was open for Athens, Alabama, but he would not negotiate with Buchanan until the latter had secured a theatre. Shortly thereafter Buchanan saw Prince and Davis, the Atlanta exchange manager for United Artists, and showed them a lease which he had entered into for the Bama Theatre. Prince took an application from Buchanan. It was submitted with the following recommendation signed by Davis:

> [fol. 3104] "We are sending through in the usual manner deal covering the above town. This is a new operation in oppositon to Sudekum and Rosenbaum, who operate in Florence, Tuscumbia, Sheffield and Athens. As you no doubt will recall from previous correspondence, after we were finally successful in securing home office approval on the deal which was submitted for the Muscle Shoals Circuit the exhibitor refused to go through with the proposition, advising that in the future he was going to let Mr. Sudekum do his buying. Since that time we have contacted Mr. Rosenbaum several times in an endeavor to reinstate the deal without success. The proposition we are submitting for Athens alone is a good one, considering what Rosenbaum previously paid for the four towns and as there is no chance of reinstating his deal we recommend the approval of this one." (Ex. 189).

Harry Gold, vice president and eastern sales manager of United Artists, testified that Buchanan's deal was rejected because United Artists could secure more revenue by selling Muscle Shoals for its four towns of Tuscumbia, Sheffield, Florence and Athens, than by selling Buchanan for Athens, and if he accepted Buchanan's application for Athens, Muscle Shoals would not buy the United Artists product for its other three towns.

On April 3, 1939, Buchanan received a letter from United Artists advising him that his application for Athens had been rejected. On April 12, 1939, after the Buchanan application had been rejected, Prince submitted to his home office a deal with Muscle Shoals for its four towns (Def. Ex. 308,) and this deal was approved five days later (Ref. Ex. 209,) although it was 40 per cent less than Rosen-

baum's previous offer, which had been rejected by Lazarus with the following comment:

> "I am not going to enlarge on our dissatisfaction with this deal as it has been submitted because I am familiar with this operation and know your difficulties. Somewhere along the line, however, somebody has got to take a stand with Mr. Rosenbaum, and even if we are not going to be able to get into his situations this season, let's at least come out with some self-respect even though we do not come out with any film rental."

On November 8, 1938, Prince wrote to Lazarus as follows with reference to the first Rosenbaum offer, which Lazarus later rejected:

> [fol. 3105] "Although the deal that we are submitting is a flat rental deal, I still told Rosenbaum that we want a percentage and that I was not at all sure that I could secure approval on a flat rental deal. I did this because I know that Rosenbaum acquaints Sudekum with everything he does and so far we have told Sudekum that we must have percentage, however, I don't mind saying now as I have said recently, I don't believe we have a Chinaman's chance of getting one percentage picture on the Sudekum circuit. I firmly believe that this deal from Rosenbaum is the best deal that can be had by anyone and I believe the tops are more than is paid to any other Company, and while the $175.00 top represents no increase over the top that we received last year, I still feel that this deal should be approved unless for some reason I may not know, you may feel that we should still hold out with Sudekum for a percentage proposition, which in my opinion would mean staying out of the Sudekum Circuit." (Def. Ex. 202).

76. In March 1939, Buchanan was advised that there were no Loew's pictures available for Athens. On July 5, 1939, Buchanan wrote Loew's requesting an opportunity to negotiate for their 1939-40 product. He was advised in reply that Loew's had an established account in Athens to which it intended to give "the first refusal" of its 1939-40 product. (Ex. 190). Buchanan heard nothing more from Loew's with regard to the 1939-40 product although Loew's was

unable to make a deal with Muscle Shoals for that product until November 25, 1940, three months after the end of the 1939-40 season, and at that time Muscle Shoals licensed only 26 pictures.

77. On or about July 5, 1939, Buchanan wrote Warner asking for an opportunity to negotiate for its 1939-40 product. He was advised in reply that Warner had an old customer in Athens to which it expected to license its 1939-40 product (Ex. 191). Warner licensed its 1939-40 product to Muscle Shoals in March 1940, as part of the franchise which included the 1940-41, 1941-42 and 1942-43 product as well (Ex. W. 13). Under this franchise Muscle Shoals licensed only 30 pictures for each season (Ex. W. 13).

[fol. 3106] 78. On July 5, 1939, Buchanan wrote RKO inquiring whether their 1939-40 product was open in Athens. RKO replied that their product would not be open unless they were unable to negotiate with their established account (Ex. 192).

79. Around January 1, 1940, a mutual friend arranged for Buchanan to see Sudekum regarding the sale of his theatre to Muscle Shoals. Buchanan negotiated with Sudekum and Rosenbaum and their respective attorneys, Armistead and Mitchell, regarding the sale of his theatre, and finally agreed to sell the Bama Theatre to Muscle Shoals and dismiss an anti-trust suit which he had previously filed against it and Rosenbaum and Sudekum. As part of the same arrangement Buchanan agreed not to operate a theatre in Alabama or Tennessee for a period of five years, and to procure an agreement from his landlord that the Bama Theatre building would not be rented for theatrical purposes for a period of five years. There has been no theatre competition in Athens since that time. The Bama was not operated by Muscle Shoals, and after that theatre was closed, Muscle Shoals reduced the operation of its Plaza Theatre in Athens to two days a week.

80. Union City, Tennessee, is the county seat of Obion County, has substantial factory payrolls, and its three banks went through the depression without a failure. It is obviously a city which for years could have supported two theatres comfortably. G. W. Haynes opened a theatre there in about January 1934, in opposition to the theatre Crescent

was then operating, and in a short while Crescent put in a second theatre and cut admission prices. Haynes continued to operate in Union City until shortly after the organization of Strand in June 1935, when, Haynes closed his theatre at Union City, and his equipment was moved elsewhere. Crescent then closed its second theatre.

On March 21, 1934, shortly after Haynes had opened his theatre at Union City, T. W. Young, Fox Memphis exchange manager, wrote to Ballance, Fox southern sales manager, that that was the first season Sudekum had given Fox recog- [fol. 3107] nition in Union City and Dyersburg in three years, and that the deals Fox had in those two towns were very poor and that they could work out a much better deal. In spite of low prices received from Crescent, Fox, refused to deal with Haynes for fear of jeopardizing the Sudekum business.

Loew's aided Crescent to combat the Haynes competition by permitting Crescent to play its product second run in Union City until this competition was eliminated without requiring Crescent to commit itself to the exhibition of any specific number of its pictures.

81. In March 1939 John Dee Henry opened the Roxy Theatre in Union City after remodeling the building in which it was located at a cost of $8,000.00, and equipping it at an additional cost of $8,000.00. Young, the Fox Memphis exchange manager, described the Roxy as "one of the most beautiful little theatres I have ever seen in any town."

Crescent had been operating only one theatre in Union City—the Capitol—but commenced work on a second theatre—the Ritz—on the same day Henry commenced work on the Roxy and opened the Ritz a week ahead of the Roxy. The Roxy was a much better theatre than the Ritz.

On April 19, 1939, Crescent and Paramount agreed upon a rider to their franchise permitting Crescent to play Paramount pictures in Union City at either the Capitol, Ritz or Opera House, which was then being used as a temporary court house. The negotiation and execution of the rider at this time showed that Crescent intended if necessary to eliminate Henry, to operate all three theatres, and Paramount was willing to cooperate.

82. Henry was anxious to make a three-year deal with Universal and told Pritchard, Universal Memphis exchange

manager, that he wouldn't be interested in anything but a three year deal. At this time, October 1938, Henry had not fully decided upon going into Union City.

In approximately the middle of November, a contract application for 1938-39, with a rider for two additional years, was prepared and signed by Henry, and forwarded by [fol. 3108] Pritchard to the home office. In connection with this situation, I find the testimony of the Government witness directly controverted by the Witness for Universal Film Exchanges, Inc. The testimony of the Government witness is unsatisfactory and the testimony of the witness for Universal accords more plausibly with the documentary evidence.

I find that in this isolated instance, as a matter of fact, the Government has failed to establish that Universal Film Exchanges, Inc., withheld an approved contract from J. D. Henry Theatre in Union City as a result of any request, pressure, combination or other arrangement with defendant exhibitors herein; but that Universal Film Exchanges, Inc., merely received an application for a proposed contract from Henry during the latter part of 1938, pending the determination of the outcome of its existing negotiations with defendant exhibitors herein, and that such application by Henry for first-run in Union City was never approved by the executive officers of Universal Film Exchanges, Inc., and that such proposed contract was never sent to the Memphis Exchange approved by such executive officers, and was not withheld from Henry after approval.

Defendant Crescent Amusement Company had been for years previously the regular and established exhibitor customer of Universal Film Exchanges, Inc., in Union City, and in the ordinary and reasonable course of its business Universal preferred to make an agreement with such defendant Crescent for the exhibition of its pictures first-run in Union City.

The agreement between Universal Film Exchanges, Inc., and Crescent Amusement Company was finally concluded in the latter part of December, 1938, covering the season of 1938-39, which agreement was identical in its terms with the agreement made between Crescent and Universal covering the preceding seasons' product, towit, 1937-38. This agreement included within its terms the license of first-run exhibition by Crescent in Union City.

[fol. 3109] John D. Henry was engaged in the operation of the Ritz Theatre at Hickman Kentucky, for several years prior to September, 1938, when he sold his theatre at that point to Ruffin Amusement Inc.; he was also engaged in the loan and insurance business at Hickman for a number of years. After the sale of his theatre at Hickman, Kentucky, he began to make arrangements to open a competing theatre to the Crescent Amusement Company at Union City, Tennessee, and at or about the time of the sale of his theatre at Hickman he contacted H. I. Mansfield, salesman for Universal Film Exchanges, Inc., out of the Memphis exchange, as to the possibility of obtaining the Universal Products at Union City in the event he decided to open a theatre at Union City. He was told that he would have to see Mr. J. A. Prichard, branch manager at Memphis.

About October 15, 1938, Henry came to Memphis and called on Prichard with reference to the purchase of Universal pictures at Union City. He said that he had not fully made up his mind as to whether he was going to open in Union City, but wanted to know whether Universal product would be available to him if he did open, and stated that he was interested only in a three year contract. Prichard told him that the Universal Film Exchanges, Inc., had been selling its product regularly to Crescent Amusement Company at Union City for a number of years, and that negotiations were being carried on between Universal and Crescent for the sale of the 1938-39 product, but no contract had been made. He further stated that if they were unable to sell Crescent at Union City, Universal would be glad to discuss the sale of its product with Henry.

On November 15, 1938, Henry called on Prichard at his office in Memphis, and at that time stated to him that he definitely had made up his mind to open the theatre in Union City but had not yet been able to obtain a lease for a satisfactory location. He also stated that he had made application to Columbia and United Artists for their product. Prichard again told him that Crescent was their old customer in Union City, and that at that time negotiations [fol. 3110] were being continued between Crescent and Universal for the sale of the 1938-39 product, and that until these negotiations were concluded he would not be in a position to discuss product with Henry.

Henry insisted that Prichard allow him to make application for the 1938-39, 1939-40, and 1940-41 product, saying that the fact that he had made an application to Universal Film Exchanges, Inc., would be helpful to him in obtaining favorable action on his applications for United Artists and Columbia product. He stated, however, that in the event he made application and was finally unable to negotiate a satisfactory lease he wanted to be protected against the obligation of his contracting with Universal, in the event Universal received his applications.

Prichard agreed to allow him to make application and gave him the protection requested in the form of a verbal agreement that Henry might have a thirty day option on the contract in the event Universal made no deal with the Crescent Amusement Company, and accepted Henry's application prior to the expiration of the thirty day period.

Prichard gave Henry a copy of the application, and in accordance with the usual and customary practice, forwarded the other copies of the application to Harry McCarthy, Eastern District Sales Manager of Universal Film Exchanges, Inc., in New York, who was his immediate superior in the matter of passing upon Universal applications. When the application was forwarded to McCarthy, Prichard explained to him generally the circumstances surrounding its execution by Henry.

Negotiations between Universal and Crescent Amusement Company for the sale of its 1938-39 product for the various Crescent towns, including Union City, commenced in July 1938, and continued sporadically but more or less continuously from that time until an agreement was finally concluded on December 22nd or 23rd, 1938. Such negotiations were in progress on November 15, 1938, when Henry made his application for first-run.

Several days prior to December 1, 1938, Henry again [fol. 3111] contacted Prichard, advising him that he was having difficulty in obtaining his lease, but that he expected to get the matter settled satisfactorily within the next few days, after which he would advise Prichard as to the outcome of his negotiations for his lease. In this conversation the 1938-39 product was again discussed, and at that time Prichard told him that there was no change in Universal's original position with reference to the sale of its product.

On December 1, 1938, following the conversation previously had with Prichard, Henry wrote Prichard advising him that he would not be able to be in Memphis that week, and that he would be out of town the first of the following week, and would be in Memphis to see Prichard on December 10th. He also stated that he had not heard from either United Artists or Columbia. On December 7th, Henry wired Prichard asking him to do nothing about Union City until he saw him on December 10th. Henry was not in Prichard's office between December 1st, and December 10th, both inclusive.

On December 10th Henry called on Prichard at his office in Memphis, and at this time Prichard again told him that Universal hadn't determined whether they would deal with Crescent Amusement Company for their 1938-39 product at Union City, and that he had been notified to be in Nashville on December 13th, to meet with other Universal officials to resume negotiations with the Crescent Amusement Company, and that after his return from Nashville he would advise Henry as to the outcome of these negotiations, and whether or not Universal would be in a position to consider his application for Union City.

On December 14th, Henry again wrote Prichard, stating that it was necessary for him to give his landlord an answer as to his lease, and urged him to let him know what Universal intended to do with reference to the sale of its product to him. In this letter he also asked Prichard to extend the thirty day option until January 10th.

The negotiations between Universal and Crescent Amusement Company, in which Prichard participated, extended over December 13th and December 14th, Prichard leaving [fol. 3112] Nashville in the afternoon of December 14th for Memphis. At this time it appeared that the negotiations would be concluded, but no definite agreement had been reached.

On December 15th, upon receipt of Henry's letter of December 14th, Prichard wired him that he would be unable to give him any information until Monday (which would be December 19th).

The negotiations between Universal and Crescent at Nashville resulted in a tentative agreement as to the 1938-39 product, which had to be approved by the New

York Office, and which Harry D. Graham, District Manager of Universal at Atlanta, took to New York with him on December 15th or 16th.

The negotiations between Universal and Crescent Amusement Company revolved around an agreement as to the price to be paid by Crescent for first-run Nashville, and it was only on December 14th that a proposition with reference to first-run Nashville was made by Crescent Amusement Company, which promised any hope of acceptance in New York. The proposition was submitted to Mr. McCarthy by Mr. Graham in New York and was finally accepted by McCarthy for Universal about December 22, or 23rd.

Sometime between December 25th and December 28th, Prichard was notified that a deal had been made between Universal and Crescent Amusement Company, which included the sale of its product at Union City, and that the Henry applications were rejected.

This was the first notice that Prichard had as to the outcome of the December 13th-14th negotiations with Crescent Amusement Company, and following Prichard's telegram of December 15th, to Henry, above referred to, on December 19th he again wired Henry, advising him that he would get in touch with him Thursday with reference to Union City. On December 23rd, Henry again wired Prichard, requesting him to have Universal accept or reject the application that day, and to wire him immediately.

[fol. 3113] As soon as Prichard received information as to the outcome of the Crescent negotiations and the action of the New York office on the Henry application he advised Mr. Henry.

Prichard notified Henry, and on December 30th, Henry came into Prichard's office at Memphis and made an application for twenty-two pictures second-run, 1937-38 product, at Union City, which application was accepted. Henry did not close his lease until after January 1, 1939, and his contracts with United Artists and Columbia were not accepted until ten days or two weeks after that. Henry played only four of these pictures and did not pay for the balance.

From the time Henry's application was forwarded by the Universal Exchange at Memphis to the Universal Executive Office in New York until it was returned to the Memphis Exchange with notice of rejection during the latter part of

December 1938, it was never returned to the Memphis Exchange, nor was it at any time accepted nor approved by the New York Office of Universal Film Exchanges, Inc.

Neither Prichard nor his secretary at any time told Henry that the application was in the Memphis Office, or that it was approved, nor did Prichard tell Henry that the application had been approved, but he had been requested by his district manager, Mr. Graham, to withhold delivery pending further negotiations with the Crescent Amusement Company.

83. Crescent made a deal for the RKO product for the 1938-39 season, which was approved December 20, 1938. The contract contains a provision giving the exhibitor the right to select 21 pictures, the exhibitor's rate of rejection to be limited to two pictures out of each three released, and the rejection of a picture must be given to the distributor within 21 days after availability.

Henry negotiated with Avery, RKO Memphis exchange manager, from October 1938 to February 1939, concerning a deal for the RKO product. Avery said RKO had a [fol. 3114] number of pictures from prior years that had not been exhibited in Union City and offered these pictures to Henry. Henry also tried to license 1938-39 product. Avery told Henry that he had sold 15 pictures, but that he couldn't sell any of the other pictures to him because he had been advised by Mr. Sudekum's office not to sell those pictures to Henry as Crescent was going to open a theatre in Union City, and would likely want all of them.

A letter from Avery to Jules Levy, RKO sales manager, dated January 28, 1939, states in part:

> "Mr. J. D. Henry, who is building a new theatre called the Roxy in Union City, Tennessee, in opposition to the Sudekum Circuit, called on me yesterday for the purpose of purchasing such film as is unsold to Mr. Sudekum.
>
> I made a deal with him only for the unsold portion of our 1937-38 product, this consists of eighteen features, and inasmuch as it was only the program pictures that were left, he would only pay a program price, which is $10.00.

, I would not sell him any of the 1938-39 product as Mr. Sudekum's booker advised that they were putting in a second theatre themselves over there, and would no doubt use our entire 1938-39 product.'" (Ex. 179,)

The only contract Sudekum ever made for the 1938-39 product was the 21-picture, selective first-run commitment (Ex. 21).

84. When Henry went to Union City, he knew that Crescent was running Paramount pictures, and he called on W. F. Bugie, Paramount Memphis branch manager, for the purpose of licensing some second-run pictures. He was informed that Sudekum's franchise gave him an option on second-run pictures and that he (Bugie) would have to take the matter up with his company. Henry went back later and was told that the second-run product was under contract to Sudekum or Crescent. At the same time, he was offered six pictures eliminated by Crescent which he bought.

On January 27, 1939, Bugie wrote a letter to H. F. Wilkes of the district office, with respect to Henry, as follows:

[fol. 3115] "* * * He has also, agreed to buy a selective deal on the S-10 product second run—30 pictures, rentals from $13.00 to $15.00 with 6 of the pictures to carry a percentage sharing agreement.

The Sudekum franchise provides for an option on second run in any of his towns.

Will you kindly advise me whether I should consider a second-run in any of his towns." (Ex. 159).

Bugie was a witness on behalf of the defendants and testified that he told Henry he would not sell him any second run pictures because he didn't think the town could support a second-run theatre. He said this conversation was before he wrote the letter of January 27, 1939, to Wilkes, quoted above, and at that time he didn't have the franchise before him and didn't know anything about it, but he had read the franchise. This letter does not even refer to whether or not the town justified or would support a second-run theatre.

85. Henry called on T. W. Young, Fox Memphis branch manager, and was able to buy pictures which had been eliminated by Crescent. He also tried to make a contract for second-run pictures.

Young wrote Ballance, Fox southern district manager, on January 28, 1939, with respect to the deal for rejected features as follows:

> The attached proposition submitted for the Roxy theatre, Union City, Tennessee, probably does not require more explanation than given on the recommendation, but for your information, the gentleman opening this theatre about March 22nd, 1939, is the one that I spoke to you about several weeks ago, wanting a second-run deal in this town. At the time, you stated we would have to renew our franchise with the Crescent Amusement Company this year and that you would rather not have this obstacle to overcome.
>
> I stalled the Exhibitor until recently and he was so persistent that it was my suggestion that he use the pictures first run previously passed up and eliminated by Mr. Sudekum. That is what this contract represents. I ascertained that Metro, Paramount, and others have tendered him pictures eliminated by his opposition. [fol. 3116] If you have no objection, I see no reason why we should not pick up this additional revenue." (Ex. 213).

On April 11, 1939, Young wrote Kupper, Fox eastern sales manager, as follows:

> "First, the Roxy Theatre, Union City, Tennessee—Mr. J. Dee Henry erected and opened one of the most beautiful little theatres I have ever seen in any town. This is in direct opposition to a house operated by the Crescent Amusement Company. I negotiated a deal for all pictures passed up by the Crescent Amusement Company to be used as first-run in the Roxy Theatre and Mr. Henry has now demanded a second-run on 36 pictures from our L-6 releases and 16 to 20 of the K-5 group.
>
> I think the town large enough for a second-run, furthermore, I believe that on some of our bigger subjects sold on a guarantee against percentage we could earn more second-run than we did on a flat rental basis, first-run with Tony Sudekum. Realizing that our franchise terminates with Sudekum this year, I have been reluctant and stalled Mr. Henry regarding a second-run up to the present time, because I did not know just

what effect it would have on our negotiations with Sudekum for next season. On the other hand, I know this gentleman Henry is not going to sit idly by and close his theatre for the want of product. I discussed the situation with Mr. Wilson of Atlanta at the Convention and it was his opinion that a sale of our product to Mr. Henry second-run in Union City would have no effect on his negotiations with Sudekum on the circuit.

The time is pretty close when I must take a definite stand, one way or the other—either take the second-run deal, or tell the exhibitor definitely we cannot sell him. I would, therefore, appreciate your consideration of this situation and advice." (Ex. 216,).

Kupper testified, but was not questioned about the answer, if any, that he gave to Young.

86. Early in May 1939, Ruffin saw Henry and told him that he had made a mistake in opening the Roxy because he could not buck Sudekum, and suggested that he see Sudekum about selling the theatre to Crescent. Henry did see Sudekum in Nashville in June 1939 and sold the Roxy Theatre to Crescent for $8,000.00, the value of the equipment.

Crescent required Henry to agree not to compete with [fol. 3117] Crescent or its affiliates in any of their towns for a period of 25 years. The Roxy was closed immediately after Crescent bought it and has since been converted into a store.

87. W. F. Roth has operated the Palace Theater in Gallatin, Tennessee, since 1913; in 1929 or 1930, R. T. Hill of the Cumberland Amusement Company, asked Roth to set a price on his theatre. Roth said he was not interested in selling, and Hill told him that Crescent was going to enter Gallatin and that the town was not large enough for two theatres. In November 1937 Crescent opened the Roxy Theatre in Gallatin in opposition to Roth's Palace, and both theatres have been operated since that time.

88. Roth played Paramount pictures every season from 1914, to and including the 1937-38 season. In February 1937 Morgan wrote to Joseph Unger, Paramount's southern division sales manager, that Roth had been a good account, and Morgan testified that in the summer of 1937 he regarded Roth as a good account. In the summer of 1937

Roth asked the Paramount salesman, Lonnie Loew, if it would be possible to get a franchise, and Lowe replied that Paramount did not sell franchises to anybody.

In January 1938, Roth became worried about whether he would get the Paramount product for the 1938-39 season, and went to Atlanta to see Cecil House, the Paramount exchange manager. House told him that he had bad news, that Gallatin had been included in the Crescent Franchise, commencing with the 1938-39 season. House said by way of explanation that this had been done in New York and that he had nothing to do with it.

Roth returned to Gallatin and on January 22, 1938 wrote the following letter to Unger (Ex. 36).

> "I made a special trip to Atlanta this week, to see about contracts for your pictures for 1938-39 and was very much disappointed by the information furnished by your branch manager.
>
> [fol. 3118] "I understand you have sold a franchise to my opposition for a period of five years and completely refused to offer your product to me, after being a consistent user of your product for over eighteen years and paid you plenty percentage during that time. Your representative, Mr. Lowe advised me about this time last year that I needn't worry about Paramount, as they would stick by me. I also tried to buy a franchise deal from him at the time and he told me that you wouldn't sell anybody a franchise.
>
> I think after using your product for over 18 years without a bobble of any kind, that I am due some sort of explanation, why I deserve such treatment as above."

After returning from Atlanta, Roth also wrote to the Department of Justice complaining about Paramount's sell-away of its 1938-39 product to Crescent.

On February 10, 1938 Unger wrote Morgan the following letter to which was attached Roth's letter of January 22, 1938, to Unger (Ex. 153):

> "Dear Mr. Morgan: The attached copy of letter speaks for itself. Was it absolutely necessary for us to include Gallatin in the Sudekum franchise?
>
> Please write me in connection with the attached so I may reply intelligently to this exhibitor."

Morgan replied to Unger on February 11, 1938, as follows (Ex. 149):

> "Replying to your letter of February 10th, in regard to Gallatin, Tennessee, it will be absolutely necessary to include Gallatin in the franchise. If you recall, Sudekum made an issue out of this in New York because even after we had started negotiating with him on the franchise Gallatin had been sold in July and we agreed to include Gallatin for the remaining four years in the total of his product for the Crescent circuit. Incidentally, Tony has built a big, new, beautiful theatre in Gallatin. Roth's old house is a pretty poor one and it is very doubtful if he will be able to continue against Tony's big proposition.
>
> For instance, he had a guarantee of $30.00 on Artists and Models, and High, Wide and Handsome, and he grossed $35.50 on Artists and $45.15 on High and Wide. He had $30.00 guarantee on Double or Nothing, and grossed $60.40."

On March 8, 1938, House called upon Roth and told him that although the 1938-39 product had been sold to Sudekum, Paramount would attempt to secure a split deal for Roth if he were agreeable to that. Roth said that he would [fol. 3119] consider the split deal and let House know. On March 17, 1938, Roth received a letter from Unger asking him to make up his mind regarding the split deal within 30 days, and on May 13, 1938, Roth wrote Paramount at Atlanta rejecting the split deal offer.

Roth's 1937-38 Paramount deal (Ex. P. 7) was a much better one for the distributor than the deal Paramount took from Crescent the following season (1938-39) (Ex. P. 24). Roth's 1937-38 deal called for 16 pictures in the top bracket at 40% against a guarantee; there were only 4 pictures at 40% in the top bracket of Crescent's 1938-39 deal, with no minimum guarantee. The next bracket in the Roth deal called for 12 pictures at $30.00 each as compared with the second bracket in the Crescent deal, which called for 8 pictures at $25.00 each. In the third bracket of the Roth deal there were 16 pictures at $25.00 each, while there were only 10 pictures at $20.00 each in the third bracket of the Crescent deal. The remaining pictures in the Roth deal

were licensed at $15.00, while the remaining pictures in the Crescent deal were licensed at $10.00. Roth paid more for Paramount pictures in Gallatin in every one of the four preceding seasons that Crescent did in 1938-39. (Ex. 332).

89. Roth used Loew's pictures from 1916 up to and including the 1936-37 season. The Loew's salesman, McGuire, failed to call upon Roth in the summer of 1937 as he customarily did, and on September 30, 1937, Roth wrote the following letter to Loew's (Ex. 29):

> "Please advise by return mail whether or not you intend to sell your pictures for next season for use in my theatre. Thanking you in advance for a prompt reply, I remain."

Roth never received a reply to this letter.

On December 6, and 7, 1937 the Roxy Theatre, (Crescent) played "Conquest", a Loew's 1937-38 feature, and on December 22 and 23, 1937, the Roxy played a second Loew's 1937-38 feature. It played two or more of the Loew's 1937-38 features in January 1938, and seven more in February, 1938.

[fol. 3120] On December 27, 1937, Roth wrote Loew's calling attention to the fact that after having played Loew's pictures for 15 years the 1937-38 product was sold away from him without even being offered to him, (Ex. 30), and sent copies of this letter to the trade papers.

On or about January 15, 1938, Avey, Loew's Atlanta exchange manager, called on Roth and asked him if he could use some pictures. Roth replied that he could use 15 or 20 pictures, but asked how he could use Loew's pictures when they were already being played at the Roxy theatre. Avey replied that he thought Roth would be interested in some second-runs, and when Roth said that he did not play second-run, Avey left.

Roth received a letter from Avey dated January 18, 1938, which read in part as follows (Ex. 32):

> "I wish to thank you for the courtesies extended me during my visit with you Saturday, January 15th.
>
> I was disappointed when you told me that you could not use our 1937-38 product, that you had open time for only fifteen (15) pictures."

On January 25, 1938, Roth wrote Avey as follows (Ex. 33):

> "I am unable to understand the gesture of your letter dated January 18th and received this morning. I wrote you several times in September, asking you to advise me by return mail, whether or not you intended to sell me your product for the season of 1937-38 and haven't received a reply to date. I wasn't given a chance for refusal of the new product. Your new product was sold and is being shown at the Roxy Theatre in Gallatin and am unable to figure out how you expect them to be shown at both houses, as I do not run second-run pictures.
>
> Please explain yourself further on this matter, as it is all a mystery to me, as I can use more pictures than you will release."

Roth testified that on his visit of January 15, 1938, Avey offered him only second run product. Avey testified that on his visit of January 15, 1938 he had offered Roth some first run pictures but he did not recall whether he had [fol. 3121] offered Roth all of the 1937-38 Loew's releases which had not already been played by Crescent.

On February 9, 1938, Avey and McGuire again called on Roth and offered him a split deal of Loew's 1937-38 product. During the course of this visit, Avey mentioned the fact that he knew Roth had complained to the Department of Justice. On February 21, 1938, Avey wrote Roth offering him a split deal (Ex. L. 2). Roth rejected the split deal by a letter of February 28, 1938, (Ex. 34). Crescent had already played 11 pictures, or almost 25% of Loew's 1937-38 product (Ex. 331).

Prior to November 10, 1937, the attention of T. J. Connors, Loew's assistant general sales manager, was called to the fact that their proposed deal with Crescent for the 1937-38 season included Gallatin.

On December 21, 1937, Postman, contract clerk in Loew's New York office, wrote the following letter to Kessnich (Ex. 174):

> "We received Sudekum contracts yesterday and approved all of them with the exception of the Roxy Theatre at Gallatin, Tennessee. According to our records,

we have sold the New Palace Theatre in this situation for many years and neither Mr. Connors nor the writer recalls your having mentioned it when we discussed the Sudekum deal generally. The terms of the Roxy Theatre are not as good as the terms we had last season for the New Palace Theatre both on features and shorts, but Mr. Connors requests that we withhold action on the contract pending receipt of further advice from you as to reasons for not continuing with our old customer in this situation."

On December 22, 1937, Kessnich replied to Postman as follows (Def. Ex. 59):

"In reference to the Roxy Theatre, Gallatin, Tennessee—Sudekum account, Mr. Roth operating the old theatre in Gallatin has never been a satisfactory account. Aside from that he only has a little store show, with plate glass windows in the front of it, and for a period of years we have never had anything but trouble in handling the account.

"Sudekum has built a much better theatre in the situation and in allocating the prices for Gallatin, we used the rentals set up previously for another town of comparable size in the circuit. You will have to approve the Roxy Theatre, Gallatin contract as it is a part of the whole Sudekum deal and I would thank you to do [fol. 3122] so immediately."

Connors testified that he overruled Kessnich's recommendation that the product be sold to Crescent and directed Kessnich to offer the product to Roth, but he did not stop Crescent's Roxy Theatre from continuing to play the features Kessnich was supposed to offer Roth. Connors did not give his final approval to the Crescent contract until March 3, 1938, but between December 21, 1937, the date on which Postman wrote Kessnich that Connors had requested action on the Crescent application be withheld, and March 3, 1938, the Roxy Theatre played 9 of the Loew's 1937-38 releases, and the effect on Roth's business in Gallatin was exactly the same as if the Crescent Theatre had played those pictures under a contract approved in December 1937.

Avey attempted to explain the failure to withhold these 9 pictures from Crescent by stating that at the time the

Crescent application was taken Crescent had booked a few pictures, and Loew's did not want to inconvenience Crescent by pulling the dates on short notice. Permitting a new account to play a substantial number of pictures before the contract was approved was an extraordinary procedure. In only three instances has the Loew's Atlanta office allowed new accounts to play pictures before their contracts were approved, and in each case only one picture was played in that manner (Ex. 372).

None of the Loew's 1939-40 releases were shown at the Roxy Theatre until January 30, 1941. On June 10, 1940, Roth wrote Loew's asking for an opportunity to license some of that season's pictures (Ex. 40). On June 25, 1940, Avey replied that they could not negotiate with Roth for this product as they were engaged in negotiations with their established account in Gallatin for the sale and exhibition of the product at the Roxy Theatre (Ex. 41). Crescent did not enter into a contract with Loew's for the exhibition of the 1939-40 product in Gallatin until January 17, 1941 (Ex. L. 7), and then licensed only 20 pictures out of the entire 1939-40 product (Ex. L. 7).

[fol. 3123] 90. W. O. Taylor has been operating the Uptown Theatre in Dresden, Tennessee, since September 1936; Dresden is approximately eleven miles from Greenfield, Tennessee, and nine miles from Martin, Tennessee. In 1940, the population of Dresden, Tennessee, was 1,115; that of Greenfield was 1,509; and Martin had a 1940 population of 3,587.

91. Taylor's 1937-38 Paramount contract provided: "No town is to have clearance over this town" (Ex. P. 3). In the spring of 1938 Tom Watson, a Paramount salesman, called upon Taylor at his office and said that he had to do something that he disliked very much. He then told Taylor that his home office had made a five-year franchise with the circuit, that Martin and Greenfield had been granted clearance over Dresden, and they would have to cancel the dates on all of the pictures he had booked, and rebook them behind Martin and Greenfield.

The following week Taylor went to Memphis and spoke to Mr. Bugie, the Paramount branch manager, who said that the home office had sold Crescent a franchise, that he did not have any control over it, and that he had cancelled

the dates on the pictures which had been booked ahead of Martin and Greenfield.

On or about October 10, 1938, Watson negotiated with Taylor for the 1938-39 Paramount product. Although Taylor told him that he wanted to play clear of Martin and Greenfield, Watson said that he could not accept an application except with the provision that Dresden play behind Martin and Greenfield. Accordingly, Taylor's contract for the 1938-39 season provided Martin and Greenfield to have prior runs if played within 60 days of national release and provided prints were available (P. 4). His Paramount contracts for the 1939-40 and 1940-41 seasons contain similar provisions (Ex P. 5, P. 6).

The change in the Dresden run cannot be accounted for on the basis of the film rentals the three towns paid, because in the 1937-38 season when Taylor's contract provided that he was to play clear of Martin and Greenfield, [fol. 3124] he paid Paramount much more than it received from those two towns, and in the 1938-39 season when Martin and Greenfield played ahead of him, Taylor still gave Paramount a better deal than each of those towns, and in 1939-40 Taylor gave Paramount a better deal than Greenfield and almost as good a deal as Martin.

At the time the Dresden run on Paramount pictures was changed, Ruffin and Stengel were interested in acquiring the town (Exs. 242-43). They have not yet acquired it.

92. Page has been operating the only theatre in Mount Pleasant, Tennessee, since 1933. On several occasions late in 1936 and early in 1937, Castleberry and Stengel called on Page and told him they were interested in purchasing his theatre, and each time Page told them he was not interested in selling. On April 9, 1937, Stengel wrote Page:

> "I have not heard from you regarding my letter of April 1st. I understood from our conversation that you wished to talk to Mr. Sudekum before we went any further with our plans. I want to be fair with you about this matter in that we are holding up other negotiations until we hear from you." (Ex. 24).

A few days after writing this letter, Stengel again came to see Page. He insisted that Page set a price on the house; and when Page quoted a figure of $25,000.00 Stengel said:

"For $25,000.00 I can build a theatre across the street and lose money for three years and still save money on it."

About this time it was rumored in Mount Pleasant that Crescent was about to build a theatre, and as a matter of fact, Crescent took an option on a lot. Crescent could not have acquired this lot for the purpose of building a theatre on it as the lot was not deep enough for a theatre, its price was too high, and its location was poor.

93. Prior to the 1937-38 season, Page had played Paramount pictures without regard to when they played in Columbia, a Crescent town eleven miles away. In negotia- [fol. 3125] ting the Crescent franchise, however, Paramount agreed to give the Crescent theatre in Columbia thirty days' clearance over Mount Pleasant (Ex. P. 24), and since then Page has been able to license Paramount pictures only in accordance with that clearance.

94. E. R. Perdue, president of the East Gadsden Bank, was invited by 10 employees of the Goodyear plant in East Gadsden, Alabama, to join with them in putting up the Dixie Theatre in East Gadsden. The investment in the Dixie Theatre was $21,600.00. It was opened September 2, 1939, after the institution of this suit. At this time, there were four theatres operated by Crescent in Gadsden, the Capitol, Princess, and Gadsden in downtown Gadsden, and the Ritz, in the Alabama City section of Gadsden, about two and one-half to three miles west of downtown Gadsden. The Dixie is about a mile and a half from downtown Gadsden and four or five miles from the Alabama City section. The latter has been a part of Gadsden for nearly ten years. There is a direct bus connection between the Dixie and the Ritz, and it is a 20 to 30 minute trip by automobile. East Gadsden is made up mostly of Goodyear employees and about 50 per cent of them have cars.

East Gadsden is a mill section of Gadsden and the theatre was erected as a neighborhood enterprise for the reason, as given by the president of the owning corporation, that residents of East Gadsden needed a neighborhood theatre so that they would not be required to pay the high admission prices charged by the down-town A theatre in Gadsden proper and would not be required to make the nine or ten mile round trip journey to Crescent's Ritz Theatre in the

Alabama City section of Gadsden, which is another mill section on the opposite side of Gadsden proper. On the basis of this evidence, East Gadsden and Alabama City cannot fairly be regarded as competitive. Alabama City was formerly a separate corporation, but a few years ago was taken into the City of Gadsden. According to the 1940 census Gadsden has a population of 36,975, as compared with a population of 24,042 in 1930, when Alabama City was a sepa- [fol. 3126] rate corporation. The distributors continued to treat Alabama City as a separate corporation and to make first-run deals for Alabama City although, when considered as a part of the City of Gadsden, the Alabama City theatre actually exhibits its pictures after they are exhibited by the down-town A theatre. All of the theatres in Gadsden proper, including the A theatre known as the Princess and two B theatres, the Gadsden and the Capitol, are operated by Crescent, as well as the Alabama City Theatre, known as the Ritz, and this was the situation when the Dixie Theatre in East Gadsden was erected.

The Ritz Theatre at Alabama City is about the size of the Dixie and is in an old building. It charged 5 and 15 cents in the afternoons and 10 and 20 cents at Night. Wednesday was bargain day at 10 cents. The Dixie charged 5 and 10 cents in the afternoon and 10 and 20 cents in the evenings.

The Princess is the largest theatre in Gadsden and has 1200 to 1500 seats. The Gadsden is an opera house about 30 years old and seats 817. It used a combination vaudeville and picture program. The Capitol is a very small and old theatre; the Dixie is more modern in every respect than any of the other theatres except the Princess.

95. The 1939-40 Loew's product was not shown in the Crescent theatres during that season. The Dixie manager, Curry, tried to make a deal for this product in July, 1940, at the end of the season, but Avey, Loew's Atlanta branch manager, and Butler Loew's salesman, told him they were negotiating a five-year deal with Crescent, and therefore, could not discuss a deal with him. The only pictures available were six re-issues, four of which he bought. Curry asked to spotbook the current season's (1939-40) product under a special waiver clause which could provide that the Dixie would relinquish its first-run if Crescent decided to buy. He received a reply on July 26, 1940, from Avey

saying that they could do nothing as they were still negotiating.

[fol. 3127] H. T. Bailey succeeded Curry as manager of the Dixie on September 19, 1940; Bailey immediately made a written application for the 1939-40 product under date of September 20, 1940, nearly a month after the end of the season. He offered to buy this product upon the condition that if the Princess started using it, the Dixie would automatically drop back to second-run, (Ex. 87). He followed this letter up with a second letter October 2, 1940 (Ex. 88), but received no reply to either letter.

In November 1939, Butler called on Bailey and offered him the 1940-41 product second-run. Bailey asked him about the 1939-40 product, and he said that he had not yet worked out a deal with Crescent. At this time, Crescent had begun to play the 1940-41 product.

Bailey made a contract for 1940-41 pictures with the following clause: "Subsequent, follow, Ritz Theatre, Alabama City, not earlier than 60 days after first-run in Gadsden" (Ex. L. 10).

Under this contract, pictures were made available approximately 60 days after the Princess, but the Ritz at Alabama City was allowed to play them 14 to 21 days after the Princess. Bailey asked Butler why the Dixie had to follow the Ritz and Butler said that was the policy that had been set up and if the Dixie wanted pictures, it would have to get them after the Ritz.

On March 26, 1941, Bailey was finally able to make a contract for the 1939-40 product (Ex. L. 11). At this time, the Princess had commenced to exhibit that product. This contract contained the same provisions as to run as the contract for the 1940-41 product, and Bailey again raised the same question about playing behind the Ritz and got the same answer.

The Ritz made no contract for the 1939-40 product. The contract for the 1940-41 season shows no clearance in favor of the Ritz over the Dixie. Avey and Connors were not examined by the defendants about the reasons for compelling the Dixie to follow the Ritz. Butler did not testify.

96. Curry bought a subsequent run of the 1939-40 Fox
[fol. 3128] product on August 1, 1940; there was no clearance specified because this product had already been played in Gadsden. Mitchell, Fox salesman, told him that if these

pictures were played off rapidly, he would give him "a nice set up" on the current (1940-41) product.

On November 12, 1940, Bailey made a contract with Fox for 1940-41 product. This contract contained the following provision: "Subsequent, not less than three per month as available, 90 days after first-run Gadsden." Bailey argued that the comparative merits of the theatres entitled the Dixie to at least a play on a par with the Ritz, but Mitchell told him that if he wanted the pictures, he would have to play them third run in the city of Gadsden. The Fox pictures played in the Ritz about a month after they played first-run at the Princess, and two months later were available to the Dixie.

Wilson, Fox Atlanta exchange manager, was called by the defendants to explain why this situation, and he testified that it was not unusual for theatres to play film more than 90 days after release. He made no statement as to why the Dixie had to follow the Ritz.

97. Bailey made a contract with Warners for the 1940-41 feature product in December 1940. This contract contained the following provision: "sub-run—pictures are to be made available 14 days after second-run." J. H. Black, the salesman, explained to Bailey that "second run" as used in that contract, meant a "second down-town run" at the Gadsden or Capitol. The way this worked out was that a Warner picture played first run in the Princess, then in about two or three weeks it played at the Ritz, then it was run at either the Capitol or Gadsden, and 14 days thereafter, it became available to the Dixie for an actual fourth run in Gadsden.

The explanation made to Bailey by Black, as to why the Dixie had to follow the Ritz was that the Ritz "was set up on their books as a first-run account and there was nothing he could do about it," although Bailey offered to pay rentals on a par with the Ritz if he could license pictures on an [fol. 3129] equal basis. Bailey testified "some pictures of Warner Brothers might have been run as many as four times in Sudekum theatres" before he got them. This resulted from the fact that under the Warner franchise Crescent had bought a first run and a selective second run for the Princess, Capitol and Gadsden, (Ex. W. 7) and a first run for the Ritz, with a repeat-run option (Ex. W. 6). The repeat-run option provided that this run was subject "to all runs and clearances which may now exist or may here-

after be granted to other exhibitors in Alabama City." As there were no other exhibitors in Alabama City, Crescent was free to repeat pictures at the Ritz just as soon as a print was available. After the first run at the Princess, Crescent thus had the privilege of playing two more runs at the Ritz and an additional run at the Capitol or Gadsden before the Dixie could show the picture. The Ritz contract contains no provision for clearance over the Dixie (Ex. W. 6).

98. Bailey negotiated contracts with United Artists in December 1940, for its 1940-41 product (ex. UA 3, R. 1297.) These contracts contained a provision "run subsequent", "to be played as available". Barnes, a United Artists salesman, told Bailey that this meant that Dixie would get the pictures 90 days after the Princess and that the term "subsequent run" was used so that the Ritz Theatre in Alabama City could get the pictures before the Dixie got them. United Artists pictures were made available to the Dixie about one and one-half months after they played the Ritz. Barnes said he didn't know why the Dixie had to follow the Ritz but if he wanted the pictures, that is the way he would have to play them.

99. For many years prior to 1939 and up to the present time United Artists Corporation has sold its product to the Crescent Amusement Company for the Ritz Theatre at Alabama City and the three Crescent theatres in Gadsden proper. During the time Alabama City was a separate corporation the Ritz Theatre was set up as a first-run situation in Alabama City, and after Alabama City became a part [fol. 3130] of Gadsden, Alabama, and prior to the opening of the Dixie Theatre in East Gadsden, United Artists Corporation had continued the established custom of setting up the Ritz Theatre at Alabama City as a first-run situation for the Alabama City area, booking its pictures first-run Alabama City, but subsequent to the first run in Gadsden proper of the Crescent A House. After the establishment of the Dixie Theatre in East Gadsden and up to the present time it has continued this established custom.

100. Curry didn't attempt to negotiate with Paramount "because it was well understood that the Crescent Amusement Company had a first-run franchise and second-run option." The franchise provides both a first run in Gadsden

and a first run in Alabama City with a repeat-run option.

Bailey negotiated with Fogler, the booker at the Paramount Atlanta exchange, who told him Mr. Sudekum then had a "first-run franchise and second-run contract in downtown Gadsden and first-run contract in Alabama City," so that when the Dixie got pictures it would actually be a fourth run. He therefore, did not buy a full season's product, but merely arranged to spotbook ten pictures. The Paramount franchise grants a first run in Gadsden and a first run in Alabama City, with the option of repeating pictures in either place.

Fox, Loew, Paramount, United Artists and Warner all held the Dixie back of the Ritz, although there was no clearance provision in their contracts with the Ritz which would require them to do so. Their uniformity in holding a superior theatre behind an inferior one may only be explained by the pressure which Sudekum was able to exert on each of these distributors.

Other than the situation resulting from the execution of the franchises in question, the Court views evidence relative to the Gadsden area as significant only in comparison of the preference accorded the Ritz Theatre in Alabama City.

101. J. W. Baird, President of Newport Amusement [fol. 3131] Company, an affiliate of Crescent, threatened Taylor and Dr. Hicks with the construction of a competing theatre in Copperhill, Tennessee, unless the Doradell, in which they owned an interest, was sold to Newport. He took an option on a lot in Copperhill and told Taylor and Mortimer Kauffman, who also owned an interest in the theatre, that Crescent had threatened opening a theatre against him in Newport and he had sold the interest in his theatre to Cheokree "because his mule was scared".

102. Castleberry called on Wm. G. Head on two occasions and asked him if he would be interested in selling his theatre at Greenville, Kentucky. In August 1938, Pittman, the Crescent manager at Central City, pursuant to Stengel's instructions, went to Greenville, Kentucky, and ostentatiously measured a lot for the purpose of giving the impression that Crescent was planning to come into the town. Pittman testified that he did not have to tell anyone in Greenville why he was measuring the lot because "Everybody thought that is what we were going to do, I did not

have to say a word. It is a very small town." In September 1938 Head sold his theatre to Rockwood.

103. In 1937 there were two competing theatres in Central City, Kentucky, the Selba and the Empress. The latter was operated by F. M. Pittman. Rockwood acquired the Selba Theatre in the latter part of 1937 and about a month later Pittman sold the Empress to Rockwood, because he realized that he could not compete with Sudekum.

104. Mr. and Mrs. Caldwell operate the only theatre in Scottsville, Kentucky. On several occasions in 1935, Castleberry called upon them and attempted to purchase their theatre. He described the size, power, and wealth of the Crescent organization to them, and told them that Crescent intended to go into several Kentucky towns, including Elizabethtown, Russellville, Franklin, Glasgow and Scottsville, and also into Gallatin, Tennessee. He threatened that Crescent would build another theatre, secure the choice of films, and drive the Caldwells out of business unless they [fol. 3132] sold their theatre.

105. Arthur Mitchell has operated the only theatre in Russellville, Kentucky, since 1932. During the years 1935-36-37, he was approached on several occasions by Castleberry, who called on him for the purpose of persuading him to sell his theatre to Crescent. During the course of his visits, Castleberry told Mitchell that unless Mitchell sold his theatre, Crescent would build a second theatre in the town, that if they built a theatre, they could buy all the film on the market, that Crescent had over 100 theatres and $4,000,000.00 in cash, and that the boss wanted some action in Russellville.

During this period, Castleberry visited Russellville frequently and examined and made inquiries concerning sites for theatre construction and buildings which could be converted into theatres. He told M. O. Duncan, a druggist in Russellville, that Crescent would put up a show as soon as they had a location and run "Mitch" out of business. Castleberry later admitted to Mitchell that he had done these things in order to bluff Mitchell into selling his theatre to Crescent.

106. Carl Hutton has operated the Jefferson Theatre in Jefferson City, Tennessee for seven years. In the fall of 1936 Hendren called upon him and told him that unless he

leased his theatre to Cherokee they would build a theatre in Jefferson City twice as large as the Jefferson. Hendren then proceeded to outline the manner in which Cherokee would operate this theatre in order to drive the Jefferson Theatre out of business, which included running on a 10 and 15-cent admission policy, operating at a loss for a year or even two years, and, as a result of the Crescent buying power, securing the most desirable product. On subsequent occasions threats of a substantially similar nature were made by Hendren, Fred Gorman and Stengel to Hutton, his father, T. C. Hutton, and C. T. Rankin, who owned a mortgage on the Jefferson Theatre. On one occasion Gorman took the Huttons to see Sudekum who told them he felt it would be to their best interests to get together with Cherokee. He referred to other towns in which he had eliminated competition by putting up a new theatre and conducting a good operation, and intimated that unless the Huttons leased their theatre to Cherokee, a new theatre [fol. 3133] would be built in Jefferson City. Hutton refused to lease his theatre despite Cherokee's threats and he has not been approached since 1937.

107. Guy B. Amis operates the only theatre in Lexington, Tennessee, and was operating it in 1937; early in 1937 Castleberry and Stengel called on Amis on two occasions and told him that they intended to operate a theatre in Lexington. They stated that unless he sold his theatre to them they would build a new theatre in town. Shortly thereafter Ruffin called on Amis and offered to buy his theatre for $20,000.00. He told Amis it would be much better for him to sell his theatre than to have opposition and be forced out of business; Amis declined to sell.

108. Mike Brown has been operating the only theatre in Livingston, Tennessee, for the past sixteen years. The theatre which he now operates (the Ritz) was built in 1937. Early in 1939, Castleberry called on Mr. and Mrs. Brown. He told Mr. Brown that he understood that the Crescent Amusement Company had a lease on his theatre. When Brown told him that he was sure they did not have, Castleberry replied: "It may be another house here in town." Castleberry asked Mrs. Brown if they would sell either all or a part of their theatre and asked if they would rather be affiliated with Crescent than have a house built across the square.

109. In March 1939 Ruffin was operating one theatre in Hickman, Kentucky, and Joe Wiley began to convert a building in to a second theatre. Shortly after Wiley commenced with his remodeling, Ruffin commenced converting another building into a theatre. When Wiley decided that Ruffin was going to open a second theatre he dropped his plans to open a theatre in Hickman: Ruffin's new theatre, the Rex, operated seven days a week for a short period and then went to a two-day-a-week operation, after which it was closed. On August 12, 1939, Ruffin wrote Stengel regarding their new theatre in Hickman as follows (Ex. [fol. 3134] 245):

> "As we will need equipment for our new theatre at Benton, do you think it would be advisable and safe to consider dismantling this theatre so as to use some of this equipment at Benton, or forget our investment at Hickman and keep same intact for assurance against competition? I would welcome any and all suggestions that you may have to offer."

Stengel replied that both he and Mr. Sudekum thought that the house should be closed but the equipment should not be removed in case they wanted to reopen it if conditions improved.

110. Decatur, Alabama, has two distinct business sections, the Second Avenue and the Bank Street district. For several years Crescent has operated two theatres in the Second Avenue section; the Bank Street section did not have a theatre until January 1941.

In October 1940, H. R. Mitchell, who had formerly operated a theatre in Linden, Alabama, became interested in opening a theatre in the Bank Street district of Decatur. On October 30, 1940, he leased a building in that section and arranged for its conversion into a theatre. On November 4, 1940, Sudekum announced that Crescent would construct a theatre on Bank Street, and on November 12, the Decatur daily newspaper carried an article announcing that remodeling of the building which Crescent had selected had been commenced. Mitchell thereupon dropped his plans to open a theatre in Decatur. The new Crescent theatre was opened around January 1, 1941.

111. The theatres maintained by the defendant exhibitors and their affiliates in the towns in which they operate are

modern and up-to-date in their appointments; are attractive in appearance, for the most part have been originally built as motion picture theatres, have adequate seating capacity, and the equipment and buildings are well maintained. They have large sums invested in buildings and equipment. The management is competent and experienced. The exhibitor defendants and their affiliates are adequately financed, are financially responsible, have stabilized the op- [fol. 3135] eration of motion picture theatres in the small towns in the area in which they operate, and have the reputation of playing out their contracts as agreed.

112. For the most part theatres operated by independents in competition with the defendant exhibitors and their affiliates have been greatly inferior to those operated by the defendant exhibitors or their affiliates in the several competitive situations. Usually the theatre building was a converted store building, not built for the purposes of a theatre, unattractive in appearance, and inadequate in modern conveniences. In many instances the equipment has been second hand. Some operations have been inadequately financed, and in a number of cases there was no stability of operation in these independent situations.

The distributors have found it necessary by reason of this instability of operation and inadequate financing in some instances, to make large concessions from the contract terms originally agreed upon, or to accept cancellations of obligations to exhibit pictures as originally called for under the contract.

D—Profits

113. During the five-year period immediately preceding the suit, the Crescent and Rockwood companies each experienced a phenomenal growth in earnings and surplus which was out of all proportion to the increase in gross receipts and gross assets resulting from physical expansion of the business and improving general economic conditions. During the five-year fiscal period from June 30, 1934 to June 30, 1939, Crescent's total assets were less than doubled, but its surplus was increased thirty times. During the last fiscal year of said period its gross receipts were less than twice the amount of its gross receipts for the first fiscal year of said period, but its net profits (exclusive of dividends received) were more than five times those of the first year. During the five-year period, its net earnings

(exclusive of dividends received) averaged about 35 per cent per annum, on its capitalization.
[fol. 3136] During the three calendar years 1937 to 1939, inclusive, (Rockwood was organized in February 1936), Rockwood's total assets approximately tripled, but its surplus increased about eight times. During the calendar year 1939, its gross receipts were somewhat less than three times its gross receipts during the calendar year 1937, but its net earnings (exclusive of dividends received) for 1939 were thirty-one times what they were for 1937. During this three-year period, its net earnings per annum (exclusive of dividends received), averaged about twelve times its original capital investment. (Ex. 308). Sudekum and Stengel were also able to profit personally from the absorption of competitors by securing the payment of substantial salaries from the corporations which they formed to take over competing theatres, in addition to their regular compensation from Crescent and Rockwood.

E—Franchises

114. The ordinary film licensing agreement covers a single season's product. The franchises in question have granted certain exclusive film licensing privileges for continuous periods of five years (Paramount), six years (Fox), and twelve years (Warner), respectively.

The Paramount Franchise

115. The current franchise with Crescent and Rockwood and their subsidiaries is embodied in three documents, each dated July 28, 1938, as of November 20, 1937. One covers first run at the Paramount Theatre in Nashville (Ex. P. 30), a second covers the Crescent and Lyric theatres outside of Nashville and subsequent runs in Nashville (Ex. p. 24, p. 40), and the third covers the Rockwood situations, including those operated by subsidiaries as well as those operated by Rockwood directly (Ex. p. 29). Each has a paragraph which makes a refusal or failure to perform any one of the three agreements a refusal or failure to perform the other two for purposes of cancellation or termination by Para-
[fol. 3137] mount. They were negotiated by Sudekum and Stengel for the exhibitors with Oscar Morgan, southern district manager, for Paramount and cover a five-year term commencing with the 1937-38 season and ending with the

1942-43 season, which coincides with the five-year term under which the Paramount Theatre in Nashville is leased for operation by Crescent.

The background of this franchise goes back to the time when Paramount leased its Nashville theatre to another partner, Mr. Bob Wilby, to operate. This was apparently about 1932, as Morgan explained he was unable to make a deal with Sudekum for the 1932-33, 1933-3- or 1934-35 product because of Sudekum's grievance over the licensing of this theatre to Wilby, instead of to him. Although he never told Morgan he wouldn't buy Paramount films for the Crescent theatre, Sudekum merely offered an unattractive rental. In any event, Morgan finally suggested that the theatre department would be favorably inclined toward a deal for the theatre with Sudekum if he bought the Paramount product, for his circuit, so he bought the product for the 1935-36 season for the Crescent situations, with the results on his competition at Brownsville, Paris and Earlington heretofore stated. As the theatre deal did not go through, Sudekum left Paramount out of the Crescent and Rockwood situations for the 1936-37 season.

Morgan then began negotiating a three-year deal beginning with the 1936-37 season as a three-year deal with the theatre department was then in the making for the operation by Sudekum of the Paramount Theatre in Nashville. When the latter was switched to a five-year deal, the franchise negotiations switched to five years.

116. The general conditions in the three documents are stated in substantially identical form, the only variations appearing in the description of the situation covered and the rental, run and clearance terms. They all cover all of the features released by Paramount from August 1, 1937, to August 1, 1942, except re-issues, foreign-made features produced by companies not affiliated with Paramount, and such features made by other producers which have [fol. 3138] the privilege of approving distribution terms, as Paramount may be unable to secure approval for. The first-run Nashville franchise is to terminate if the Crescent sub-lease or the Paramount Theatre terminates prior to expiration date.

117. The first-run Nashville agreement (Ex. P. 29) provides for fixing rental terms for the last four years by agreement and by arbitration if no agreement is reached.

The basis for what is regarded as a fair rental is stated in the following requirement that the terms "shall be not less favorable to Paramount than the general terms and conditions upon which such photoplays shall be generally exhibited" during the four-year period in theatres located in the southern states and operated by Paramount or its subsidiaries (Ex. P. 30). The effect of the franchise and Paramount Theatre lease was thus to create a virtual partnership between Paramount and Crescent in Nashville during the five-year period comparable to the relationship obtaining between Paramount and theatre-operating companies affiliated with Paramount and theatre-operating companies affiliated with Paramount through stock ownership. Morgan referred to the franchise itself as making them "moral partners."

Exhibit P. 24 licenses the features for first-run exhibition in all of the Crescent towns outside of Nashville, and for second and subsequent runs in the Crescent theatres in Nashville. By a rider (Ex. P. 40), Huntsville, operated by Lyric, was also included.

The only second or subsequent runs licensed by this agreement are those for the Crescent theatres in Nashville.

A repeat-run option is granted by Paragraph 8 (e), which reads as follows:

> "The Exhibitor may at its election exhibit for repeat exhibition any of the feature photoplays licensed hereunder at any theatre covered by this agreement upon the same terms and conditions applicable to the Hopalong Cassidy feature photoplays in respect of such theatre, as set forth in the annexed Schedule A, and the Exhibitor agrees to pay as license fees for each feature photoplays during each such repeat exhibition the license fees payable hereunder for the said Hopalong Cassidy feature photoplays." (Ex. P. 24)

The annexed Schedule "A" provides a rental of $10.00 or [fol. 3139] $12.50 for the Hopalong Cassidy's, depending on the size of the town. The same schedule calls for a rental of 40 per cent on the top four features in all towns with the balance at varying flat rentals, the lowest of which is generally substantially higher than the Hopalong rental. Over the last four years a gradual increase is provided in

all features except the four at 40 per cent and the Hopalong Cassidy's which remain the same.

Schedule "C" lists the clearance applicable to the franchise as follows:

"*Alabama City, Ala.* Prior run over Attalla, Alabama.

Bowling Green, Ky. 30 days over Glasgow.

Brownsville, Tenn. 1937-38 prior run over Bells. Remaining four years 14 days over Bells.

Columbia, Tenn. 30 days over Mt. Pleasant, Tenn.

Dyersburg, Tenn. 1937-38—prior run over Dresden. Remaining four years 14 days.

Gadsden, Ala. 30 days over Attalla, Alabama.

Gallatin, Tenn. 30 days over Portland and Hartsville.

Harriman, Tenn. 60 days over Spring City and Kingston.

Lebanon, Tenn. 30 days over Hartsville, 14 days over Old Hickory and Dupontonia. 60 days over Watertown and Alexandria.

Madisonville, Ky. 1937-38—7 days after Earlington. Remaining four years seven days over Earlington.

Murfreesboro, Tenn. 60 days over Woodbury.

Springfield, Tenn. 60 days over Portland.

Union City, Tenn. 1937-38 prior run over Dresden —remaining four years 14 days."

This schedule froze the playing positions of sixteen towns behind Crescent towns for a five-year period regardless of the character of theatres that might be operated there.

118. The Rockwood franchise (Ex. P. 29) covered first [fol. 3140] run on all of the features released during the same five-year period in all of the eight towns operated by Rockwood directly, the two operated by Hartselle, one by Newport (Copperhill had not then been acquired) two by Mid-State, one by Kentucky, six by Cherokee, four by Ruffin, and three by Chickasaw. The exhibitor is committed to play not less than forty features and six Hopalong Cassidy's in all of the towns except Central City, Kentucky, where the commitment is for fifty-two (Ex. P. 29, p. 3). The features to be exhibited are to be selected "within sixty days after the national release of each such feature," (Ex. P. 29, P. 17).

The Hopalong Cassidy rental is $8.00 for each of these situations. The features are licensed four at 40 per cent and the remainder at varying flat rentals, the lowest being $8.00. A gradual increase over the last four years is provided except for the Hopalong and per centage pictures.

Schedule "C" provides clearance as follows:

"*Coal Creek, Tenn.* 30 days over Norris and Briceville,

Guthrie, Ky. 14 days over Elkton.

Huntingdon, Tenn. 1937-38 to play after McKenzie with prior run over Camden. Remaining four years 14 days over McKenzie and Camden.

Manchester, Tenn. 14 days over Woodbury.

Rockwood, Tenn. 30 days over Spring City and Kingston.

Tracy City, Tenn. 30 days over Palmer and Monteagle 7 days over Sewanee.

Russellville, Ala. 14 days over Haleyville.

Dickson, Tenn. 1937-38 prior run over Waverly—Remaining four years 14 days over Waverly.

Cookeville, Tenn. No town within radius of 35 miles to have clearance over Cookeville. 30 days over Monterey, Tenn. 14 days over Livingston.

Carthage, Tenn. 30 days over Hartsville. No town within 35 mile radius to have clearance over Carthage. [fol. 3141] Erwin, Tenn.; La Follette, Tenn.; Lenoir City, Tenn.; Sweetwater, Tenn.; Oneida, Tenn.; Spruce Pine, N. C.; Newport, Tenn.; Covington, Tenn. No town within radius of 25 miles to have clearance over these towns.

Martin, Tenn. 1937-38 Prior run over Dresden; last four years 14 days clearance over Dresden.

Newbern, Tenn. Prior run over Dyer, Tenn. 1937-38 season; remaining four years 14 days over Dyer.

Alamo, Tenn. 1937-38 protection as agreed upon with Memphis Exchange. Last four years prior run over Bells.

Greenfield, Tenn. Prior run over Dresden and Dyer.

Milan, Tenn.; Humboldt, Tenn. 1937-38 prior run over Dyer, Bells and Trenton. Last four years 14 days over these towns.

Elizabethtown, Ky. Starting 1938-39 for last four years 14 days over Hodgenville."

The effect of the franchise (ex. P. 24, P. 29, and P. 30), on the independent competition at Dresden, Earlington, Gallatin, McKenzie, Spruce Pine, Union City, Hopkinsville, Gadsden, Morristown, Harriman, Newport and Mt. Pleasant has already been recounted. Morgan, in negotiating it, knew precisely what its effect on those independent accounts would be.

119. The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to any opposition theatre, as shown by the experience of Smith, Anderson and Henry when they tried to buy a second-run. As Morgan described its effect in a letter to Unger, his immediate superior, on November 14, 1938, (Ex. 152):

> "In any event, the only way we could sell second run, even if we wanted to in these particular towns, (Harriman, Morristown, and Newport) would be after Sudekum had taken the refusal, because Paragraph E of Article 8 of the Crescent Amusement Company franchise provides he can repeat any feature at a given price."

[fol. 3142] The repeat-run clause was apparently never brought to the attention of Agnew, the general sales manager, until this trial, and even after Unger suggested a modification, the only thing that was done was to make Crescent and Rockwood exercise the option within a fixed period of time. The clause, as modified, still prevents the sale of a second-run to the opposition. That Stengel regarded the modified repeat-run clause as granting him an option on second-run is shown by his letter of general instructions to Ruffin, dated May 9, 1939 (Ex. 244), in which he says:

> "We have today signed a rider to the effect that we agree to notify Paramount within thirty days after the conclusion of the initial exhibition of each feature photoplay in any theatre as to whether or not this picture is to be used second run in the particular theatre or town."

The modification, as originally proposed by Paramount, provided that the exhibitor must select and play the features within ninety days of the conclusion of the first-run exhibition. Stengel, in a letter to Kirby on June 9, 1939

(Ex. 34), asked that a qualifying clause be inserted which would provide that "if we are unable to mutually agree on a repeat run date within the ninety-day period, then in that event we will be permitted to play the picture in question as soon after the ninety day period as dates can be made available." Morgan replied on June 19, 1939 (Ex. 348), as follows:

"DEAR KERMIT:

"I have read your letter of June 9th to John Kirby about the rider as affected by the 90-day period in which you are to play your repeats. While the Legal Department wanted a shorter space of time, I finally explained the matter to them—but after all, Kermit, there are two sides to everything, and I think maybe you are drawing a line too fine.

"I think it would be advisable for you to agree to the rider as we have drawn it, because certainly we can agree on repeat dates within the period mentioned, but while you are so insistent on being protected, we want the same right of being protected. As a matter of fact, Kermit, the new Trade Practice Agreement provides that an exhibitor must agree to select his [fol. 3143] pictures on repeats or Short sales within 21 days after availability—so you can understand that we are being far more liberal than that. I don't feel that you need worry about the problems you brought out in your letter, as over the last two years, you will find I am sure, that you had no difficulty on the very thing you're talking about.

"Finally, after all, under the franchise, we are supposed to be some form of moral partners, and it is to the advantage of both of us to work together. Frankly, I would rather not for many reasons, change the rider, and will greatly appreciate it if you will therefore sign and send through to John's office."

The legal department declined to accept the qualifying paragraphs submitted by Stengel, which might have extended the repeat-run privilege indefinitely where there was a failure to agree on a date within the 90-day period, but finally agreed to a specific extension of the 90-day period

to 120 days, the clause finally reading as follows, when forwarded to New York by Morgan on September 7, 1939:

> "With respect to each theatre licensed hereunder the exhibitor shall notify Paramount in writing of its election to exhibit any feature photoplay for repeat exhibition at such theatre not later than thirty (30) days after the conclusion of the initial exhibition of each such feature photoplay at any such theatre, and such repeat exhibition shall be held within one hundred and twenty (120) days from the conclusion of the initial exhibition of such photoplay. It is agreed that Paramount will have prints for each feature photoplay available for booking by the exhibitor for such repeat exhibition during the aforesaid one hundred and twenty (120) days. If no such prints shall be available on the dates selected by the exhibitor, then the time of the exhibitor to exhibit shall be within fifteen (15) days after such prints shall become available. If the exhibitor shall fail to so notify Paramount in writing of its election, then and in such event, upon the expiration of thirty (30) days following the conclusion of the initial exhibition of such photoplay the exhibitor's license to exhibit such photoplay for a repeat exhibition shall thereupon forthwith terminate and revert to Paramount and Paramount may license the exhibition of such photoplay when and where desired by it.
>
> "If the exhibitor shall have elected as aforesaid to exhibit for repeat exhibition any photoplay and shall fail to so exhibit such photoplay within the aforesaid period of one hundred and twenty (120) days, the license fee for each such photoplay shall thereupon forthwith become due and payable to Paramount and [fol. 3144] the exhibitor's license to exhibit such photoplay for repeat exhibition shall forthwith terminate and revert to Paramount, and Paramount may license the exhibition of such photoplay when and where desired by it without accounting to or crediting the exhibitor for any sums received therefor." (Ex. P. 24)

The effect of the modification, as finally drafted, was simply to limit the maximum period during which the clause could prevent a competing theatre from playing a picture used by Crescent first run to a period of 120 days after

its first run, if Crescent elected to repeat the picture, and 30 days if it decided not to repeat it.

Morgan testified he was unable to recall any other clause attached to a franchise which had the same terms as this one. Of the "many contracts giving the exhibitor the right to repeat at a certain film rental" which he had written, he could recall none used in a situation where the exhibitor had a competitor trying to get Paramount pictures. Any exhibitor's repeat-run option is obviously undesirable from the standpoint of the distributor, where competition exists, as it obligates the distributor to make prints available on an additional run without any assurance of additional film rental.

Thus the price paid by Paramount for an assured outlet in the circuit involved not only the elimination of the competition of the Paramount Theatre in Nashville with Crescent's theatres but the complete elimination of any second as well as first-run competition in licensing Paramount films in all of the Crescent and Rockwood situations outside of Nashville, as well.

The franchise was contrary to the general policy with respect to franchises then pursued by Paramount, but was approved by Agnew because of the exceptional circumstances involved. The principal exceptional circumstances was, of course, that Sudekum had built up a circuit which had virtually eliminated all competition, and there was no way to get in that circuit and stay in without leasing him the Paramount Theatre in Nashville on a partnership [fol. 3145] basis, and treating him like a partner in promoting his theatre business outside of Nashville, as well, at the expense of Sudekum's independent competition.

The Warner Franchises

120. On November 25, 1930, Crescent entered into an agreement with Warner Brothers Pictures, Inc. (Ex. W. 18), whereby the latter, which was then contemplating the erection of a first-run theatre in Nashville on the Odd Fellows' property, obtained an option to purchase all of the theatre properties then owned by Crescent, both in and outside of Nashville (Annex Two and Annex Three) and all of Crescent's stock in other theatre operating corporations, including the defendants Cumberland and Lyric and Muscle Shoals Theatres, Inc., (Annex Four) on or

before December 1932. By an agreement dated November 24, 1930, (Ex. W. 15), Warner's sales subsidiary, Vitagraph, Inc., gave Crescent's franchise covering the exhibition of Warner and First National pictures released during the 1930-31 and 1931-32 season. The franchise provided for selection of 26 of the features released each season for exhibiton on first run on percentage terms in all of the towns where Crescent was then operating (Schedules A and B, p. 1). It contained no second run commitment or repeat-run option clause. By a supplementary agreement dated January 18, 1933 (Ex. W. 16), the date for closing of the purchase of the Crescent theatre interests pursuant to the option given on November 25, 1930, was extended to February 1935, and the terms with respect to the Nashville properties were modified. By the same agreement, the franchise was extended for a five-year period, and the extension "shall apply to all motion pictures, photoplays, etc., now being released or distributed by Warner and/or its affiliated or subsidiary companies and those which may be heretofore released or distributed by it or them, during the extended period."

[fol. 3146] By an agreement dated August 15, 1935, (W. 17) a settlement was made between Crescent and Warner disposing of certain law suits which had arisen out of the controversy over alleged non-performance by both parties of the purchase agreement in February 1935, by which settlement agreement Warner was released from any obligation to take over the Crescent theatre interests and agreed that it would not, prior to December 31, 1939, use or lease its property in Nashville for a moving picture theatre without Crescent's consent. The franchise was, by the same agreement, also extended to December 31, 1939.

What happened in Brownsville, Hopkinsville, Newport and Rogersville has already been recited. Crescent also took 1935-36 Warner product away from Parrott and Hendren at Greenville.

121. The current franchise picked up where the old franchise left off, commencing with the 1939-40 season and ending with the 1942-43 season. Having been placed in final form after the filing of this suit, it was not included in one document but took the form of separate contracts for each town covered, all dated March 1, 1940, and approved by the distributor on March 14, 1940, (Ex. W. 14). These

contracts cover the Crescent, Lyric, Hartselle, Muscle Shoals, and Rockwood towns, the latter including those of its subsidiaries, Lawrenceburg, Dickson, Mid-State, Ruffin, Chickasaw, Kentucky and Cherokee, and Cherokee's subsidiary, Newport, for the seasons 1939-40 to 1942-43, inclusive.

The order of negotiation seems to have been as follows, an agreement in principle in November 1939, by Kalmenson with Stengel and Sudekum on the Crescent situations, with details, such as clearance and repeat runs, on Crescent, and the Rockwood deal left to be worked out by the branch managers with Stengel. At the same time, Kalmenson promised Sudekum that Warners would work out a franchise for the Muscle Shoals towns. Sudekum later stated to Atlanta branch manager McCoy that "he did not want to include the Muscle Shoals theatres with his franchise [fol. 3147] on account of the pending law suit, but that he did want to work out a separate franchise the same with the other town as with Louis Rosenbaum" (Ex. 198), and McCoy then worked out the Muscle Shoals deal with Rosenbaum. In any event, the franchise was obviously a single transaction insofar as Warner was concerned. However, the Crescent and Rockwood contracts were not signed by Sudekum and Stengel until after that date, and Rosenbaum's approved contracts were not forwarded to him until April 1940.

122. The former franchise for the Crescent towns covered Warner product of the 1939-40 season released prior to January 1, 1940. The current franchise, insofar as it related to the towns covered by the former franchise, therefore, does not cover the entire year's product for 1939-40, but only 31 features. For the three succeeding seasons, all features released each season are covered. For all of the other situations, the franchise covers the entire 1939-40 season's feature product, as well as the entire feature product for the three succeeding years.

The following feature rental terms are identical for the towns of Cleveland, Columbia, Decatur, Dyersburg, Greenville, Hopkinsville, Madisonville, Maryville, Murfreesboro, Paris and Union City, in all of which the films were licensed for exhibition in either of the two theatres then operated in each of those towns by Crescent. For the last three seasons, 24 features are to be played first run on per-

centage, and the balance of those released are to be played first run at varying flat rentals. Twenty features are licensed for a second run at $12.50 each. Each contract carries the following rider, copied from the Cleveland contract, with only the name of the town changed:

> [fol. 3148] "The twenty (20) features licensed for second run exhibition shall be selected by Exhibitor from the features licensed, first run, for each of the motion picture seasons 1939-40, 1940-41, 1941-42, and 1942-43, in the following manner:
>
> Within thirty (30) days after the last date of the Exhibition of any feature, first run, Exhibitor will notify Distributor in writing whether Exhibitor selects such feature for second run exhibition. Failure on Exhibitor's part to so advise within said period with respect to any feature shall be regarded as a rejection by Exhibitor of such feature for second run exhibition. Any feature rejected as herein provided may be disposed of by Distributor elsewhere as and when it deems advisable.
>
> Exhibitor shall have the right to exhibit any reissues, except Westerns, at the lowest allocated rentals, and in such event the Exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly.
>
> Should Exhibitor's playing time be reduced by reason of the closing of a theatre, then Exhibitor's commitment shall be reduced proportionately.
>
> In event one theatre closes, exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Cleveland, Tennessee, and in such event the Exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly." (Ex. W. 14).

Each of these two-theatre towns was large enough for possible competition from independent theatres and such competition had actually been encountered in Cleveland,

Decatur, Greenville, Hopkinsville, Maryville, Paris and Union City.

The feature licensed first-run for the last three seasons were "all features released for each season." Thus, although only 20 features were licensed for second-run, each feature released was tied up until 30 days after its first run by this agreement, at which time Crescent might decide to play the picture second run or reject it so that it could be licensed to another exhibitor. In this way, the only second run a competitor in those towns could buy would be second [fol. 3149] run of the features that Crescent didn't think were good enough for a second run, and the decision as to which pictures he got would be entirely up to Crescent.

Crescent was not committed to play a second run at all if it decided to close one theatre in these situations as the next to the last paragraph provides that if Crescent closes one of its two theatres, its commitment is reduced proportionately, that is to say, cut in half. The second-run commitment, 20 pictures at $12.50, or $250.00 is obviously less than half of the total commitment (Ex. W. 14), as the pictures in the first-run flat rental brackets alone always substantially exceed the second-run total and a reduction of half in the commitment would eliminate the second-run commitment entirely.

But even with one theatre closed and its second-run commitment out of the way, the exhibitors obviously wished to still be in a position to prevent a competitor from getting a second run. The last paragraph, giving a repeat-run option where one theatre is closed, was plainly in addition to the rider insisted upon by the exhibitors, as it confers no rights or advantages on the distributor. Unlike the Paramount repeat-run clause, this option was so worded as to make the repeat-run subject to such other runs in the same town as the distributor might license. The only purpose that this clause could serve was to make it difficult for Warner to license a second-run theatre in opposition to Crescent after Crescent shut one theatre and got rid of its second-run commitment.

The purpose of the repeat-run option was plainly to replace the second-run commitment as a means of tying up second run in the situations where that commitment was subject to elimination upon closing a theatre, as in the situations where no second-run commitment was made, a straight repeat-run privilege was inserted which does not

depend on the closing of a theatre to take effect. Thus in Harriman and Morristown, where Crescent was also operating two theatres, but no second-run commitment was [fol. 3150] made, the repeat-run clause reads as follows:

> "KCS. [In the event one theatre closes]* Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee, and in such event the exhibitors commitment to exhibit such features in the lowest rental classification shall be reduced accordingly."

The only difference between this and the repeat-run clause previously quoted is in the stricken opening phrase: "In the event one theatre closes". In all of the one-theatre situations in which no second run was bought, the same unqualified repeat-run clause as that stated above was used.

123. The only Crescent situations outside of Nashville, in which no repeat-run clause was included, were Bowling Green, Kentucky, (Ex. W. 17), and Gadsden, Alabama, (Ex. W. 7), where the Crescent circuit bought a first and second-run to be played in any one of its three theatres in each town. The other terms were the same here as in the other Crescent situations noted above, including the same clause for a proportionate reduction of the commitment upon closing of a theatre. But if Crescent closed a theatre in Bowling Green or Gadsden, it would still have two theatres operating, one of which could take care of the second-run commitment and there was, therefore, no need for a repeat-run clause to take the place of an eliminated second run.

In Nashville, all of the features were licensed for first-run at the Knickerbocker or Fifth Avenue or Princess or Rex on a percentage basis. A selection of 25 features each season is licensed for a subsequent run at each of the following theatres at a flat rental of $10.00 each: Belle Meade, Belmont, Capitol, Elite-West, Madison, Roxy, State and Woodbine. None of the Nashville contracts contains a repeat-run clause.

124. In the Rockwood towns, first run of the Warner product was tied up for the four-year period by a commit-

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[* Words enclosed in brackets erased in copy.]

[fol. 3151] ment to play only "a selection of 26 each season." No second-run commitment was made in any situation. The manner in which those features were to be selected and the repeat-run privilege are stated in a uniform rider as follows:

"The features and short subjects licensed hereunder shall be selected by Exhibitor in the following manner:

Within thirty (30) days from the date of each availability notice, Exhibitor will notify Distributor in writing whether Exhibitor selects or rejects the features and short subjects listed in such availability notice. Failure on Exhibitor's part to so advise within said period shall be regarded as selection by Exhibitor of said features and short subjects. Any features and short subjects rejected as herein provided may be disposed of by Distributor elsewhere as and when Distributor deems advisable.

Exhibitor shall have the right to exhibit any reissues except Westerns, at the rental specified above for features, and in such event the Exhibitor's commitment shall be reduced accordingly.

Exhibitor shall have the right to repeat any feature at the rental specified above for features, subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Alamo, Tennessee, and in such event the Exhibitor's commitment shall be reduced accordingly.

Should Exhibitor's playing time be reduced by reason of the closing of said theatre, then Exhibitor's commitment shall be reduced proportionately."

The flat rental for these features was fixed at $10.00 in each of the following towns: Alamo (Chickasaw), Benton, Kentucky, (Chickasaw), Brownsville, (Cherokee,) Carthage (Mid-State), Central City, Kentucky, (Rockwood,) Cowan (Rockwood), Greenfield, (Ruffin) Guthrie, Kentucky, (Rockwood) Halls, (Chickasaw), Hartselle, Alabama, (Hartselle), Huntingdon, (Rockwood), Lake City (Rockwood,) Madisonville, (Cherokee) Marshall, North Carolina (Cherokee) Manchester, (Rockwood) Oneida, (Cherokee), Providence, Kentucky, (Rockwood) Rockwood, (Rockwood), Rogersville (Rockwood), Russellville, Alabama, (Hartselle

Tompkinsville, Kentucky, (Mid-State), and Tracy City, (Rockwood). The rental for each of the features was $11.00 in Dickson, (Dickson), Greenville, Kentucky (Rockwood) Lenoir City, (Cherokee), McKenzie (Rockwood), Newbern (Ruffin,) and Spruce Pine, North Carolina (Cherokee.) [fol. 3152] The feature rental terms were four at 35 per cent, four at $20.00, and eighteen at $12.00 for the following towns: Elizabethtown, Kentucky, (Kentucky), Erwin (Cherokee,) Humboldt (Chickasaw), Hickman, Kentucky (Ruffin), LaFollette (Cherokee), Martin, (Ruffin), Milan (Chickasaw), Newport (Newport), and Sweetwater (Cherokee.)

In Cookeville (Mid-State), Copperhill (Newport) and Covington (Ruffin) and Lawrenceburg (Lawrenceburg), 36 features instead of 26 were committed with the top four at 35 per cent and the rest at flat rentals.

The same rider as that quoted above, was attached to all of these situations, with only the name of the town changed and the phrase "rental specified above", contained in the repeat-run clause, altered to "lowest allocated rental" in the situations where there was more than one rental bracket. The repeat-run provisions found in those riders are otherwise identical with those used in those Crescent situations in which no second-run commitment was made. Obviously, the rentals were arbitrarily fixed and allocated among the various Rockwood towns, as no town directly operated by Rockwood paid a rental higher than $11.00, although several towns operated by subsidiaries in which a partner was also interested and which were smaller situations than some of Rockwood's paid much higher rentals. Compare the Rockwood towns of Rockwood, Tennessee, (3,981), Central City, Kentucky (4,199) and Providence, Kentucky (4,397), all playing the 26 selected features at $10.00 each, with Elizabethtown, Kentucky (3,667); Erwin, Tennessee, (3,350) (Cherokee): Hickman, Tennessee, (2,268) (Ruffin); and Newport, Tennessee, (3,575), (Newport,) all playing the 26 selected features as follows: four at 35 per cent, four at $20.00, and 18 at $12.00.

125. Muscle Shoals tied up the first run in its four situations by a "selection of 30 each season" in each town, all to be played at varying flat rentals. No second-run commitment was made and each contract contains the same clause [fol. 3153] as to selection of features for first run as the

Rockwood contracts contained, except that the 30-day period is shortened to 14. A repeat-run clause is also found in each rider which is identical with that contained in these Rockwood and Crescent riders where no second-run commitment is made.

126. On March 17, 1940, McCoy wrote Kalmenson that he had been unable to get the Crescent and Rockwood contracts signed because of changes desired by Sudekum and Stengel (Ex. 199).

Sudekum and Stengel obviously intended to tie up second run in all situations, whether there was existing competition or merely potential opposition. While there was a definite second-run commitment, no repeat-run privilege was necessary for their purpose, and conversely, while there was no definite second-run commitment in effect, a repeat-run privilege was necessary to accomplish their purpose.

What the new franchise does to existing competitive situations is illustrated by the new clearance, incorporated for the first time in it. The only clearance specified in the old franchise is "usual protection". On December 15, 1939, W. C. Hames, Warner Office manager, wrote Stengel as follows:

"With reference to your letter of recent date, enclosing a schedule of clearance that you wanted for your situations, we are enclosing herewith a schedule that we have worked out. This covers your theatres, as well as the Crescent Amusement Company.

We cannot grant clearance that you requested as listed below:

Rockwood, Tenn.	14 days over Spring City.
Columbia, Tenn.	14 days over Mt. Pleasant.
Gadsden, Alabama,	21 days over Attalla, Albertville, Guntersville, Center, Piedmont, Jacksonville, Boaz and Coleville, Alabama.
Alabama City, Ala.,	14 days over Attalla.

"It so happens on all of the above we had already made contracts on our new product, which makes it impossible for us to extend clearance as you have requested."

[fol. 3154] "Won't you please be kind enough to check over the attached schedule very carefully, and if there

is anything that is not satisfactory, you can discuss this with Mr. McCoy as he will be in Nashville sometime the early part of next week."

The precise clearance which Warner said it couldn't grant for Columbia, Gadsden and Alabama City, turned up as requested by Stengel and Sudekum in the final contracts (Exs. W. 14, W.7, W.6). The Columbia and Gadsden clearances were evidently not included until after March 14, 1940, the Warner approval date of the contracts, as in McCoy's letter to Kalmenson of March 17, 1940, he stated that Sudekum's request for these clearances is one of the changes which was holding up the signing of the contracts (Ex. 199). The other clearances contained in the franchise as finally signed are as follows:

Brownsville, Tenn. 14 days over Bells and Summerville
Cookeville, Tenn. 14 days over Monterey
Copperhill, Tenn. 7 days over Blue Ridge, Ga.
Dickson, Tenn. 14 days over Waverly
Earlington, Ky. 14 days over Dawson Springs
Harriman, Tenn. 30 days over Kingston
Humboldt, Tenn. 21 days over Dyer
Huntsville, Ala. 60 days over Mill houses and Y. M. C. A.
Lake City, Tenn. 30 days over Norris, Briceville and Carryville.
Madisonville, Ky. 14 days over Dawson Springs
Manchester, Tenn. 14 days over Woodbury
Milan, Tenn. 21 days over Dyer
Morristown, Tenn. Prior run over Jefferson City
Murfreesboro, Tenn. 30 days over Woodbury
Rockwood, Tenn. 30 days over Kingston
Russellville, Ala. 14 days over Holeyville, Ala.
Tracy City, Tenn. 30 days over Palmer and Mt. Eagle

These clearances were an effective means of controlling Sudekum's competition in nearby cities. None of the clearances granted bore any relation to the film rentals received by Warner as they were not negotiated until after the rentals had been agreed upon.

[fol. 3155] *The Fox Franchises*

127. The first Fox franchise (Exs. F.10, F.11) was negotiated in February and March 1936, and was preceded by circumstances summed up by District Manager Ballance

in a letter to Eastern Sales Manager Kupper on March 13, 1936 as follows:

"As you know we have had a great deal of difficulty with the Sudekum circuit and the procedure in the past has been such that we almost had to take anything that Sudekum wanted to give us. I have been on the verge of splitting with him a time or two, but could not see that I was gaining anything, so always late in the season would take rather unsatisfactory deals.

"However, this year, after repeated efforts to get together with him on any kind of a deal that would show an improvement over anything we received in the past, I closed up and called it a day and attempted to salvage what money I could from a few opposition points, thinking that maybe with Fox out some opposition would open up. He has opposition in the towns of Gadsden and Maryville in the Atlanta territory and in the Memphis territory, he has opposition in Paris, Tennessee. In the Indiana territory, they sell a little bit of a town outside of Madisonville, called Earlington, which George Landis advised me he received a very satisfactory contract from for the K-3 product. In Decatur, he has opposition in a town called Hartselle, which we have sold, but this is all we could salvage; I imagine the whole thing amounted to about seven or eight thousand dollars.

"Since I have sold away from Toney, he has evidenced some desire to get together with us in the future and while it is too late to sell him in some of his spots this year, we have worked out a deal that I think is excellent. I am sending you a recap of the money that we have received, which includes all of the towns in his circuit, for which he buys direct, (he still owns half interest in the Hill Circuit, but this is a separate corporation). This shows the gross total of $24,745.50.

"Briefly, the deal is this:—he is to give us $20,000.00 for half of the K-3 product, but deducting from this, the money he would normally allocate against the towns w-ere we have already sold. In other words, we sell him only half of the K-3 product, but in view of the fact that we receive more from these towns than we have received from Tony, the deal will probably run

up to considerably more than $20,000.00, for the K-3 product.

"The deal for these towns is to be in accordance with the proposed franchise that I am attaching. This is an accumulative 5% increase on K-4, K-5, and K-6, and will have either a weekly, monthly or quarterly payment plan, so that we receive $769.00 a week for the next three years. As a matter of fact, this is a greater increase for him to pay, but he does not like the fact that I am selling what little opposition he has.

[fol. 3156] "Sudekum plays no pictures on percentage. We have never been able to get a percentage and neither does Paramount nor Metro and it is just one thing that he will not go far. As a matter of fact, he has no opposition and is not the best operator in the world and with the big lift that we are receiving from anything we have secured in the past, I think this is an excellent deal and takes care of one of the most troublesome spots that I have almost ever experienced.

"Looking at the past records of what we have received for Fox, I believe you will agree with me that this increase from $24,745.50 to $40,000.00 with a gradual increase each year is pretty good.

"The deal has been agreed upon in principle, but he wants to allocate the money a little differently than he has in the past, but the total will start at $40,000.00, and end at $44,000.00.

"I would appreciate your giving me your thoughts in the matter, or anything else you might want to add to this, but I would like to get it operating as quickly as possible. These are all very small towns, no opposition and some of them are pretty bad looking propositions insofar as gross returns are concerned, although a few of them are pretty good. I do not think I could ever do any better and I am quite sure that I could not go up there "cold" and sell him next year's product at $40,000.00.

I will be in Dallas for several days next week and would like to hear from you as soon as possible." (Ex. 205).

The deal for half of the K-3 product (1935-36 season R. 4261) was made on separate contracts dated March 30, 1936, for Crescent and two Rockwood situations, and on May 15,

1936, for 10 more Crescent situations (Ex. 13). The documents containing the franchise deal (Ex. F, 10) for the Crescent and Rockwood towns and (Ex. F. 11) for the Muscle Shoals towns are dated April 2, 1936, and April 3, 1936, respectively. They cover the three succeeding seasons, 1936-37 to 1938-39, inclusive (K-4, K-5 and K-6).

Even though the independents in the towns where there was then opposition, Earlington, Gadsden, Maryville, Paris and Hartselle, paid Fox more than it received from Sudekum, the total revenue from them added up to only "about seven or eight thousand dollars." The Sudekum franchise offered a total rental of better than $120,000.00 for all situations for the three years' product and that being the case, this product was sold away from the independent exhibitors [fol. 3157] at the "opposition points", who had bought the 1935-36 product, without giving them any opportunity to negotiate for the next season. Everyone of these independents, who paid more than Sudekum in their individual situations but could not collectively match his total Circuit purchase, was eventually taken over by Crescent or Rockwood before the expiration of the franchise in August 1939.

Hendren's letter of February 7, 1936 (Ex. 258), indicates that if he could have gotten the Fox 1936-37 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greenville. For the 1935-36 feature product in Maryville, he paid $2,456.61 as against $570.00 paid by Crescent for the 1934-35 feature product and $1,080.00 paid by Crescent for the 1936-37 feature product (Ex. 327) in the same town. For the 1935-36 feature product in Greenville, he paid $2,589.00 against $1095.00 paid by Crescent for 1937-38 (Ex. 328).

128. The forty thousand dollar a year deal included the Muscle Shoals, as well as the Crescent situations and was made as a lump sum deal for both companies' theatres. Atlanta branch manager Wilson's letter of April 30, 1936 (Ex. 208) to Mr. Jack Bloom in the contract department at New York, explains how the deal was figured. In that letter he says "To start with the K-4 deal (1936-37 season) represented for the Crescent Amusement Company, the Rockwood Amusement and the Muscle Shoals theatre totaled $40,000.00, and in the same letter he states:

> "I can easily imagine the difficulties you must have had in analyzing the Sudekum deal because I thought

I would go crazy in trying to figure it out, in starting with a lump sum of money and breaking it down into each allocation for each town probably left me a little dizzy."

In explaining the origin of the franchise negotiations, Wilson testified as follows:

"The year before this franchise was made, we did not sell the Sudekum circuit, and sold the opposition houses [fol. 3158] in the towns there was opposition, and it had gotten to a point where it did not look like we would ever make a deal with the Sudekum Circuit; but Mr. Rosenbaum came into Atlanta to arrange a deal for his towns, and we persuaded him to act to see if he couldn't bring the Sudekum circuit and negotiate a deal with us for the entire situation."

Rosenbaum testified that he submitted a three-year franchise proposition to Sudekum on behalf of Paul Wilson, of Fox, after Wilson cut prices down at Rosenbaum's suggestion, and that Sudekum accepted because the prices looked better. Rosenbaum also testified that about the same time he agreed with Fox on a three-year franchise for Muscle Shoals. Then he said that Balance flew down to Florence and wound up the deal there.

129. The deal, as finally made and incorporated in exhibits F. 10 and F. 11, is as follows:

For the Crescent and Rockwood towns, all of the features released during the 1936-37, 1937-38 and 1938-39 seasons were bought first run in all of their situations, except Nashville. The total rentals to be paid by each company in monthly installments each year are as follows:

Year	Rockwood	Crescent	Total
1936-37	$1,624	$33,376	$35,000
1937-38	1,724	35,026	36,750
1938-39	1,864	36,723.50	38,587.50

The rentals allocated for individual theatres are broken down in deal sheets for each town, which have also a minimum commitment for each town of either 40 or 52 features.

The exhibitor is to select the features it will use within 14 days after they become available (p. 8). Paragraph "Eighth" is as follows: "As to any motion picture photoplays that have been exhibited by the exhibitors for regular

exhibition run in any of the theatres mentioned in the deal [fol. 3159] sheets, annexed, said exhibitors shall have the right to exhibit such motion picture photoplays again upon the terms to be mutually agreed upon. It is expressly understood that such privilege shall be granted only in such cases where the repeated exhibition of the motion pictures will not interfere with the clearance granted to any subsequent exhibitor" (pp. 8, 9).

The Crescent clearance granted by the franchise is specified in the deal sheets as follows:

Alabama City, clearance over Attalla, Ala., providing pictures are played within 21 days of national release date.
Columbia, Tenn., clearance over Mt. Pleasant, Tenn.
Decatur, Ala., clearance over Huntsville, Ala.
Gadsden, Ala., clearance over Attalla, Ala., providing first run plays within 21 days of national release date.
Madisonville, clearance over Earlington, Ky.

No second runs were bought in any situations.

For the four Muscle Shoals towns, the same features were licensed first-run, with a minimum commitment of 42 each year in Florence and 36 in Athens, Sheffield and Tuscumbia.

The total rental, to be paid quarterly, is as follows:

1936-37	$5,000.00
1937-38	$5,250.00
1938-39	$5,512.32

Pictures exhibited are to be selected within 14 days after availability. Exhibitor is granted privilege of interchanging Florence, Sheffield, Tuscumbia features (pp. 6, 7).

Clause "Tenth" is a repeat-run provision identical with clause "eighth" in the Crescent-Rockwood franchise.

129. In June 1939, before the expiration of this franchise, Rosenbaum, Sudekum and Stengel negotiated a new one at [fol. 3160] Nashville with Wilson. At the conclusion of the negotiations, on June 27, 1939, Wilson typed out a memorandum of the deal, which memorandum states the terms for all of the Muscle Shoals, Crescent and Rockwood situations (Ex. 286) and signed the original, which he gave to Sudekum or Stengel and gave a copy to the other; Sudekum signed the copy in evidence "Crescent Amusement Co. by Tony Sudekum" and gave it to Wilson. Wilson had pre-

viously given Rosenbaum a signed pencil memorandum of the Muscle Shoals deal (Def. Ex. 94).

Sudekum was aware of all of the negotiations for all of the situations covered when he signed the memorandum. Before it could take final form, this suit intervened and it eventually was embodied in three documents, one for Muscle Shoals (Ex. F. 13), one for Crescent and Lyric (Ex. F. 8), and one for Rockwood and its subsidiaries (Ex. F. 12). As originally proposed, there was one document for Muscle Shoals, and one for Crescent, Rockwood, et al., as in the former deal, but the Crescent-Rockwood document was split into two documents pursuant to Stengel's letter of May 30, 1940 (Ex. 355), "because of present conditions."

130. The new franchise covers the three seasons 1939-40, 1940-41 and 1941-42, first run in all of the Crescent, Lyric, Rockwood and Muscle Shoals towns and contains certain second-run and repeat-run option provisions. All of the Rockwood towns had a minimum commitment of 40 pictures and no second runs were bought for any of them. The deal sheets attached to the agreement covering these towns (Ex. F. 12), which bears the statement on the cover, "Distribution Agreement covering the Sudekum Circuit", "Dated: August 22, 1940", are all dated June 27, 1939. June 27, 1939 is also the date that all of the first-run deal sheets bear which are attached to the agreement giving the Crescent and Lyric terms (Ex. F. 8), which also has the statement on the cover "Distribution Agreement covering the Sude-
[fol. 3161] kum Circuit", but is "Dated: July 31, 1940." The second-run deal sheets attached to this agreement are all dated December 14, 1939.

The Muscle Shoals agreement is dated "as of June 27, 1939" (Ex. F. 13), and the deal sheets attached to it all bear that date. It contains no second-run commitments and contains the same provisions with respect to a repeat-run as that contained in the previous franchise.

However, the Rockwood and Crescent franchises each contain the following repeat-run provisions numbered *Eighth* in each agreement:

> "In any towns in which only one theatre operates regularly (where a definite second-run is not sold) the Exhibitors may play any feature picture as a repeat run and will pay therefor a license fee of fifty per

.cent (50%) of the original license terms, but which license fee shall in no event be less than the prices set forth in the lowest allocation. The Exhibitors agree, however, that they will notify the Distributor within thirty days (30) of the last day of the first run exhibition of their intention to use any picture as a repeat run, and further agree that they will submit exhibition dates for the showing of the picture within sixty days of the last exhibition of the first run. For every repeat run the Exhibitors may, however, eliminate a picture from the lowest classification. It is further understood and agreed that if during the term of this franchise a competitive theatre operates in any village, city or town listed on the attached deal sheets (where a definite second run is not sold) the Exhibitors shall not have the right to exhibit any feature motion pictures as a repeat run" (Ex. F. 12).

Sudekum had experienced some difficulty with second-run opposition during the preceding franchise. Henry had come close to obtaining a second run from Fox in Union City, and Anderson had actually been able to license Fox second run in Hopkinsville. Sudekum had been unable to buy a second run in Gallatin shortly after he opened his theatre there, apparently because Fox did not sell second runs anywhere in towns of that size. The obvious solution to problems of this kind was an unqualified repeat-run option in the new franchise, similar to that obtained from Paramount, which would automatically block the sale of an opposition second run. The memorandum deal (Ex. 286) provided for an optional repeat run in all situations at 50 per cent of the first-run film rental, except where such percentage would not represent a film rental equal to the lowest first-run [fol. 3162] allocation, (Ex. 286) but Ballance refused to accept an unqualified repeat run option. In lieu of that clause, a selective second-run commitment for 26 pictures each year was later negotiated for the larger towns, where there were two or more theatres operated by Crescent, including Hopkinsville and Union City, as set forth in Wilson's letter of January 11, 1940, to Kupper (Ex. 352).

The repeat-run clause that finally appeared in the franchise, therefore, provided for a repeat-run only where a definite second run was not sold and even in these situations, the clause provided that if during the term of the franchise,

a competitive theatre is operated in any situation where a definite second run was not sold, the repeat-run privilege is eliminated. The result was that in the larger situations where there had been second-run competition in the past, they were compelled to make a selective second-run commitment to get protection against that kind of competition on Fox product in the future. In situations where they were unwilling to make even a selective second-run commitment, Fox refused to let them tie up an additional run with a repeat-run option, except during such time as there was no opposition in the towns in question. The obvious restraint on second-run competition resulting from a repeat-run option in towns where there were competing theatres was forcibly brought to the attention of Stengel and Sudekum in the course of the Fox negotiations in November 1939, and the Warner franchise was not finally signed by the exhibitors until after March 17, 1940.

131. In the matter of clearance, the Fox company was also concerned about the legal aspects of the Crescent and Rockwood demands for widespread clearance which their towns had not previously enjoyed. With respect to this subject, Wilson wrote Stengel on November 22, 1939:

[fol. 3163] "This will acknowledge your letter of November 9 to which you attached a letter from Mr. Armistead relative to the clearance clause and repeat-run clause which you want to insert in the franchise. I am answering both of those questions separately.

"As I advised you during our telephone conversation, our attorney from New York was in Atlanta a few weeks ago to secure information to guide him in preparing our defense on the government suit. Upon his return to New York he discussed the matter with our legal department and with Mr. Kupper, and Mr. Kupper wired me, which telegram I read to you over the phone, to the effect that the clearance cannot be changed or made any different from what it was in the previous year.

"Then upon receipt of Mr. Armistead's letter yesterday I discussed the matter at length with Mr. Ballance, who stated that it would not be advisable to change any clearance clause in view of the instructions given us which are as follows: Under no circumstances

is clearance to be changed from that granted previously. You can readily understand that changing these clauses would only mean our continuously defending lawsuits unnecessarily because any clearance that worked out satisfactorily previously should not necessitate any change."

132. The matter of clearance was handled in the franchise finally drawn as follows:

In the following situations, the following specific clearance was granted:

Alabama City, Ala., clearance over Attalla, Ala., providing picture played within 21 days of national release date.
Columbia, Tenn., clearance over Mt. Pleasant, Tenn.
Gadsden, Ala., same as Alabama City, (Ex. F. 8).
Central City, Ky., 60 days over Drakesboro, Ky.
Elizabethtown, Ky., 14 days over Hodgenville, Ky.
Providence, Ky., 30 days over Clay, Ky.

In all other situations, no clearance was specified and the statement "clearance to be agreed upon" was substituted. In no situations was there any clearance against a theatre covered by the franchise, except the Crescent second-run houses in Nashville. This, of course, leaves Fox free to handle the clearances which are of doubtful legality, simply by making prints available in a discriminatory manner without any express statement of clearance, as was done in [fol. 3164] Gadsden, Alabama, with reference to the clearance over the Dixie in East Gadsden, which the Ritz in Alabama City enjoyed.

The result reached in the Fox franchise was thus substantially the same as that accomplished by the Paramount and Warner franchises, insofar as elimination of first and second-run competition and the imposition of arbitrary clearance was concerned.

133. One obvious purpose of all three franchises was to give Fox, Warner, and Paramount an ostensibly valid legal excuse for discriminating in favor of the Sudekum circuit in licensing its films during the period covered in the same manner that they had discriminated in the past. The Sudekum circuit, by virtue of having built up a preponderance of closed situations, through the persistent elimination of competition, was in a position to deal effectively with such

competition as remained or might arise in the future, in making one-year film deals, but franchises offered protection against future changes in those discriminatory practices. In negotiating a consent decree in the New York suit filed on July 20, 1938, the Government exempted from its operation those franchises which had been signed prior to the date the negotiations commenced, June 6, 1940.

F—Columbia:

134. Defendant Columbia Pictures Corporation did not at any time during the period involved in this case combine with the defendant exhibitors herein or any of them unreasonably to restrain interstate trade or commerce in motion picture films or to monopolize or to attempt to monopolize the exhibition of motion pictures in the towns mentioned in the complaint known as Crescent towns in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi or North Carolina.

[fol. 3165] 135. Defendant exhibitors have not alone or in combination compelled defendant Columbia to grant to all of any of them in any or all of said Crescent towns, the exclusive privileges during the time said exhibitors have operated theatres in said towns of selecting from the feature pictures released by Columbia such feature pictures as defendant exhibitors deemed suitable for exhibition in said towns as and when prints thereof become available before any of said pictures were released to any other exhibitors in said towns; and said exhibitors have not alone or in combination compelled defendant Columbia to grant to all or any of them in all or any of said Crescent towns the exclusive privilege of receiving clearance on feature pictures over competing theatres in said towns; nor has Columbia granted any of such privileges to said defendant exhibitors.

136. Defendant Columbia has not been dominated, controlled, coerced or influenced by the defendant exhibitors to withhold its feature pictures from independent exhibitors in the said States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi or North Carolina or in so-called Crescent towns or in towns where independent exhibitors were and are in competition with defendant exhibitors, but on the contrary for the period in question the feature pictures pro-

duced and distributed by defendant Columbia were at all times ready and available to independent exhibitors in the so-called Crescent towns and in all towns where independent exhibitors were in active competition with defendant exhibitors in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi and North Carolina.

137. For the period in question defendant Columbia made it a practice to give independent exhibitors in Crescent towns, including competitive towns, reasonable rejection privileges in its contracts, as well as fair and reasonable clearance privileges. For example, in Russellville, Kentucky, defendant Columbia entered into eight contracts with Arthur Mitchell, independent operator, for the period in question (Defendant's Exhibit 1 to 8) from which it ap- [fol. 3166] pears that said Mitchell had the right to reject a substantial number of pictures; in Spruce Pine, North Carolina, defendant Columbia Pictures Corporation entered into three contracts with independent exhibitor J. E. Taylor for the period in question (Defendants' Exhibits 10 to 12) from which it appears that the said Taylor had the right to reject a substantial number of pictures; in Mount Pleasant, Tennessee, defendant Columbia entered into eleven contracts with independent exhibitors Rubble B. Page for the period in question (Defendants' Exhibit 13) from which it appears that said Page had the right to reject a substantial number of pictures; in Gallatin, Tennessee, defendant Columbia entered into eighteen contracts with independent exhibitor W. F. Roth for the period in question (Defendants' Exhibit 33) from which it appears that the said Roth had the right to reject a substantial number of pictures.

138. In Mount Pleasant, Tennessee, defendant Columbia did not subject the independent exhibitor Rubble B. Page to clearance in favor of a closely competing town, to-wit, Columbia, Tennessee, in which one of the defendant exhibitors operated a theatre, as appears by the eleven contracts, (Defendants' Exhibit 13). In Dresden, Tennessee, the six contracts made between defendant Columbia and the independent operator W. O. Taylor for the period in question, (Defendants' Exhibit 14), affirmatively contained provisions that no theatre within a radius of fifteen miles of Taylor's theatre was to have protection over him, although some of the defendant exhibitors were operating theatres in

the towns of Martin and Greenfield, Tennessee, which were less than fifteen miles from Dresden, Tennessee. In Earlington, Kentucky, the last two seasons' contracts out of a group of eighteen contracts in evidence (Def. Ex. C35), made during the period in question between defendant Columbia and independent E. W. Dozier, gave said exhibitor fourteen days clearance over a theatre operated by one of the defendant exhibitors in a much larger town located nearby.

139. Defendant Columbia invariably tried to obtain the best rental possible for its pictures for the period in question. In Crescent towns including towns in which inde- [fol. 3167] pendent operators were in competition with some of the defendant exhibitors, defendant Columbia invariably leased its product to such independent exhibitors and refused to sell its products to defendant exhibitors. Specifically such towns and independent exhibitors were:

Gallatin, Tennessee, W. F. Roth.
Earlington, Kentucky, E. W. Dozier.
Rogersville, Tennessee, William P. Miller.
Union City, Tennessee, John D. Henry.
Hopkinsville, Kentucky, Andy Anderson.
Athens, Alabama, Max Buchanan.

140. An independent exhibitor, E. W. Dozier operated a theatre since the season 1931-32 in Earlington, Kentucky, defendant Columbia sold him its entire product for each season from 1931-32 down to 1939-40 (with the exception of the season 1934-35). This town is in competition with Madisonville, Kentucky, situated about seven miles away, in which there is a theatre operated by defendant Crescent Amusement Company, Inc. In January 1934 defendant Columbia in leasing its product to said Dozier for Earlington, Kentucky, inserted a clause therein at Dozier's request to the effect that if it sells Madisonville, Kentucky, said Dozier has the privilege of cancelling the unplayed portion of his contract. (Defendant's Exhibit 73).

141. Defendant Columbia was justified in asking for a deposit from the witness Tim Smith who wanted to buy three seasons' product for the towns of Harriman, Morristown and Newport, Tennessee, in 1938, for the reason that said Tim Smith had entered into a contract with said defendant in 1932 for his theatre in Knoxville and there-

after had refused to perform the same or play any of defendant's pictures mentioned in said contract, or to pay for them; that his financial condition in 1938 was bad.

142. The course of conduct of the defendant Columbia during the period in question showed a willingness on the [fol. 3168] part of said defendant to rent or lease its product freely to independent exhibitors in all the Crescent towns including all competitive towns in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi and North Carolina, upon a fair competitive basis as between independent exhibitors themselves and independent exhibitors and defendant exhibitors.

143. The Government failed to prove that defendant Columbia had been guilty of any conspiracy to restrain trade or commerce with the defendant exhibitors or any of them, or that defendant Columbia has committed any of the acts charged in the complaint.

G—Universal Pictures Company, Inc.

144. The defendant, Universal Pictures Company, Inc., is a corporation incorporated under the laws of the State of Delaware, with its executive office in the city of New York. The defendant, Universal Pictures Company is not engaged in the distribution of films.

145. Universal Pictures Company, Inc., did not at any time enter into any contract with any of the defendant exhibitors in this action for the exhibition of films, nor did it enter into any business dealings or relationship of any kind with any of such defendants. Universal Pictures Company, Inc., did not ship, send or make available in any manner any motion picture photoplays to any of the defendant exhibitors in this action, and has not and did not contract, combine or conspire with any of the aforesaid for any purpose whatsoever.

146. Universal Pictures Company, Inc., has not contracted, combined or conspired with any of the defendant exhibitors with the intent or for the purposes mentioned in the bill of complaint.

147. The plaintiff has introduced no proof to sustain any charges in the bill as to Universal Pictures Company, [fol. 3169] Inc., There is no evidence whatsoever to sustain

any charges in the bill of complaint herein as to Universal Pictures Company, Inc.

II—*Universal Film Exchanges, Inc.*

148. Universal Film Exchanges, Inc., does not produce any motion pictures. It distributes in the United States the positive prints of copyrighted motion pictures produced by Universal Pictures Company, Inc.

149. The Universal Film Exchanges, Inc., has not aided the defendant exhibitors in taking over and keeping closed any theatre in any town in which the defendant exhibitors, or their affiliates have operated at any time during the period covered by this lawsuit, and up to the present.

This defendant granted to the defendant exhibitors only such choice of products as their contracts, made in the usual and ordinary course of business, and in the exercise of its independent judgment for securing the greatest amount of revenue from the motion picture films provided.

150. In fixing the price for their product and in granting the privileges of selection and clearance as between the defendant exhibitors and independent or competing operators, Universal Film Exchanges, Inc., acting separately and independenently, and in the exercise of its own business judgment, has at all times attempted to license and has licensed exhibition rights of their respective photoplays so that it would receive from such distribution the largest possible returns consistent with sound business policy and with existing conditions, and without knowledge of the action taken by any other defendant distributors; and without any knowledge of the effect of such action upon competitors of the defendant exhibitors.

151. As to the "other towns" mentioned in paragraph [fol. 3170] 2 (e) of the plaintiff's several bills of particulars, no proof was introduced by the plaintiff which showed or tended to show any discrimination on the part of Universal Film Exchanges, Inc., in the licensing of motion picture films to the independent exhibitors in said towns. On the contrary, where it is mentioned in connection with said independent towns the proof shows that it granted the independent operators the usual and ordinary privileges incident to the licensing of motion picture films in similar towns in the areas covered by this lawsuit.

152. As to the situations mentioned in paragraph 5 (d) of the plaintiff's several bills of particulars addressed to paragraph 48 of the bill, except in the situations hereinafter specially discussed, there is no proof whatsoever in the record on the situations therein mentioned as to Universal Film Exchanges, Inc.

153. Universal Film Exchanges, Inc., contracted with Dozier for the exhibition of their entire product in the Roxy Theatre at Earlington for each of the seasons 1934-35 to 1938-39 inclusive. It did not sell any of its product either to the Crescent Theatre at Madisonville or to the Earl Theatre at Earlington at any time during the period covered by this lawsuit. Its contract with Dozier for 1938-39 gave him fourteen days clearance over Madisonville, and thirty days over second run Earlington.

154. At Brownsville, Tennessee, there is no evidence that Universal Film Exchanges, Inc., sold either Lawing or the Crescent Amusement Company.

At Paris, Tennessee, Lawing made no application for Universal product and it does not appear that the Crescent Amusement Company contracted for Universal Product during the period that it operated in competition with Lawing.

155. There is no evidence that Universal Film Exchanges, Inc., discriminated against either of the independent operators, Parrott & Hendren Amusement Company or Ausmus & Parrott Amusement Company, in Greenville, or Mary- [fol. 3171] ville, Tennessee, in the licensing of films at any time.

156. Universal Film Exchanges, Inc. had sold its product to Crescent Amusement Company at Morristown and Harriman continuously each year, beginning with the 1934-35 season, and its product for those two points was under contract with the Crescent Amusement Company at the time Peerless opened in competition with Crescent at those two towns.

At Newport Universal Film Exchanges Inc. had sold Baird individually prior to acquisition of interest in his theatre by Cherokee Amusement Inc., and continued to sell Newport Amusement Company, Inc. thereafter.

There is no evidence that Peerless Enterprises applied for Universal product at either of the three towns above mentioned at any time, and no evidence that Universal Film

Exchanges, Inc., at any time discriminated against Peerless Enterprises, Inc. in the sale of its product in these towns.

157. There is no evidence in the record as to any discrimination or any dealings on the part of Universal Film Exchanges, Inc., with Ray Smith at Murfreesboro, Tenn. Ray Smith operates a theatre at McMinville, Tennessee, in competition with Cumberland Amusement Company. There is no testimony as to any theatre operation at McMinville, Tennessee, by James R. Wilson.

158. Universal Film Exchanges, Inc., now sells and has sold its product at McMinville, to Ray Smith for a number of years, and does not sell Cumberland Amusement Company at that point. There is no evidence that Universal Film Exchanges, Inc., has discriminated against him in any way.

159. Roth at Gallatin, Tennessee, had difficulty with Universal Film Exchanges, Inc., in 1928, and has neither bought nor tried to buy its product since that time.

160. William Griffith Head operated a theatre in Greenville, Kentucky, from 1933 until September 1938, when he sold out to Rockwood Amusements, Inc., which had operated [fol. 3172] an opposition theatre to him at that point since 1937. He was consistently able to contract for the product of Universal Film Exchanges, Inc., during the entire period of his operations at Greenville.

161. There is no proof of any dealings between Universal Film Exchanges, Inc., and Anderson, or Crescent Amusement Company, for the period during which Anderson was in competition with the Crescent Amusement Company at Hopkinsville, Kentucky.

162. Universal Film Exchanges, Inc. sold to Buchanan its 1937-38 and 1938-39 product for Athens. Buchanan had considerable difficulty in playing off this contract as and when pictures became available, applied for and received substantial price concessions, and at the time he sold out to Muscle Shoals he was delinquent in his contract and owed Universal Film Exchanges, Inc., substantial sums under his contract. He paid for such pictures as he had played under the contract, but refused and failed to make any payment for the amounts due upon the unliquidated portion of the contract.

163. In conducting its negotiations and making its contracts for the licensing of films in the territory covered by the complaint, Universal Film Exchanges, Inc., conducted all its negotiations and made all its contracts, whether with independents or defendant exhibitors, without any intent, purpose or effect to bring about a monopoly in the exhibition of motion pictures in that territory, or unduly restrain interstate commerce, but with the sole purpose and intent of receiving the maximum amount of revenue legitimately possible.

I — United Artists:

164. The selling season for each year commences after the respective convention of United Artists Corporation, usually held during the month of July, during which period the salesmen out of the various branch offices attempt to sell the maximum number of *of* exhibitors in their respec- [fol. 3173] tive territories.

United Artists Corporation sells pictures released by it in producer blocks, selling one or more of the pictures released by its respective producer clients in one separate contract with the exhibitor, or exhibitors, purchasing such picture or pictures. There is no regularity of release with respect to features sold by United Artists Corporation. A picture sold as part of one season's releases may not be released until one or two seasons later, or may never be released.

165. United Artists Corporation has made the following contracts with the defendant exhibitors and their affiliates for the season 1934-35 to 1936-37, inclusive:

Crescent Amusement Company, dated February 1936; six pictures, 1934-35 season	$4,250.00
Crescent Amusement Co., dated April 4, 1935, three pictures	$3,500.00
Crescent Amusement Co., dated June 3, 1935, six pictures, 1934-35	$4,500.00
One picture, 1935-36	1,500.00
	$13,750.00
Crescent Amusement Co. contract dated March 20, 1936, four pictures 1935-36 season	$4,750.00
Crescent Amusement Co. contract, undated four pictures, 1935-36 season	$3,350.00
	$8,100.00

The contracts for the 1934-35 and 1935-36 seasons are blanket contracts covering eighteen towns operated by Crescent Amusement Company, except for the two contracts for four pictures each of the 1935-36 season three more Crescent towns were added.

Crescent Amusement Co. contract dated Septem-
[fol. 3174] ber 2, 1936, ten pictures 1936-37
season, and two pictures, 1937-38 season $7,353.00
Crescent Amusement Co. contract dated Decem-
ber 2nd, 1936, ten pictures, 1936-37 season, and
two pictures, 1937-38 season 1,008.00

The contract of September 2nd, 1936, covers twenty-one Crescent towns and six sub-runs in the City of Nashville.

Contract of December 2nd, 1936 covers eight Rockwood towns and one Hartselle town.

Rockwood Amusements contract dated May 4, 1937, five pictures, 1936-37; one picture 1937-38 season and four pictures 1938-39 season, $3,816.00. The towns covered by this contract are the same as those covered by the contract of December 2nd, 1936, with the addition of five Cherokee towns.

Crescent Amusement Company contract dated May 4, 1937 five pictures, 1936-37 season, one picture 1937-38 season, and four pictures, 1938-39 season, total $3,856.00.

The towns covered by this contract are the same as those covered in the contract of September 2nd, 1936, except that Lewisburg, owned by Lewisburg Theatres, Inc., is substituted for Kingsport, and Elizabethtown, Kentucky, owned by Kentucky Amusements Inc., and Russellville, Alabama, owned by Hartselle Theatres, Inc., are added.

In each of these contracts the price per picture is fixed at a lump sum for all of the situations covered by the contract with no allocation as to the respective individual situations. There is no allocation as to price between the several separate corporations whose towns are included in the same contract. The total of the foregoing contracts is $16,033.00.

During the 1937-38 season United Artists Corporation negotiated with the defendant exhibitors and their affiliates [fol. 3175] for the licensing of their products for their products for that season but were unable to make a contract.

Such United Artists pictures as were played by the defendant exhibitors and their affiliates in the 1937-38 season were hold-overs on prior contracts hereinabove mentioned.

Again in the summer of 1938 United Artists Corporation initiated negotiations with the defendant exhibitors and their affiliates for sale of the 1938-39 product, which negotiations extended over a period of seven or eight months, during which time United Artists made contracts wherever possible with various independents operating in competition with the defendant exhibitors. Finally, on April 8th, 1939, United Artists Corporation was able to make a contract with the Crescent Amusement Company and its affiliates for certain pictures of the 1938-39 product. The contract was signed by Tony Sudekum and included first-run exhibitions in eighteen Crescent Amusement Company towns and nine sub-runs in the City of Nashville, a total of twenty-seven Crescent situations; first run in six Cherokee towns, five Ruffin towns, ten Rockwood towns, four Chickasaw towns, one Dickson town, two Hartselle towns, one Kentucky Amusements town, one Lewisburg town, three Midstate towns, one Lawrenceburg town, and one Newport town, a total of sixty-one situations.

The contract provided for the exhibition of ten pictures for the 1938-39 season and two pictures for the 1939-40 season, for a total amount of $14,800.00. Separate price was made for each picture listed in the contract but there was no allocation as between the various corporations covered by the contract, nor was the price broken down into specific amounts for each town. It provided, among other things, that the entire rental for each picture was to be paid with the first shipment of the picture.

166. On November 22nd, 1940, the United Artists Corporation made a contract with the defendant Tony Sudekum, and Kermit C. Stengel, for the exhibition of fourteen pic- [fol. 3176] tures for the 1939-40 season for a total of $20,750.00. This contract covered first-run in twenty-one Crescent Amusement Company towns and ten sub-runs in the City of Nashville, a total of thirty-one situations, and first-run in nine Cherokee towns, five Ruffin towns, twelve Rockwood towns, five Chickasaw towns, one Dickson town, two Hartselle towns, one Kentucky town, two Midstate towns, one Lawrenceburg town, two Newport towns, and one Lyric town, a total of seventy-three situations.

As to the situations covered, the only difference between the seventy-three situation contract and the sixty-one situation contract was the additional towns of Crescent and affiliated exhibitors, and also the addition of some towns of affiliated exhibitors not covered by the sixty-one situation deal.

As in the sixty-one situation deal, a blanket price was made for each picture in the seventy-three situations, but there was no allocation as to price as between the affiliated corporations, nor was the price for each picture broken down as between the individual situations.

This contract, among other things, provided that the entire rental for each picture was to be paid prior to its first shipment.

The above two latter contracts were in no respect different from the prior United Artists contracts above mentioned except in an increased number of affiliated corporations and towns covered. These were all the contracts made by United Artists with defendant exhibitors or their affiliates for the period covered by this law-suit except with Muscle Shoals Theatres, which always made and negotiated its own contracts, and contracts with Rogersville Theatre, Rogersville, Tennessee, and Cumberland Amusement Company, hereinafter mentioned.

167. In the negotiation and execution of the two foregoing contracts United Artists pursued its usual, ordinary and customary practice in contracting for the exhibition of motion pictures with exhibitors and affiliated exhibitors operating groups of theatres.

168. In the negotiations and execution of the two fore- [fol. 3177] going contracts United Artists Corporation pursued the usual and customary policy which they had found through long experience to be particularly desirable and advantageous to it in the operation of its business; in that, first, it received payment in full at or before the first exhibition of each picture, thus furnishing stability of financing for its producer clients; and second, in that it insured the liquidation of the contracts.

169. The conditions under which United Artists conducts its distribution business is substantially different from other distributors in the motion picture industry. It distributes for a limited number of producers under con-

fractual arrangements with them, and has for distribution each year only a limited number of first-class, expensive, feature length pictures commonly referred to in the industry as "A" pictures; whereas other distributors generally distribute two or three times as many feature length pictures, and also shorts and news reels as well.

The business of the United Artists in some respects resembles that of a cooperative venture, the producers exercising certain control and supervision over the distribution of their respective pictures, the prices to be paid by the exhibitors and the days on which they are to be played by exhibitors, and the United Artists retains a percentage of the film rentals as its fee for distribution services. A substantial portion of the pictures distributed by the United Artists are foreign made pictures, which have little or no box office appeal in the majority of theatres in the territory involved in this lawsuit and which a large number of exhibitors in this territory refuse to exhibit. Generally speaking, the pictures distributed by United Artists are costly and expensive pictures but appeal to a sophisticated type of audience commonly and generally found only in large communities. The producers distributing through United Artists produce pictures either with their own capital or upon borrowed capital pledging their own credit secured by the pledge of anticipated film rentals, and the return of their invested capital through their respective share of the [fol. 3178] film rentals procured by United Artists is a matter of prime importance to them.

Because of the fact that United Artists had no exchange in Memphis, Tennessee, the exchanges of the United Artists servicing the territory involved in this lawsuit were at a considerable distance, in many instances from 500 to 800 miles distant from many of the towns involved in this lawsuit.

The blanket contracts made by United Artists Corporation for 61 situations in 1938-39, and for 73 situations in 1939-40 provided the United Artists with full payment for the license to exhibit its pictures in the territory in question, was for the benefit of the producers for whom it was distributing. It eliminated the necessity of incurring expenses connected with the canvassing and solicitation of many small towns and situations where the type of picture distributed by United Artists did not have a great audience appeal, where the exhibitor would not exhibit such pictures

on a percentage basis on Saturdays and Sundays, as the United Artists producers demanded; and where the flat rentals procured might not warrant the time, energy, effort and expense involved in such solicitation.

United Artists in making such blanket deals for a flat rental price with the Crescent and other affiliated theatres was acting in accordance with ordinary sound and reasonable business judgment in the light of the existing conditions in the territory, and not with any purpose or intention to combine, conspire or contract with the defendant exhibitors herein to suppress or restrain interstate commerce; nor with the intent, purpose or effect of bringing about a monopoly in the exhibition of motion pictures in the territory covered by this bill.

170. Such contracts above mentioned did not in fact suppress or restrain interstate commerce, or create or tend to create a monopoly in the exhibition of motion pictures in the territory covered by the bill.

[fol. 3179] 171. United Artists Corporation sold Dozier for exhibition in the Roxy Theatre in Earlington their product for the years 1937-38 and 1938-39.

It sold thirteen of its 1936-37 product and two hold-over pictures from the 1937-38 product to Rockwood Amusement Company for exhibition in the Earl Theatre at Earlington but did not sell any of its 1937-38 or 1938-39 product for exhibition in that theatre.

The Crescent Amusement Company at Madisonville, Kentucky, had been a customer of United Artists for a portion of its product for the years 1934-35, and 1936-37 but had purchased no United Artists product for 1937-38, and was one of the Crescent towns covered by the sixty-one situation deal executed on April 8th, 1939, for the 1938-39 product.

Except for a misunderstanding which arose over the booking of the picture "Stage Coach" in June 1939, which was later settled amicably between Dozier and the branch manager of United Artists at Indianapolis, Dozier makes no complaint as to the treatment received by him from United Artists Corporation, and there is no evidence of any discrimination by the United Artists Corporation against Dozier and in favor of Crescent Amusement Company or Rockwood Amusements, Inc.

172. Lawing contracted for the 1934-35 United Artists product at Brownsville but did not play any of the pictures because he considered the price too high and the express on the film from St. Louis likewise too high.

There is no evidence that he ever liquidated this obligation. He made no effort to procure the 1935-36 product either at Paris or Brownsville.

173. There is no evidence of any discrimination by United Artists Corporation in the licensing of its pictures at Greenville, Maryville, and LaFollette, as between the Crescent Amusement Company and the independent exhibitors Parrott & Hendron Amusement Company and Ausmus and Parrott Amusement Company.

[fol. 3180] 174. United Artists Corporation sold none of its product to Crescent Amusement Company or Newport Amusement Company, Inc., either at Morristown, Harriman or Newport, during any of the period in which Peerless was in competition with Crescent Amusement Company or Newport Amusement in those towns. On the other hand, it made all of its product available to Peerless Enterprises, Inc., and made contracts with it for the exhibition of its product in those towns during the entire period of its operation there.

175. There is no evidence in the record as to any discrimination or any dealings on the part of United Artists Corporation with Ray Smith at Murfreesboro, Tennessee.

176. There is no evidence in the record of any dealings between the United Artists Corporation and Ray Smith at McMinnville, Tennessee, and no proof of any discrimination against him by United Artists Corporation.

177. W. F. Roth has continuously purchased United Artists product at Gallatin, since 1936-37, and United Artists Corporation has never sold Crescent Amusement Company at Gallatin.

178. William Griffith Head operated a theatre in Greenville, Kentucky, from 1933 until September 1938, when he sold out to Rockwood Amusements, Inc., which had operated an opposition theatre to him at that point since 1937. He was consistently able to contract for the product of

United Artists Corporation, during the entire period of his operation at Greenville.

179. United Artists Corporation has sold its product to Crescent Amusement Company at Hopkinsville, Kentucky, until the 1937-38 season. In January or February 1938 it sold its 1937-38 product to Andy Anderson at this point.

180. John D. Henry, operating a theatre at Union City, Tennessee, made an application for United Artists Corporation product at Union City on October 13, 1938, for twenty-seven pictures, 1938-39 product, and ten pictures, 1937-38 product. At the time he made his application and several times subsequent thereto Henry detailed his plans [fol. 3181] for opening opposition theatres to the Crescent Amusement Company, not only at Union City, but at several other West Tennessee towns.

As soon as Henry obtained his lease on January 3rd, 1939, he advised United Artists at Atlanta to this effect, and his applications were accepted and approved by United Artists. At the same time United Artists Corporation expressed a willingness to contract with Henry at such other opposition points as he should be able to open theatres, and made every effort to cooperate with him in his opposition to Crescent Amusement Company.

He played only a small part of his contract with United Artists Corporation at Union City, and at the time of his sale to the Crescent Amusement Company owed United Artists about one thousand dollars for unplayed pictures, none of which he ever paid.

J. — Strand Enterprises, Inc.:

181. G. W. Haynes in 1933 entered the motion picture business and operated a small theatre in Tiptonville, Tennessee, and later opened a few more theatres in small towns in that vicinity. In 1934, he entered Union City, Tennessee, and converted a store into a theatre which had about three hundred seats. This theatre was known as a Class "B" theatre and exhibited mainly action and western pictures at admission prices of 10¢ for children and 15¢ or two for 25¢ for adults.

182. Defendant, Crescent Amusement Company was operating a theatre in Union City when Mr. Haynes entered. Haynes does not recall whether or not it was a Mr.

Cox, who was manager of the Crescent Theatre at Union City, or some friend, who suggested to him the possibility of forming a connection with defendant Sudekum, or the Crescent Amusement Company. In any event, negotiations were held and Strand Enterprises, Inc., was incorporated in 1935, the capital stock being $25,000.00, one-half of which was issued to Haynes and the other half to Crescent. Haynes [fol. 3182] testified that he was desirous of forming a connection with Crescent because he was planning to expand and needed additional capital. In fact, that was the main reason for his desire to become connected with Crescent.

183. Crescent paid $12,500.00 for its half interest in Strand Enterprises, Inc., and Mr. Haynes put into the corporation his theatres at Tiptonville, Tennessee, Ridgely, Tennessee, Earl, Arkansas, and West Memphis, Arkansas. The theatre at Union City was closed and the equipment moved to Fulton, Kentucky, where the company operated a theatre.

184. The Company has opposition at Lexington, Philadelphia, and Durant, Mississippi, and Lepanto, Arkansas. The company has always had opposition in Lexington, Mississippi since the opening of its theatres there in 1937. The opposition at Philadelphia commenced in January 1941, and the opposition at Durant, Mississippi, is just beginning. An opposition house at Lepanto opened in June 1941. Strand Enterprises, Inc., is preparing to open a second theatre at Durant.

185. Haynes did his own purchasing of pictures for the Strand circuit and never had any advice or assistance from Sudekum, Stengel or any of the officials of the other defendant exhibitors. He had no franchises for films and Strand never had any clearance clauses in any of its contracts. Whenever Strand purchased an opposition theatre, in no case did it require the opposition to agree that it would not enter the motion picture business. In fact, the evidence shows that one or two of them have come back after Haynes purchased from them and have opened up an opposition theatre. A particular instance is that at Durant, Mississippi. Strand purchased from Odom Brothers and after making the purchase from the thereafter Odom Brothers reentered Durant and opened up an opposition theatre.

[fol. 3183] 186. Also, Strand Enterprises bought films from producers at times when Crescent was not buying films from those same producers. Ever since Haynes has been in business he purchased pictures from Paramount until the 1939-40 season, when he left them out. Then he left out Fox and Warner in 1939-40. Crescent was purchasing product from both of those producers for those seasons.

187. Strand Enterprises, Inc., has not received any privileges from any distributor or producer whereby competition has been eliminated, and it has not entered into any conspiracy with any of the other defendants to in any respect suppress competition. It has not compelled any distributor or producer to grant it any exclusive privilege, and no proof has been introduced that Strand Enterprises, Inc., has in any way prevented any opposition theatre from obtaining enough first class pictures for exhibition to operate its theatres. There is no evidence that Strand Enterprises, Inc., is guilty of the matters and things alleged by the plaintiff in the complaint.

[fol. 3184] CONCLUSIONS:

1. The Court has jurisdiction of this cause under the provisions of the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies", hereinafter referred to as The Sherman Act.

2. While the operation of a motion picture theatre for the exhibition of motion pictures at a fixed situs, in itself, is ordinarily considered a "local" matter and of an intrastate character, yet the making of licensing agreements between distributors of motion pictures and exhibitors and the interstate shipment of films pursuant thereto, is clearly a part of interstate commerce. The distribution of film through the branch offices of the distributors by which pictures are made available for use by the exhibitors and without which they could not carry on their "local" business, necessarily contributes to the whole.

The processes upon which exhibitors have to rely in obtaining films for exhibition, or to which distributors have to resort in undertaking to supply film for exhibition, manifestly constitutes interstate commerce. Hence it is sufficient for the purpose of testing the applicability of the

Sherman Act, if a conspiracy or combination though directed primarily against local trade, contemplates as a means for its accomplishment, interference with or unreasonable restraint of, interstate commerce by the elimination of competitive freedom of the market for the purchase of film; the monopolization of first run films, not needed and not exhibited, in order to keep competitors from exhibiting same; the elimination of competition by tying up pictures, not reasonably required in ordinary course of business, by long term contracts or franchises, and by depriving the public of seeing pictures which otherwise might have been exhibited and moved in interstate commerce.

Further, predatory practices employed in the elimination of competition although local in nature, when viewed as part of the conspiracy or combination to so interfere with interstate commerce, necessarily becomes a component part of the whole.

[fol. 3185] Especially are these principles applicable to a situation where an exhibitor has built up a large chain of theatres, operating in several different states, under circumstances where the business itself assumes an interstate character.

3. The combination or conspiracy alleged in the complaint as to Columbia Pictures Corporation has not been established. Defendant Columbia at no time during the period in question combined with any or all of the defendant exhibitors unreasonably to restrain interstate trade or commerce in motion picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures in the Crescent towns and in other towns in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi, or North Carolina, in violation of Sections 1 and 2 of the Sherman Act, and that defendant Columbia during the period in question at no time violated Sections 1 and 2 of the Sherman Act. A decree should be entered herein dismissing the complaint against Columbia upon the merits.

4. The combination or conspiracy alleged in the complaint as to Universal Pictures Company, Inc., has not been established. This defendant did not at any time during the period involved in this case, combine with the defendant exhibitors or any of their affiliates, unreasonably to restrain interstate trade or commerce in motion picture films, or to monopolize or attempt to monopolize the ex-

hibition of motion pictures in the towns mentioned in the complaint. A decree should be entered herein dismissing the complaint against Universal Pictures Company, Inc.

5. The combination or conspiracy alleged in the complaint as to Universal Film Exchanges, Inc., has not been established. This defendant did not at any time during the period involved in this case combine with the defendant exhibitors or any of their affiliates unreasonably to restrain interstate trade or commerce in motion pictures in the towns mentioned in the complaint.

[fol. 3186] 6. The Universal Film Exchanges, Inc., has not been dominated, controlled, coerced or influenced by the defendant exhibitors or their affiliates, to withhold its feature pictures from exhibitors in the towns mentioned in the complaint, but on the contrary, has made its feature pictures available to exhibitors in each exchange territory upon a basis consistent with sound business judgment and compatible with obtaining the greatest amount of revenue possible, and in the usual and ordinary course of business. None of the contracts entered into by Universal Film Exchanges, Inc., with any of the exhibitors with whom it contracted, are unreasonable restraint of interstate commerce, nor do they have the effect, or tend to have the effect, of bringing about a monopoly in the exhibition of motion pictures in the territory covered by the complaint. A decree should be entered herein dismissing the complaint against the Universal Film Exchanges, Inc.

7. The combination or conspiracy alleged in the complaint as to Strand Enterprises, Inc., has not been established. This defendant did not at any time during the period involved in this case, combine with the other defendant exhibitors, or any of their affiliates, or any of the defendant distributors or co-conspirators, unreasonably to restrain interstate trade or commerce in motion picture films, or to monopolize, or attempt to monopolize, the exhibition of motion pictures in the towns mentioned in the complaint. A decree should be entered herein dismissing the complaint against Strand Enterprises, Inc.

8. The combination or conspiracy alleged in the complaint as to the defendant R. E. Baulch has not been established. There is no evidence that the defendant Baulch

actively participated in any of the violations of the Sherman Act in combining or conspiring with any of the other defendants, and is regarded by the Court as being only a nominal party to the proceedings on account of the official position held by him, as Secretary and Treasurer of some [fol. 3187] of the defendant exhibitors.

9. Each of the defendants, Crescent Amusement Company, Inc., Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company and Cherokee Amusements, Inc., has violated the Sherman Act in the following manner:

A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

B. Combining its closed towns with its competitive situations in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

C. Coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

10. The defendants, Crescent, Muscle Shoals, Rockwood, Cherokee, Lyric and Kentucky, have violated the Sherman Act by combining with each other and with each of the distributors Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them.

The franchises entered into between the co-conspirators, Paramount, Fox and Warner, and the defendant exhibitors are contracts in restraint of trade or commerce among the several states, tending to perpetuate the monopolies of the defendant exhibitors involved, foreclosing competition by independent exhibitors, with the defendant exhibitors in the licensing of film over large areas and for long periods of time.

[fol. 3188] 11. The defendant exhibitors, Crescent, Muscle Shoals, Rockwood, Cumberland and Cherokee, have col-

lectively violated the Sherman Act by combining with each other for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves.

12. The said defendant exhibitors have violated the Sherman Act by combining with each other for the purpose and with the effect of eliminating, suppressing and preventing independent competition in the territory in which each operates.

13. The said defendant exhibitors have violated the Sherman Act by combining with each other, and with the major distributors, Paramount, Fox, Warner, Loew's, RKO, and United Artists, in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them.

14. The defendant Anthony Sudekum, has violated the Sherman Act by actively participating in the foregoing violations as president of Crescent, Cumberland and Lyric.

15. The defendant, Kermit C. Stengel, has violated the Sherman Act by actively participating in the foregoing violations as an assistant to the defendant Sudekum, in managing Crescent, as president of Rockwood, vice-president of Cherokee, and vice-president of Kentucky.

16. The defendant Louis Rosenbaum, has violated the Sherman Act by actively participating in the foregoing violations as manager and active partner of Muscle Shoals Theatres.

17. The defendant United Artists Corporation, has violated the Sherman Act by the following acts:

A. Combining with Cumberland, Rockwood and Stengel to eliminate its independent theatre competition at Rogersville, Tennessee.

B. Combining with Rosenbaum, Sudekum, Rockwood. [fol. 3189] and Stengel to eliminate independent theatre competition of Muscle Shoals, at Athens, Alabama.

This phase of the case has caused the Court more concern than any other question involved. The Court recognizes the rule that a distributor of motion picture film is

perfectly free to do business with the exhibitor of its choice, and to negotiate with a circuit and an independent one, at one and the same time, and to sell either one it prefers to do business with, yet such conduct must be free from discrimination against independent enterprise as a result of pressure or coercion on the part of a monopoly or combination.

There is no evidence that United Artists entered into a conspiracy with either Crescent, Rockwood, Cumberland, Sudekum, Stengel or Rosenbaum, in any of these matters, yet to hold there was no discrimination in either of the above instances, would be ignoring the plain facts. Under all the circumstances, United Artists could hardly be blamed for preferring to do business with the circuit and its affiliates, but it should not have allowed such desire to influence its conduct to the extent it apparently did, in its dealings with Miller and Buchanan. The principal criticism for this situation, however, lies at the doorst p of the monopoly built up by Crescent and its affiliates, and United Artists hardly did more than cooperate with what it knew to be the policy of the monopoly in order to make an attractive business deal.

18. The blanket contracts made by United Artists Corporation, for sixty-one situations in 1938-39, and for seventy-three situations in 1939-40, reflected the usual method adopted by this defendant in licensing its films to exhibitors, and as far as the contract itself is concerned, the Court can see no difference in the method adopted by this defendant and the usual method followed by other distributors in making separate contracts with each exhibitor for a given number of films, nor is there anything more objectionable [fol. 3190] from the standpoint of inhibitions under the Sherman Act, in the choice of the defendant licensing its film in this manner, rather than following the usual procedure adopted by other distributors. The Court therefore concludes that the contract in itself, is not a contract in restraint of trade or commerce, in violation of any of the provisions of the Sherman Act; nor was the contract in this case executed with any purpose or intention to combine, conspire, or contract with the defendant exhibitors to suppress or restrain interstate commerce, nor with the intent, or purpose, of bringing about a monopoly in the

exhibition of motion pictures in the territory involved in this cause.

19. The plaintiff is entitled to an injunction restraining the defendants indicated herein from continuing in said conspiracies in restraint of trade and commerce, and from entering into any similar combinations and conspiracies having similar purposes and objects.

20. The plaintiff is entitled to an injunction invalidating the existing franchises to which the exhibitor defendants are parties; invalidating existing agreements not to compete in the future to which the exhibitor defendants are parties; restraining each exhibitor defendant from conditioning the licensing of films in any competitive situation, outside Nashville, upon the licensing of films in any other theatre situation; and restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, except after an affirmative showing that such acquisition will not unreasonably restrain competition.

21. The plaintiff is entitled to a decree dissolving the combination; requiring each corporate exhibitor defendant to divest itself of the ownership of any stock or other interest in any corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and requir- [fols. 3191-3208] ing the individual defendants found guilty herein of violating the Sherman Act, to resign as officers of any affiliated corporation, and requiring the defendant Rosenbaum to terminate and dissolve the partnership of Muscle Shoals Theatres, and requiring him to divest himself of any interest which he may have in any of the corporate defendants, which said acts of dissolution shall be performed within one year from date of entry of judgment in this cause. Judgment will be entered accordingly.

This the 3rd day of March, 1943.

Elmer D. Davies, United States District Judge.

Attest: A True Copy.

L. B. Ormes, Clerk, U. S. District Court, Middle District of Tennessee, By L. E. Wasson, Chief Deputy Clerk. (Seal.)

[fol. 3209] IN THE DISTRICT COURT OF THE UNITED STATES, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action 54

UNITED STATES OF AMERICA, Plaintiff,

vs.

CRESCENT AMUSEMENT COMPANY, INCORPORATED, et al., Defendant

FINAL DECREE—Filed May 17, 1943

This cause having come on for hearing before this Court upon the pleadings and upon the testimony, both oral and documentary, introduced at the trial of this cause, and the same having been argued by counsel both orally and upon briefs submitted, and the Court having made and filed its findings of fact and conclusions of law herein on the 3rd day of March, 1943:

It is hereby ordered, adjudged and decreed as follows:

(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Company, Inc., be, and they hereby are, enjoined and restrained from continuing in combination wit' each other and with each of the distributors, Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

[fol. 3210] (2) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, enjoined and restrained from continuing in combination with each other for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves; and are further en-

joined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(3) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum be, and they are hereby enjoined and restrained from continuing in combination with each other for the purpose and with the effect of eliminating, suppressing and preventing independent competition in the territory in which each operates; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(4) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel and Louis Rosenbaum be, and they hereby are, enjoined and restrained from continuing in combination with each other, and with Paramount, Fox, Warner, Loew's, RKO, and United Artists in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having [fol. 3211] similar purposes and objects.

(5) That the defendant United Artists Corporation, be, and it hereby is, enjoined and restrained from continuing in combination with Cumberland, Rockwood, and Stengel to eliminate its independent theatre competition at Rogersville, Tennessee; and is further enjoined and restrained from entering into any similar combinations having similar purposes and objects.

(6) That the defendant United Artists Corporation be, and it hereby is, enjoined and restrained from continuing in combination with Rosenbaum, Sudekum, Rockwood and Stengel to eliminate independent theatre competition of Muscle Shoals at Athens, Alabama; and is further enjoined and restrained from entering into any similar combinations having similar purposes and objects.

(7) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from creating or maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

(8) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

[fol. 3212] (9) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., its officers, agents or servants, be and it hereby is enjoined and restrained from coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

(10) That all existing franchises to which the Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, Cherokee Amusements, Inc., Lyric Amusement Company, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, or Louis Rosenbaum, hereinafter referred to as the exhibitor defendants, is a party, be, and they hereby are, declared invalid, except insofar as any such franchise may relate to theatres operated by any of said defendants in Nashville, Tennessee, the validity of which the Court does not expressly adjudicate in this cause.

(11) That all existing agreements not to compete in the future to which any exhibitor defendant is a party, be, and they hereby are, declared invalid.

(12) That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of

films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation.

(13) That each of the corporate exhibitor defendants, be, and it hereby is, required to divest itself of the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and each such defendant is hereby enjoined and restrained from acquiring the ownership of any stock or other interest in any other corporate defend- [fol. 3213] ant, or affiliated corporation, with the exception of Strand Enterprises, Inc.

(14) That the defendant, Louis Rosenbaum, be, and he hereby is, required to divest himself of any interest which he may have in any of the corporate defendants, and said defendant Rosenbaum is hereby enjoined and restrained from acquiring any interest in said corporate defendants.

(15) That the defendant, Anthony Sudekum, be and he hereby is, required to resign as an officer of any corporation except the Crescent Amusement Company, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except the Crescent Amusement Company, by acting as an officer thereof, or otherwise,

(16) That the defendant, Kermit C. Stengel, be, and he hereby is, required to resign as an officer of any corporation, except one defendant corporation of his choice, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, xcept the corporation of his choice, by acting as an officer thereof, or otherwise.

(17) Wherever reference is made in this decree to affiliated corporations such reference shall not include the following corporations: Bijou-Louisiana Corporation, Shreveport Theatre Corporation, Bijou-Pensacola Corporation, Bijou-Ft. Worth Corporation, Ace Theatre Corporation, Lincoln Amusement Company, Lewisburg Theatre Company, The Auditorium Company, Hippodrome Attractions, Stock Yards, Ricks Hosiery Mills, Springfield Woolen Mills, Mid-State, Chickasaw, Dickson and Nu-Strand Corporation.

[fols. 3214-3238] (18) That the acts of dissolution described in paragraphs (13), (14), (15), and (16) hereof, shall be performed within one year from date of entry of this decree.

(19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

(20) That the jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and decrees as may be necessary or appropriate for the construction or carrying out of this decree, for modification or termination of any of the provisions thereof, for the enforcement or compliance therewith and for the punishment of violations thereof.

(21) That the costs of this action shall be taxed against the exhibitor defendants.

(22) That the Bill of Complaint be, and it hereby is, dismissed as to the defendants, Strand Enterprises, Inc., Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Columbia Pictures Corporation, and R. E. Baulch, upon the merits.

Enter May 17, 1943.

Elmer D. Davies (Signed) United States District Judge.

[fol. 3239] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTIONS OF DEFENDANTS, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ROCKWOOD AMUSEMENTS, INC., CHEROKEE AMUSEMENTS, INC., KENTUCKY AMUSEMENT CO., INC., ANTHONY SUDEKUM AND KERMIT C. STENGEL, TO AMEND FINDINGS AND FOR ADDITIONAL FINDINGS—Filed May 27, 1943

Each of the above named dependants adopts and relies upon petitions heretofore filed in which modifications or amendments are sought as to the Findings filed March 3, 1943, viz., petition of Cumberland Amusement Company filed on March 20, 1943; petition of Rockwood Amusements, Inc., Chefokee Amusements, Inc. and Kentucky Amusement Co., Inc., filed on March 23, 1943; and supplemental petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Co., Inc., filed on March 26, 1943; and each of the above named defendants, to the extent that they or any of them may be affected by Findings more specifically relating to any co-defendant, also adopts and relies upon the petitions or motions of said co-defendants, including the motion of The Crescent Amusement Company filed simultaneously herewith. Each of said defendants further moves the Court to amend the conclusions of law and decree consistently with the amendments [fol. 3240] to findings and additional findings sought in said petitions and motions.

William Waller, Geo. H. Armistead, Jr., D. L. Lansden. Address: American Trust Building, Nashville, Tennessee, Counsel for Defendants.

[fols. 3240a-3240b] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION BY APPELLEES, THE CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ROCKWOOD AMUSEMENTS, INC., CHEROKEE AMUSEMENTS, INC., KENTUCKY AMUSEMENT COMPANY, INC., ANTHONY SUDEKUM, AND KERMIT C. STENGEL, OF ADDITIONAL PORTIONS OF THE RECORD—Filed July 23, 1943

Appellees, The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, and Kermit C. Stengel, designate the following matters to be included in the record on appeal, in addition to the matters designated by the appellant:

1. Motion of defendant, The Crescent Amusement Company, to amend findings and make additional findings, which was filed on May 27, 1943.

2. Motions of defendants, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, and Kermit C. Stengel, to amend findings and for additional findings, filed in this Court on May 27, 1943.

3. Petition of Cumberland Amusement Company filed on March 23rd, 1943.

[fol. 3240c] 4. Petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., filed on March 23, 1943.

5. Supplemental petition of Rockwood Amusements, Inc., filed on March 31, 1943.

6. Motion of The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, filed on July 23, 1943 to dismiss the appeal of the plaintiff.

7. Order entered April 20, 1943.

8. Certificate of the Clerk of this Court that the motion of The Crescent Amusement Company filed on May 27, 1943, and the motions of Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, filed on May 27, 1943, are still pending and undisposed of at the time of the filing of this Designation, and that the petition of Cumberland Amusement Company, filed on March 23, 1943, and the Petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., filed on March 23, 1943, and the supplemental petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., filed on March 3, 1943, are still pending and have not been disposed of at the time of the filing of this Designation.

9. This Designation.

Geo. H. Armistead, Jr., William Waller, Attorneys for Appellees. Address: American Trust Building, Nashville, Tennessee.

Armistead, Waller, Davis & Lansden, of Counsel. Address: American Trust Building, Nashville, Tennessee.

[fol. 3240d] IN THE DISTRICT COURT OF THE UNITED STATES

CERTIFICATE OF CLERK

I, L. B. Ormes, Clerk of the District Court of the United States for the Middle District of Tennessee, Nashville Division, hereby certify that there are now pending in this Court and undisposed of by the Court petition of Cumberland Amusement Company, a defendant in this case, filed on March 23, 1943; petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., defendants in this case, filed on March 23, 1943; and a supplemental petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., defendants in this case, filed on March 31, 1943.

Also there are on file in this Court and undisposed of a motion of defendant, The Crescent Amusement Company, to amend findings and make additional findings, which motion was filed on May 27, 1943; and motions of defendants, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, and Kermit C. Stengel, to amend findings and for additional findings, which motion was filed on May 27, 1943.

Witness My hand and the seal of this Court at Nashville, Tennessee on this the 23rd day of July, 1943.

(Signed) L. B. Ormes, Clerk. (Seal.)

[fol. 3240e] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ADDITIONAL DESIGNATION BY APPELLEES, THE CRESCENT AMUSEMENT COMPANY, ET AL., OF CERTAIN PORTIONS OF THE RECORD TO BE INCLUDED IN THE RECORD ON APPEAL—Filed August 13, 1943

The Appellees, The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, in addition to the designation filed with the Clerk of this Court on July 23, 1943, designating certain matters to be included in the record on appeal, designate the following:

1. Statement of said Appellees as to jurisdiction filed with the Clerk on July 23, 1943.

2. This additional designation.

——— ———, William Waller, Attorneys for Appellees.
Address: American Trust Bldg., Nashville, Tenn.

Of Counsel: Armistead, Waller, Davis & Lansden, Address: American Trust Bldg., Nashville, Tenn.

[fol. 3241] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED FINDINGS AND CONCLUSIONS—Filed August 30, 1943

After consideration of petitions filed in this cause by Rockwood Amusement Company, Cherokee Amusements Company, Kentucky Amusement Company, Cumberland Amusement Company, Muscle Shoals Theatres, Crescent Amusement Company, Louis Rosenbaum, and United Artists Corporations, for modification and amendment of the Findings and Conclusions filed herein on March 3, 1943, the Court hereby makes and files these amended Findings and Conclusions as follows:

AMENDED FINDINGS

19. Amend Finding No. 19 by striking from the second paragraph the words "Chicasaw Amusement Company," and "Dixon Theatres Incorporated," and adding to said paragraph the following sentence: "The defendant, Stengel, on this day owned a one-half interest in the Chicasaw Amusement Company and Dixon Theatres Incorporated," so that said paragraph, as amended reads as follows:

[3242] "On the same date, (August 11, 1939) Rockwood owned a half interest in the following theatre operating corporations, in each of which Stengel was an officer: Cherokee Amusements Company, Ruffin Amusements Incorporated, Kentucky Amusement Company, Lawrenceburg Theatres Incorporated, and Mid-State Theatres Incorporated. The defendant, Stengel, on this date, owned a one-half interest in the Chicasaw Amusement Company and Dixon Theatres, Incorporated."

57. Amend finding No. 57 by adding to the fifth sentence of said finding, the following words: "at prices he was accustomed to pay for such pictures," so that finding No. 57 as amended will read as follows:

"57. In 1937, Potts, the Crescent Manager in Morristown, contacted Miller in Rogersville and told him

that the town was too small for two theatres and advised him to make a deal with Cumberland. He suggested that if Miller wrote him a letter setting forth a proposition, he would forward it to Sudekum. During July or August 1938, Castleberry called on Miller and suggested that he sell his theatre to Rockwood. Miller told him that he was willing to sell. One of the principal reasons for Miller's willingness to sell his theatre was the difficulty he encountered as well as difficulty he anticipated, in securing suitable pictures for exhibition in his theatre, at prices he was accustomed to pay for such pictures. In August 1938, Stengel and Baulch called on Miller, and an agreement for the sale of the Palace Theatre to Rockwood and Miller's employment as manager of the Rogersville Theatre was reached. As soon as Rockwood acquired the Palace Theatre, they closed it, and only one theatre has been operated in Rogersville since that time."

58. Finding No. 58 is amended by striking from the third paragraph thereof the following words: "subject to acceptance by Mr. Sudekum," so that the third paragraph of No. 58 as amended, shall read as follows:

"In March 1939, Moore learned that Stengel had leased a building in McKenzie and immediately went to Nashville to see him. He made a deal with Stengel for $9,200.00 which represented the value of the theatre equipment and lease with nothing for goodwill of the business itself."

[fol. 3243] 61. Amend finding No. 61 by adding as a new paragraph, immediately following paragraph two, the following:

"The record is silent as to whether Taylor's lessee Mr. Gutscholk, had complied with his 1937-1938 contract with Paramount, or whether Taylor himself, after he took the theatre back, assumed Gutscholk's contract with Paramount; and the record is also silent as to whether Taylor ever had any idea of negotiating for the 1938-1939 product. Taylor testified as a witness for plaintiff that one reason he sold out was because he was afraid the film companies would raise the price of pictures with two theatres in town."

102. Amend finding No. 102 by striking out the word "Crescent" wherever it appears in said finding, and inserting in lieu thereof the word "Rockwood"; and by striking from the second sentence of said finding the words "Pursuant to Stengel's instructions", and insert in lieu thereof the words "with Stengel's consent", so that finding No. 102 as amended, shall read as follows:

> "No. 102. Castleberry called on William G. Head on two occasions and asked him if he would be interested in selling his theatre at Greenville, Kentucky. In August 1938, Pittman, Rockwood Manager at Central City, with Stengel's consent, went to Greenville, Kentucky, and ostentatiously measured a lot for the purpose of giving the impression that Rockwood was planning to come into the town. Pittman testified that he did not have to tell anybody in Greenville why he was measuring the lot because 'everybody thought that is what we were going to do; I did not have to say a word, it is a very small town.' In September 1938, Head sold his theatre to Rockwood."

112. Insert immediately after the word "part" and immediately before the word "theatres," appearing in the first sentence of finding No. 112, the following: "except as specifically found herein with respect to Henry's theatre in Union City, and the independent theatre in East Gadsden, Alabama," so that finding No. 112 as amended, will read as follows:

> "No. 112. For the most part, except as specifically found herein with respect to Henry's theatre in Union City, and the independent theatre in East Gadsden, Alabama, theatres operated by independents in com- [fol. 3244] petition with the defendant exhibitors and their affiliates have been greatly inferior to those operated by the defendant exhibitors or their affiliates in the several competitive situations. Usually the theatre building was a converted store building, not built for the purpose of a theatre, unattractive in appearance, and inadequate in modern conveniences. In many instances the equipment has been second hand. Some operations have been inadequately financed, and in a number of cases there was no stability of operation in these independent situations."

"The distributors have found it necessary by reason of this instability of operation and inadequate financing in some instances, to make large concessions from the contract terms originally agreed upon, or to accept cancellations of obligations to exhibit pictures as originally called for under the contract."

113. Amend finding No. 113 by inserting as a new paragraph immediately following paragraph No. two thereof, the following: "Within three or four years preceding the trial, Rockwood and Cherokee experimentally introduced popcorn sales and screen advertising in their theatres. During 1939 popcorn machines were put in every theatre, although popcorn sales were made in only seven out of twelve Rockwood towns during the entire year of 1939. Nevertheless, in 1939, popcorn sales and screen advertising accounted for a large part of Rockwood's net profit (exclusive of dividends) and in several Rockwood and Cherokee towns there would have been a substantial loss, instead of profit, had it not been for popcorn sales and screen advertising. In some small towns, the Saturday business accounted for a substantial part of all receipts and on Saturday it was almost the invariable custom to show a Western picture, which was not produced by any of the distributors alleged in this case to be conspirators. Defendant exhibitors have provided good theatres and good entertainment and have devoted much time and effort in the exploitation of pictures and in giving the public good entertainment in good and comfortable theatres." So that finding No. 113 as amended, will read as follows:

[fol. 3245] "113. During the five-year period immediately preceding the suit, the Crescent and Rockwood companies each experienced a phenomenal growth in earnings and surplus which was out of all proportion to the increase in gross receipts and gross assets resulting from physical expansion of the business and improving general economic conditions. During the five-year fiscal period from June 30, 1934, to June 30, 1939, Crescent's total assets were less than doubled, but its surplus was increased thirty times. During the last fiscal year of said period its gross receipts were less than twice the amount of its gross receipts for the first fiscal year of said period, but its

net profits (exclusive of dividends received) were more than five times those of the first year. During the five-year period, its net earnings, (exclusive of dividends received) averaged about 35 per cent per annum on its capitalization.

During the three calendar years 1937 to 1939, inclusive, (Rockwood was organized in February 1936), Rockwood's total assets approximately tripled, but its surplus increased about eight times. During the calendar year 1939, its gross receipts were somewhat less than three times its gross receipt during the calendar year 1937, but its net earnings (exclusive of dividends received) for 1939 were thirty-one times what they were for 1937. During this three year period, its net earnings per annum (exclusive of dividends received,) averaged twelve times its original capital investment. (Ex. 308) Sudekum and Stengel were also able to profit personally from the absorption of competitors by securing the payment of substantial salaries from the corporations which they formed to take over competing theatres, in addition to their regular compensation from Crescent and Rockwood.

Within three or four years preceding the trial, Rockwood and Cherokee experimentally introduced popcorn sales and screen advertising in their theatres. During 1939 popcorn machines were put in every theatre, although popcorn sales were made in only seven out of twelve Rockwood towns during the entire year of 1939. Nevertheless, in 1939, popcorn sales and screen advertising accounted for a large part of Rockwood's net profit (exclusive of dividends) and in several Rockwood and Cherokee towns there would have been a substantial loss, instead of profit, had it not been for popcorn sales and screen advertising. In some small towns, the Saturday business accounted for a substantial part of all receipts and on Saturday it was almost the invariable custom to show a Western picture, which was not produced by any of the distributors alleged in this case to be conspirators. Defendant exhibitors have provided good theatres and good entertainment and have devoted much time and effort in the exploitation of pictures in giving the public good entertainment in good and comfortable theatres."

[fol. 3246] AMENDED CONCLUSIONS

20. Amend conclusion No. 20, by striking said conclusion in its entirely, and inserting in lieu thereof, the fellowing:

"20. The plaintiff is entitled to an injunction invalidating the existing franchises to which the exhibitor defendants are parties; invalidating existing agreements not to compete in the future to which the exhibitor defendants are parties; restraining each exhibitor defendant from conditioning the licensing of films in any competitive situation, outside Nashville, upon the licensing of films in any other theatre situation; and restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants, are guilty of coercing, or attempting to coerce, any such independent operators into selling out to it, or to abandon plans to compete with it by predatory practices."

21. Amend conclusions No. 21, by striking said conclusion in its entirety, and inserting in lieu thereof the following:

"21. The plaintiff is entitled to a decree dissolving the combination, requiring each corporate exhibitor defendant to divest itself of the ownership of any stock or other interest, in any corporate defendant or affiliated corporation, with the exception of Strand Enterprises, Inc., and requiring the individual defendants found guilty herein of violating the Sherman Act, to resign as officers of any affiliated corporations, and requiring the defendant Rosenbaum to divest himself of any interest which he may have in any of the corporate defendants, and enjoining him from acquiring any interest in said corporate defendants, which said acts of dissolution shall be performed within one year from date of entry of judgment in this cause."

22. Amend by adding as conclusion No. 22, the following:

"22. Wherever reference is made in these conclusions to affiliated corporations, such reference shall

not include the following corporations; Bijou-Louisiana Corporation, Shreveport Theatre Corporation, Bijou-Pensacola Corporation, Bijou-Fort Worth Corporation, Ace Theatre Corporation, Lincoln Amusement Company, Lewisburg Theatre Company, The Auditorium Company, Hippodrome Attractions, Stock [fol. 3247] Yards, Ricks Hosiery Mills, Springfield Woolen Mills, Mid-State, Chickasaw, Dickson, and Nu-Strand Corporation."

23. Amend, by adding as conclusion No. 23, the following:

"23. The costs of this cause shall be taxed against the exhibitor defendants found guilty herein of violating the Sherman Act."

Judgment will be entered accordingly.

All petitions for further reconsideration, modification, and objections to Findings and Conclusions filed herein, except as herein granted, are denied and overruled accordingly.

This the 28th day of August, 1943.

Elmer D. Davis, United States District Judge.

[fol. 3247a] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed July 16, 1943

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final order and decree of this Court entered on the 17th day of May, 1943, does hereby pray an appeal from said final order and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and

prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Tom C. Clark, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

Dated this 16th day of July, 1943.

[fol. 3247b] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed October 27, 1943

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final order and decree of this Court entered on the 17th day of May, 1943, does hereby pray an appeal from said final order and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Wendell Berge, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

Dated this 27 day of October, 1943.

[fol. 3247c] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 16, 1943

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the final order and decree of said District Court entered on May 17, 1943, in the above-entitled cause, and says that in the entry of the final order and decree the District Court committed error to the prejudice of the said plaintiff in the following particulars:

1. The Court erred in entering paragraph (19) of the final decree which reads as follows:

> (19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

2. The Court erred in declining to enter in lieu of said paragraph (19) of the final decree the provision contained in paragraph (20) of the proposed decree submitted in accordance with the Court's conclusion of law No. 20, which provision reads as follows:

> [fol. 3247d] That the exhibitor defendants, and each of them, be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres outside Nashville, Tennessee, except after an affirmative showing before this Court that such acquisition will not unreasonably restrain competition.

Wherefore, plaintiff prays that the final order and decree of the District Court granting the relief set forth in para-

graph (19) thereof and denying relief in accordance with the Court's aforesaid conclusion of law No. 20 may be reversed and the cause remanded for the entry in lieu of said paragraph of a provision in accordance with said conclusion of law, and for such other and fit relief as the Court may deem just and proper.

Tom C. Clark, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

This 16th day of July, 1943.

[fol. 3247e] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed October 27, 1943

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the final order and decree of said District Court entered on May 17, 1943, in the above-entitled cause, and says that in the entry of the final order and decree the District Court committed error to the prejudice of the said plaintiff in the following particulars:

1. The Court erred in entering paragraph (19) of the final decree which reads as follows:

> (19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

2. The Court erred in declining to enter in lieu of said paragraph (19) of the final decree the provision contained in paragraph (20) of the proposed decree submitted in accordance with the Court's conclusion of law No. 20, as originally filed on March 3, 1943, which provision reads as follows:

> [fol. 3247f] That the exhibitor defendants, and each of them, be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres outside Nashville, Tennessee, except after an affirmative showing before this Court that such acquisition will not unreasonably restrain competition.

Wherefore, plaintiff prays that the final order and decree of the District Court granting the relief set forth in paragraph (19) thereof and denying relief in accordance with the Court's aforesaid conclusion of law No. 20 may be reversed and the cause remanded for the entry in lieu of said paragraph of a provision in accordance with said conclusion of law, and for such other and fit relief as the Court may deem just and proper.

Wendell Berge, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

This 27 day of October, 1943.

[fol. 3247g] In the District Court of the United States

[Title omitted]

Order Allowing Appeal—July 16, 1943

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 17th day of May, 1943, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and hav-

ing in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged.

That the appeal be and the same is hereby allowed as prayed for.

Enter July 16, 1943.

Elmer D. Davies, United States District Judge.

Dated this 16th day of July, 1943.

[fol. 3247h] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—October 27, 1943

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 17th day of May, 1943, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged.

That the appeal be and the same is hereby allowed as prayed for.

Elmer D. Davies, United States District Judge.

Dated this 27th day of October, 1943.

[fol. 3247i] Citation in usual form, filed July 16, 1943, omitted in printing.

[fol. 3247j] Citation in usual form, filed Oct. 27, 1943, omitted in printing.

[fol. 3247k] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—Filed July 16, 1943

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz:

1. Complaint, as amended.
2. Answers of Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Cumberland Amusement Company, Lyric Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, Muscle Shoals Theatres, Louis Rosenbaum, and Nettie Sudekum.
3. The findings of fact and conclusions of law filed herein on March 3, 1943.
4. The proposed decree submitted by plaintiff in accordance with the Court's decision.
5. The official record of the stenographic minutes of the proceedings before the Honorable Elmer D. Davies, United States District Judge for the Middle District of Tennessee, on May 6, 1943.
6. Final decree of the District Court filed on May 17, 1943.

[fol. 3247l] 7. Petition for appeal.

8. Assignment of errors and prayer for reversal.
9. Order allowing appeal.
10. Proof of service.
11. Statement required by Rule 12.
12. Citation.
13. Statement of jurisdiction.
14. Praecipe.

Tom C. Clark, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

This 16th day of July, 1943.

[fol. 3247m] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—August 23, 1943

In this case comes the plaintiff through its attorney Horace Frierson, and moves the Court for a sixty day extension of time within which the plaintiff may file the record in the Supreme Court pursuant to its appeal heretofore allowed herein.

And the Court being of the opinion that good cause has been shown for such enlargement or extension of time, the motion of the plaintiff is sustained and it is hereby ordered that the time within which the plaintiff may file said record be extended until October 25, 1945.

Enter: August 23, 1943.

(S.) Elmer D. Davies, U. S. District Judge.

[fol. 3247n] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—October 22, 1943

In this case comes the plaintiff, through its attorney Horace Frierson, and moves the Court for a sixty day extension of the time within which the plaintiff may file the record in the Supreme Court pursuant to its appeal heretofore allowed herein.

And the Court being of the opinion that good cause has been shown for such enlargement or extension of time, the motion of the plaintiff is sustained and it is hereby ordered that the time within which plaintiff may file said record be extended until December 25, 1943.

Enter: Oct. 22, 1943.

Elmer D. Davies, U. S. District Judge.

[fol. 3247o] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

PRAECIPE FOR RECORD—Filed October 27, 1943

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz:

1. Complaint, as amended.

2. Answers of Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Cumberland Amusement Company, Lyric Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, Muscle Shoals Theatres, Louis Rosenbaum and Nettie Sudekum.

3. The findings of fact and conclusions of law filed herein on March 3, 1943.

4. The proposed decree submitted by plaintiff in accordance with the Court's decision.

5. Order setting hearing on all objections to decree on May 6, 1943, filed on April 20, 1943.

6. The official record of the stenographic minutes of the proceedings before the Honorable Elmer D. Davies, United States District Judge for the Middle District of Tennessee, on May 6, 1943.

[fol. 3247p] 7. Final decree of the District Court filed on May 17, 1943.

8. Petition of defendants Rockwood Amusement Company, Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., for modification in findings and conclusions, filed on March 23, 1943.

9. Petition of defendant Cumberland Amusement Company for reconsideration and modification of findings and conclusions, filed on March 23, 1943.

10. Supplemental petition of defendant Rockwood Amusement Company for reconsideration and modification of findings and conclusions filed on March 31, 1943.

11. Motion of Muscle Shoals Theatres and Louis Rosenbaum to modify and supplement findings and conclusions, filed on May 6, 1943.

12. Motion of defendant Crescent Amusement to amend findings and make additional findings, filed on May 27, 1943.

13. Amended findings and conclusions and order overruling all objections to findings and conclusions except as therein granted, filed on August 30, 1943.

14. Petition for appeal filed on July 16, 1943.

15. Petition for appeal filed on Oct. 27, 1943.

16. Assignment of errors and prayer for reversal, filed on July 16, 1943.

17. Assignment of errors and prayer for reversal, filed on Oct. 27, 1943.

18. Order allowing appeal, filed on July 16, 1943.

19. Order allowing appeal, filed on Oct. 27, 1943.

20. Proof of service, filed on July (19-20) 1943.

21. Proof of service, filed on Oct. 28, 1943.

22. Statement required by Rule 12, filed on July 16, 1943.

23. Statement required by Rule 12, filed on Oct. 27, 1943.

24. Citation, filed on July 16, 1943.

25. Citation, filed on Oct. 27, 1943.

[fol. 3247q] 26. Statement of jurisdiction, filed on July 16, 1943.

27. Statement of jurisdiction, filed on October 27, 1943.

28. Praecipe.

(S.) Wendell Berge, Assistant Attorney General:
Robert L. Wright, Special Assistant to the Attorney General.

This 27th day of October, 1943.

[fol. 3247r] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—November 9, 1943

In this case comes the plaintiff through its attorney, Robert L. Wright, and moves the Court for a ten-day extension of time within which the plaintiff may file its counter praecipe pursuant to the appeal heretofore allowed the defendants herein.

And the Court being of the opinion that good cause has been shown for such extension of time, the motion of the plaintiff is sustained and it is hereby ordered that the time within which the plaintiff may file its counter praecipe be extended until November 19, 1943.

Enter: Nov. 9, 1943.

Elmer D. Davies, U. S. District Judge.

[fol. 3248] IN THE DISTRICT COURT OF THE UNITED STATES

PETITION FOR APPEAL—Filed October 29, 1943

Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum and Kermit C. Stengel, defendants in the above entitled cause, considering themselves aggrieved by (1) the findings and conclusions filed by the Court on March 3, 1943, and the amended findings and conclusions filed on August 30, 1943, (2) action of the Court in overruling defendants' motion to strike certain evidence and exhibits introduced by plaintiff, and (3) the final order and decree of this Court entered on May 17, 1943, do hereby pray an appeal to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the defendants present to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the defendants consider the action of the Court erroneous are set forth in the assign-
[fol. 3249] ment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Defendants Pray that their appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Defendants further Pray that during the pendency of their appeal the running of the period of one year as provided in paragraph (18) of the decree entered May 17, 1943, be suspended.

(S.) Geo. H. Armistead, Jr., D. L. Lansden, William Waller, American Trust Building, Nashville, Tennessee, Counsel for Defendants.

Dated this 28th day of October, 1943.

[fol. 3250] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed October 29, 1943

Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum and Kermit C. Stengel, defendants in the above entitled cause, in connection with their petition for appeal to the Supreme Court of the United States, hereby assign error to the final order and decree of said District Court entered on May 17, 1943 in the above entitled cause, and to the findings and conclusions filed on March 3, 1943 and the amended findings and conclusions filed on August 30, 1943, and say that in the entry of the final order and decree and in the filing of said findings and conclusions and amended findings and conclusions the District Court committed error to the prejudice of the said defendants in the following particulars:

[fol. 3251] I

As to the Findings and Conclusions and Amended Findings and Conclusions:

1. The Court erred in including in Finding No. 39 and in failing to eliminate, as requested by defendants, the last two sentences reading as follows:

"He (Lawing) was unable to secure any other major product nor would any of the distributors sell him a second run; the ostensible ground of refusal was that

the town was too small for a second run. But the Crescent was allowed to repeat pictures which had played Lawing's theatre in Brownsville, a much smaller town."

And in failing to add, as requested by defendants, the following:

"There is no satisfactory evidence that Lawing was unable to secure sufficient product or satisfactory product on which to operate in Paris. He made no application for Universal product or for United Artists product at Paris."

2. The Court erred in including in Finding No. 44 and in failing to eliminate, as requested by defendants, the concluding portion reading as follows:

"This could not possibly have been Connors' reason for rejecting Lawing's application, however, because, first, there is nothing to show that Connors ever told anyone Lawing's offer was inadequate, and second, Lawing's office, as a matter of fact, was as good as, [fol. 3252] if not better than, the deal Loew's accepted from Crescent. Connors further explained, in justification for his decision overruling Willingham's recommendation, that he knew that Lawing's theatre was not as modern as the new Crescent Theatre, and he felt that Metro could get more money from the new theatre. This was also an afterthought, as there is no suggestion in the voluminous correspondence regarding this situation introduced in evidence by both sides that the relative merits of the theatres entered into his decision, nor was there any necessity for Connors to speculate about what he could get from the two theatres because he had both offers before him, and by the simple process of comparing the two offers, he would have ascertained that from the standpoint of Loew's, the Lawing deal was as good as, if not better than, the Crescent offer."

3. The Court erred in including in Finding No. 45 and in failing to eliminate, as requested by defendants, the last paragraph reading as follows:

"Thus, as far as the disposition of Loew's 1935-1936 product in Brownsville, Tennessee is concerned, the

record shows that it was licensed to Crescent although Lawing offered Loew's at least as good a deal as the Crescent deal and was Loew's old customer in Brownsville."

And in failing to add, as requested by defendants, the following:

[fol. 3253] "Lawing's record for carrying out his contracts was very bad. He admitted on cross-examination that, even before Crescent's theatre was opened, he failed to comply with contracts with more than one distributor."

4. The Court erred in failing to supplement Finding No. 46 by adding the following, as requested by defendants:

"There is no evidence that Lawing had trouble getting satisfactory product or sufficient product in Brownsville. There is no evidence that he even applied for either Universal product or United Artists product after Crescent opened its theatre."

5. The Court erred in including in Finding No. 48 and in failing to eliminate, as requested by defendants, the following language in the first paragraph:

"In April 1935, Dozier entered into a contract for Paramount's 1935-1936 product which provided that Dozier was to have clearance over Madisonville, but the length of the clearance was to be decided by the N. R. A. Clearance Board at Indianapolis."

And the following language in the third paragraph:

"although it was in direct conflict with his agreement with Paramount."

6. The Court erred in failing to supplement Finding No. 54, as requested by defendants, by adding in substance the following:

[fol. 3254] "The actual comparison of the film rentals received by Warner Bros. from Miller in 1936-1937 and Cumberland in 1937-1938 was as follows:

	Features	Scores	Shorts	Total
1936-37—Miller	$858.84	$145.00	$184.50	$1188.34
1937-38—Cumberland	975.00	135.00	440.50	1550.50

7. The Court erred in including in Finding No. 59 and in failing to eliminate, as requested by defendants, the concluding paragraph reading as follows:

> "The Huntingdon deal for the 1938-39 season was only $37.00 higher than the 1937-38 deal when it did not have clearance over McKenzie, and this increase was not in payment for the switch in runs because it represented the identical season-to-season increase called for by the franchise in other Rockwood situations where no change in clearance was involved. Insofar as Huntingdon and McKenzie are concerned, Paramount lost money by switching the runs. Why then did the change occur? This is answered by Morgan's letter to Unger, Paramount's southern division sales manager, on August 6, 1938, in which he said:
>
> > 'With further reference to your letter of July 28, regarding the letter that Mr. Y. D. Moore, of McKenzie, Tennessee, wrote to Mr. Agnew. I have discussed the matter several times with Mr. Sudekum, and he insists that Huntingdon have protection over McKenzie.'"

8. The Court erred in including in Finding No. 63 and in failing to eliminate, as requested by defendants, the second paragraph reading as follows:

> [fol. 3255] "The deal with Sudekum referred to by Loew, was the franchise dated July 28, 1938, as of November 1, 1937. Clause 8(e) of that franchise gave Crescent the option of playing an additional or repeat run on any picture if played first-run in Hopkinsville and all of the other towns outside Nashville where a first run was licensed. By this option Crescent was able to prevent Anderson from obtaining any second-run feature although it made no commitment to use them itself."

9. The Court erred in including in Finding No. 70 and in failing to eliminate as requested by defendants, the concluding portion of the first paragraph reading as follows:

> "One reason Smith was advised that Paramount Pictures were not available to him second-run was because of the repeat-run option in the same franchise. This

is clearly indicated by the following portion of Morgan's letter to Unger of November 11, 1938, which was in response to a letter from Unger to Morgan, written after Smith had complained to the Department of Justice, directing Morgan to make some pictures available for Smith (Ex. 152):

> Now as regards the last paragraph of your letter about second runs, following shows the population of each town:
>
> | | |
> |---|---|
> | Morristown | 5,875 |
> | Harriman | 5,000 |
> | Newport | 2,753 |
>
> In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8 of the Crescent Amusement Company franchise, provides he can repeat any feature at a certain given price."

[fol. 3256] 10. The Court erred in including in Finding No. 81 and in failing to eliminate as requested by defendants, the concluding sentence of the last paragraph reading as follows:

> "The negotiation and execution of the ryler at this time showed that Crescent intended, if necessary to eliminate Henry, to operate all three theatres, and Paramount was willing to cooperate."

11. The Court erred in including in Finding No. 100 and in failing to eliminate, as requested by defendants, the first paragraph reading as follows:

> "Curry didn't attempt to negotiate with Paramount because it was well understood that the Crescent Amusement Company had a first-run franchise and second-run option.' The franchise provides both a first run in Gadsden and a first run in Alabama City with a repeat-run option."

And in failing to insert in lieu thereof, as requested by defendants, the following:

> "Curry testified that he didn't try to negotiate with Paramount for second-run product because it was well understood that Crescent 'had a first-run franchise and

a second-run option, so he didn't even have the heart to go to see them.' The fact was that the Dixie Theatre already had a second-run contract with Paramount made by Curry's predecessor covering specified pictures of the 1938-1939 product and that Crescent [fol. 3257] had a second run contract (not an option) with Paramount making a definite commitment for twenty photoplays of the 1939-1940 product, with only thirty days after first run play date to notify Paramount of its intention to use said picture for second run in one of its three Gadsden theatres. The Dixie Theatre thus had full opportunity to purchase the rejected pictures and could always know, within thirty days after first run exhibition in Gadsden, whether the particular picture was available. The pictures selected by Crescent had to be played at the rate of two per month, as available, so that the Dixie Theatre was not prejudiced if it desired to play these pictures on third run."

And in including and failing to eliminate, as requested by defendants, the third paragraph reading as follows:

"Fox, Loew, Paramount, United Artists and Warner all held the Dixie back of the Ritz, although there was no clearance provision in their contracts with the Ritz which would require them to do so. Their uniformity in holding a superior theatre behind an inferior one may only be explained by the pressure which Sudekum was able to exert on each of these distributors."

And in failing to insert in lieu thereof, as requested by defendants, the following:

"The Dixie Treatre paid much smaller film rentals than Crescent paid with respect to the Ritz theatre at Alabama City, which had been set up as a first-run [fol. 3258] situation when Alabama City was a separate municipal corporation, by Fox, Loews, Paramount and Warner, as well as by United Artists."

12. The Court erred in including in Finding No. 118 and in failing to eliminate, as requested by defendants, the concluding paragraph reading as follows:

"The effect of the franchise (Ex. p. 21, p. 29, and p. 30), on the independent competition at Dresden,

Earlington, Gallatin, McKenzie, Spruce Pine, Union City, Hopkinsville, Gadsden, Morristown, Harriman, Newport and Mt. Pleasant has already been recounted. Morgan, in negotiating it, knew precisely what its effect on these independent accounts would be."

13. The Court erred in including in Finding No. 119 and in failing to eliminate, as requested by defendants, the first paragraph reading as follows:

"The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to any opposition theatre, as shown by the experience of Smith, Anderson and Henry when they tried to buy a second-run. As Morgan described its effect in a letter to Unger, his immediate superior, on November 14, 1939 (Ex. 152):

'In any event, the only way we could sell second-run, even if we wanted to in these particular towns (Harriman, Morristown and Newport) would be after Sudekum had taken the refusal, because Paragraph E of Article 8 of the Crescent Amusement Company franchise provides he can repeat any feature at a given price.'"

And in including in the second paragraph and failing to eliminate, as requested by defendants, the following sentence:

[fol. 3259] "The clause, as modified, still prevents the sale of a second-run to the opposition."

14. The Court erred in including in Finding No. 122 and in failing to eliminate, as requested by defendants, the three concluding paragraphs reading as follows:

"But even with one theatre closed and its second-run commitment out of the way, the exhibitors obviously wished to still be in a position to prevent a competitor from getting a second run. The last paragraph, giving a repeat-run option where one theatre is closed, was plainly an addition to the rider insisted upon by the exhibitors, as it confers no rights or advantages on the distributor. Unlike the Paramount repeat-run clause, this option was so worded as to make the

repeat-run subject to such other runs in the same town as the distributor might license. The only purpose that this clause could serve was to make it difficult for Warner to license a second-run theatre in opposition to Crescent after Crescent shut one theatre and got rid of its second-run commitment.

"The purpose of the repeat-run option was plainly to replace the second-run commitment as a means of tying up second run in the situations where that commitment was subject to elimination upon closing a theatre, as in the situations where no second-run commitment was made, a straight repeat-run privilege was inserted which does not depend on the closing of a theatre to take effect. Thus in Harriman and Morristown, where Crescent was also operating two theatres, [fol. 3260] but no second-run commitment was made, the repeat-run clause reads as follows:

'KCS. Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee, and in such event the exhibitors commitment to exhibit such features in the lowest rental classification shall be reduced accordingly.'

"The only difference between this and the repeat-run clause previously quoted is in the stricken opening phrase: 'In the event one theatre closes'. In all of the one-theatre situations in which no second run was bought, the same unqualified repeat-run clause as that stated above was used."

15. The Court erred in including in Finding No. 127 and in failing to eliminate, as requested by defendants, the two concluding paragraphs reading as follows:

"Even though the independents in the towns where there was then opposition, Earlington, Gadsden, Maryville, Paris and Hartselle, paid Fox more than it received from Sudekum, the total revenue from them added up to only 'about seven or eight thousand dollars.' The Sudekum franchise offered a total rental of better than $120,000.00 for all situations for the three years' product and that being the case, this product was sold away from the independent exhibitors at the

'opposition points', who had bought the 1935-1936 product, without giving them any opportunity to negoti-[fol. 3261] ate for the next season. Everyone of these independents, who paid more than Sudekum in their individual situations but could not collectively match his total Circuit purchase, was eventually taken over by Crescent or Rockwood before the expiration of the franchise in August, 1939.

"Hendren's letter of February 7, 1936 (Ex. 258) indicates that if he could have gotten the Fox 1936-37 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greenville. For the 1935-36 feature product in Maryville, he paid $2,456.61 as against $575.00 paid by Crescent for the 1934-35 feature product and $1,080.00 paid by Crescent for the 1936-37 feature product (Ex. 327) in the same town. For the 1935-36 feature product in Greenville he paid $2,589.00 against $1,095.00 paid by Crescent for 1937-38 (Ex. 328)."

16. The Court erred in including in Finding No. 133 and in failing to eliminate, as requested by defendants, the first two sentences reading as follows:

"One obvious purpose of all three franchises was to give Fox, Warner, and Paramount an ostensibly valid legal excuse for discriminating in favor of the Sudekum circuit in licensing its films during the period covered in the same manner that they had discriminated in the past. The Sudekum circuit, by virtue of having built up a preponderance of closed situations, through the persistent elimination of competition, was in a position to deal effectively with such competition [fol. 3262] as remained or might arise in the future, in making one-year film deals, but franchises offered protection against future changes in those discriminatory practices."

17. The Court erred in overruling the following general exception of defendants to the findings and conclusions filed on March 3, 1943:

"Defendant excepts not only to the findings hereinbefore specifically conferred to, but to all findings and parts of findings adopted from the Government's brief

and to the conclusions based upon such findings, upon the ground that the method thus used was improper and unfair to defendant exhibitors and did not constitute a weighing of the evidence by the Court. A copy of the Government's said brief is filed herewith as a part of these motions and reference made to same for purposes of comparison. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings."

18. The Court erred in overruling the following general exception of defendants to the findings and conclusions filed on March 3, 1943:

"Defendant further excepts to all findings and parts of findings predicated upon unsworn statements, either written or oral, made by employees of distributors and other third persons, upon the ground that such unsworn statements are both hearsay and *res inter alios acta*. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings."

[fol. 3263] II

As to Rulings on Evidence:

19. The Court erred in overruling defendants' motion, made at the conclusion of plaintiff's evidence in chief, to strike the following portions of plaintiff's proof and exhibits:

"24. All inter-office or inter-company memoranda and correspondence of Universal. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Universal, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"25. All inter-office or inter-company memoranda and correspondence of United Artists. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and United Artists, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"26. All inter-office or inter-company memoranda and correspondence of Columbia. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of [fol. 3264] conspiracy between defendant exhibitors and Columbia, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"27. All inter-office or inter-company memoranda and correspondence of RKO. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and RKO, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"28. All inter-office or inter-company memoranda and correspondence of Fox. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Fox, and no such case has been proven. In any event, said ex-

hibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of [fol. 3265] their duties, and these facts are not relevant or material to any issue in the case.

"29. All inter-office or inter-company memoranda and correspondence of Paramount. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Paramount, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"30. All inter-office or inter-company memoranda and correspondence of Warner Brothers. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Warner Brothers, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"31. All inter-office or inter-company memoranda and correspondence of Loew's. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Loew's, and no such case has been proven. In any event, said [fol. 3266] exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case."

III

As to the Final Order and Decree:

20. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (1), reading as follows:

> "(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Company, Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each of the distributors, Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further [fol. 3267] enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects."

21. The Court erred in including in the final order and decree entered May 17, 1943, paragraphs (8) and (12), reading as follows:

> "(8) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films."
>
> "(12) That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation."

[fol. 3268] 22. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (13), reading as follows:

"(13) That each of the corporate exhibitor defendants be, and it hereby is, required to divest itself of the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and each such defendant is hereby enjoined and restrained from acquiring the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc."

23. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (15), reading as follows:

"(15) That the defendant, Anthony Sudekum, be and he is hereby, required to resign as an officer of any corporation except the Crescent Amusement Company which is affiliated with any exhibitor defendant, and said defendant, is enjoined and restrained from acquiring any control over any such affiliated corporation, except the Crescent Amusement Company, by acting as an officer thereof, or otherwise."

24. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (16), reading as follows:

[fol. 3269] "(16) That the defendant, Kermit C. Stengel, be, and he hereby is, required to resign as an officer of any corporation, except one defendant corporation of his choice, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except the corporation of his choice, by acting as an officer thereof, or otherwise."

25. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (18), reading as follows:

"(18) That the acts of dissolution described in paragraphs (13), (14), (15), and (16) hereof, shall be performed within one year from date of entry of this decree."

26. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (21), reading as follows:

"(21) That the costs of this action shall be taxed against the exhibitor defendants."

Wherefore, defendants pray that the action of the District Court on August 30, 1943, in filing amended findings and conclusions but in failing to amend the findings and conclusions filed on March 3, 1943 as hereinbefore set forth, and the action of the District Court in including in the final order and decree of May 17, 1943, the paragraphs hereinbefore set forth, may be held erroneous and said decree [fol. 3270] accordingly reversed and the cause remanded for the amendment of said findings and conclusions and the elimination of said paragraphs in the decree, and for such other and fit relief as the Court may deem just and proper.

(S.) Geo. H. Armistead, Jr., D. L. Lansden, William Waller, American Trust Building, Nashville, Tennessee, Counsel for Defendants.

Dated this 28th day of October, 1943.

[fol. 3271] In the District Court of the United States

[Title omitted]

Order Allowing Appeal—Entered October 29, 1943

In the above entitled cause, defendants, Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum, and Kermit S. Stengel, having made and filed their petition praying an appeal to the Supreme Court of the United States from the findings and conclusions filed by the Court on March 3, 1943, the amended findings and conclusions filed on August 30, 1943, and the final order and decree entered on May 17, 1943, and having also filed their assignment of errors and prayer for reversal and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged that the appeal be and the same is hereby allowed as prayed for, and that said defendants give a bond with good and sufficient security in the sum of $2000.00 that they as appellants shall prosecute their appeal to effect and answer all costs, if they fail to make their appeal good.

It is further ordered and adjudged, as prayed by the above named defendants, that during the pendency of said appeal the running of the period of one year as provided in paragraph (18) of the decree of May 17, 1943, be suspended.

Enter Oct. 29, 1943.

Elmer D. Davies, United States District Judge.

Dated this 28th day of October, 1943.

[fols. 3272-3275] Bond on appeal for 2,000.00 approved and filed Oct. 29, 1943, omitted in printing.

[fols. 3276-3286] Citation in usual form, entered Oct. 29, 1943, omitted in printing.

[fol. 3287] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR SHORTENING RECORD ON APPEAL—Filed November 26, 1943

It is stipulated by and between appellee, United States of America, and appellants, The Crescent Amusement Company, et al., that in making up the record on appeal there need not be included Exhibit B to Answer of The Crescent Amusement Company, et al., to Supplement to Complaint, being the answers of defendants to the amended complaint filed in the District Court of the United States for the Southern District of New York on November 14, 1940, in the case entitled, "United States of America, petitioner vs. Paramount Pictures, Inc., defendants".

It is further stipulated there need not be included in the record on appeal plaintiff's printed brief in this case, filed October 15, 1941, and also filed by the Crescent Amusement [fol. 3288] Company, et al., as a part of their motion filed May 23, 1943, to amend the findings filed March 3, 1943. In

lieu of including said plaintiff's brief, it is stipulated that a comparison of the Findings and Conclusions filed March 3, 1943, with said brief will show:

(a) That the Findings numbered 11 to 67, inclusive, correspond with language in plaintiff's printed brief at pages 6 to 77, inclusive, with the exception of the last paragraph of Finding No. 52 and the first paragraph of Finding No. 67.

(b) That the Findings numbered 70 to 81, inclusive, correspond with language in plaintiff's printed brief at pages 78 to 91, inclusive.

(c) That the Findings numbered 83 to 98, inclusive, correspond with language in plaintiff's printed brief at pages 97 to 122, inclusive, with the exception of the second paragraph in Finding No. 94.

(d) That the Findings numbered 100 to 110, inclusive, correspond with language in plaintiff's printed brief at pages 122 to 132, inclusive, with the exception of the concluding paragraph of Finding No. 100 and with the further exception of the designation in Finding No. 101 of J. W. Baird as "President of Newport Amusement Company, an affiliate of Crescent".

(e) That the Findings numbered 114 to 133, inclusive, correspond with language in plaintiff's printed brief at pages 133 to 185, inclusive.

(f) That references to the record given in the brief are not included in the Findings, except where the references [fol. 3289-3299] are to exhibit, and at intervals sentences or paragraphs in the brief are omitted in the Findings. The numbers assigned the Findings are not found in the brief.

It is further stipulated that appellants, The Crescent Amusement Company, et al., shall have to and including November 29, 1943, within which time to file an amended praecipe, which shall supersede the praecipe heretofore filed by them, and appellee shall have ten additional days within which to file a counter praecipe.

This stipulation shall be filed as a part of the record in the cause and included in said amended praecipe.

Dated this November 23, 1943.

Robert L. Wright, Special Assistant to Attorney General. George H. Armistead, Jr., William Waller, Counsel for Appellants, The Crescent Amusement Company, et al.

[fol. 3300] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—Filed November 5, 1943

To the Clerk of the United States District Court:

In connection with the appeal allowed the United States of America on October 22, 1943 in the above entitled case, please include in the transcript of the record the following papers, viz.:

1. Petition for appeal filed by United States of America on July 16, 1943.
2. Order allowing said appeal entered July 16, 1943.
3. Citation issued July 16, 1943.
4. Acknowledgment of service of appeal papers.
5. Defendants' motion to dismiss said appeal.
6. Order extending time for filing record entered August 23, 1943.
7. Order extending time for filing record entered October 22, 1943.
8. Statement of defendants opposing jurisdiction on second appeal.

[fol. 3301] 9. Motion to dismiss second appeal.

10. This Praecipe.

William Waller, Geo. H. Armistead, Jr., D. L. Lansden, Attorneys for Defendants. Address; American Trust Building, Nashville, Tennessee.

Dated this November 5th, 1943.

[fol. 3302] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDED PRAECIPE FOR RECORD—Filed November 26, 1943

To the Clerk of the United States District Court:

Please disregard the Praecipe heretofore filed on October 29, 1943 (dated October 28, 1943) and prepare a transcript of the record in the above entitled cause, in the matter of the

appeal herein, and include in said transcript, in the order given below, the following papers, viz.:

1. Complaint.
2. Motions of defendants, The Crescent Amusement Company et al., to strike portions of complaint and for bill of particulars.
3. Opinion of the Court dated February 21, 1940.
4. Order of the Court entered February 23, 1940 on motions of The Crescent Amusement Company et al.
5. Bill of particulars filed May 22, 1940 in response to motion of The Crescent Amusement Company et al.

[fol. 3303] 6. Order entered August 16, 1940.

7. Answer of defendant exhibitors, Anthony Sudekum, et al.
8. Orders entered January 3, 1941, dismissing complaint as to certain defendants and amending complaint by striking paragraphs 50-53, inclusive, thereof.
9. Additional bill of particulars filed in response to motions of defendants, The Crescent Amusement Company et al.
10. Second additional bill of particulars filed in response to motion of The Crescent Amusement Company et al.
11. Third additional bill of particulars filed in response to motion of The Crescent Amusement Company et al.
12. Supplemental answer of defendants.
13. Supplement to complaint and order allowing same to be filed.
14. Answer of The Crescent Amusement Company et al. to supplement to complaint, excluding Exhibit B thereto.
15. Request to stipulate served on plaintiff on July 12, 1941, by defendants, Anthony Sudekum et al.
16. Plaintiff's response to request to stipulate.
17. The following portions of plaintiff's evidence in the case, including the testimony of plaintiff's witnesses hereinafter mentioned and exhibits filed and read to the Court in connection with said evidence, and objections of counsel to admissibility of such evidence and exhibits, to-wit:

[fol. 3304]

pp. 342-429	(Hendren)
pp. 673-702	(Pittman)
pp. 759-819	(Lawing)
pp. 820-970	(Dozier)

pp. 971-1057	(Miller)
pp. 1210-1225	(Perdue)
pp. 1226-1250	(Currey)
pp. 1251-1341	(Bailey)
pp. 1396-1574	(Smith)
pp. 1575-1635	(Anderson)
pp. 1708-1862	(Morgan)
pp. 1863-1946	(Willingham)
pp. 1947-1990	(Avey)
pp. 1991-1999	(Avery)
pp. 2195-2230	(Kirk)
pp. 2255-2279	(Ballance)
pp. 2280-2316 and 2341-2346	(Wilson)
pp. 2251-2464	(Baird)
pp. 2465-2578	Ruffin)
pp. 2595-2613; also R. 2723-2725	(Hendren)

18. The following plaintiff's exhibits not read into the evidence:

P 16;
P 23;
P 24;
P. 29;
P 30;
F 8;
F 12;
W 14.

Government Exhibits 294-297, inclusive.

[fol. 3305] 19. Motions of defendants made at conclusion of plaintiff's evidence in chief, including motion to strike portions of plaintiff's evidence and exhibits, made August 5, 1941, and the portions of the transcript at pp. 3357-3362 and 3789-3799 relating to said motions and the action of the Court thereon.

20. The following portions of defendants' evidence in the case, including the testimony of defendants' witnesses hereinafter mentioned and exhibits filed and read to the Court in connection with said evidence, and objections of counsel to admissibility of such evidence and exhibits, to-wit:

pp. 3812-3933	(Sudekum)
pp. 2000-2030	(Connors)

pp. 4251-4351	(Morgan)
pp. 4367-4421	(Kalmenson)
pp. 4422-4461	(Kupper)
pp. 4462-4519	(Wilson)
pp. 4643-4847 and 5259-5341	(Stengel)
pp. 5053-5092	(Agnew)
pp. 5342-5352 and 5401-5402	(Stipulations)

21. The following defendants' exhibits not read into the evidence:

Defendants' Exhibits 58, 136, 215, 216, 217, 220-228, inclusive, and F-15.

22. "Findings and Conclusions" filed March 3, 1943.

23. Petition of Cumberland Amusement Company for reconsideration and modification of findings and conclusions filed March 23, 1943.

[fol. 3306] 24. Petition of defendants, Rockwood Amusements, Inc. et al. for modification of findings and conclusions, filed March 23, 1943.

25. Final decree entered May 17, 1943.

26. Motion of defendant, The Crescent Amusement Company, to amend findings and make additional findings, filed May 27, 1943, excluding copy of plaintiff's brief filed as a part of said motion.

27. Motion of defendants, Cumberland Amusement Company et al. to amend findings and for additional findings, filed May 27, 1943.

28. Paper entitled "Amended Findings and Conclusions" filed August 30, 1943.

29. Petition for appeal.

30. Assignment of errors and prayer for reversal.

31. Order allowing appeal of The Crescent Amusement Company, et al.

32. Appeal Bond of The Crescent Amusement Company, et al.

33. Proof of service of appeal papers.

34. Statement required by Rule 12.

35. Citation.

36. Statement of jurisdiction.

37. Stipulation dated November 23, 1943.

38. This amended praecipe.
39. Order enlarging Time for Filing Record.

(S.) D. L. Lansden, William Waller, George H. Armistead, Jr., Counsel for Defendants. Address: American Trust Bldg., Nashville, 3, Tenn.

Dated this November 26, 1943.

[fol. 3307] Service of the foregoing Amended Praecipe and receipt of copy thereof is hereby acknowledged this November 26th, 1943.

(S.) Horace Frierson, United States District Attorney.

[fol. 3308] In the District Court of the United States

[Title omitted]

Order Enlarging Time—November 26, 1943

In this cause come the parties through their attorneys and move the Court that the time be extended to and including February 7, 1944, within which the parties may file the record in the Supreme Court pursuant to the appeal heretofore allowed plaintiff on October 27, 1943, and the appeal heretofore allowed certain of defendants on October 29, 1943.

And the Court being of the opinion that good cause has been shown for such enlargement or extension of time, the motion of the parties is sustained and it is hereby ordered that the time for filing said record be extended to and including February 7, 1944.

Enter: Nov. 26th, 1943.

Elmer D. Davies, United States District Judge.

[fol. 3309] In the District Court of the United States

[Title omitted]

Order—January 11, 1944

On motion of appellants, Crescent Amusement Company, et als., supported by affidavit of Kermit C. Stengel, to correct an alleged error on page 4845 of the transcript of evi-

dence, and the Court having no independent recollection or memorandum as to the language sought to be corrected, and it appearing that the stenographer's notes have been destroyed, it is ordered that said affidavit of Kermit C. Stengel be filed and made a part of the record in the cause.

The Clerk will include a copy of said affidavit and a copy of this order in the transcript of the record on appeal.

Approved for entry:

(S.) Geo. H. Armistead, Jr., William Waller, Attorneys for Appellants. Horace Frierson, U. S. Atty.

Enter: Jan. 11, 1944.

Elmer D. Davies, Judge.

[fol. 3310] [File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF KERMIT C. STENGEL—Filed January 11, 1944

KERMIT C. STENGEL, being first duly sworn, states as follows:

On page 4845 of the transcript in the above case the following appears:

"By Mr. Waller, for Defendants:

Q. Mr. Stengel, you recall that there was a second run Fox contract in this theatre in East Gadsden, the Dixie Theater, in East Gadsden, when Mr. Crawford was the Manager of that theater?

A. Yes.

Q. Is that what you were mentioning, what we were talking about during the noon recess?

A. That is what I was talking to you about. When we told them we couldn't take but so many at a time, they went ahead and sold what we would want them to sell."

In regard to the language shown in affiant's second answer "they went ahead and sold what we would want them to sell", affiant states that he did not make this statement,

or at least did not intend to make it. Affiant did not know, at the time Crescent was negotiating for second-run Fox pictures for Gadsden, that the Dixie Theatre in East Gadsden was negotiating for Fox pictures, but during the trial of this case he learned that Fox did make a deal [fol. 3311] with the Dixie Theatre after Fox had refused to make a deal with Crescent for a small number of pictures for second-run exhibition. Affiant believes that he said, or intended to say "they went ahead and sold what they wanted to sell", or words to that effect. Affiant certainly did not say, or intend to say, that Fox sold what "we" wanted them to sell.

This January 10th, 1944.

(S.) Kermit C. Stengel.

Subscribed to and sworn before me this January 10th, 1944. (S.) Webb Hays, Notary Public. My Commission Expires 3-7-44.

[fols. 3312-3313] IN THE DISTRICT COURT OF THE UNITED STATES

STIPULATION AS TO RECORD ON APPEAL—Filed January 12, 1944

In order to avoid duplication, it is stipulated that the record on appeal of United States of America, allowed October 27, 1943, and the record on appeal of The Crescent Amusement Company, et al., allowed October 29, 1943, be consolidated and that the sequence of papers and documents set forth in the praecipes may be altered by the Clerk in transmitting the record, to the end that such duplicatfon be avoided and the papers and documents included in a logical sequence, as determined by the Clerk. A copy of this stipulation shall be included in the record on appeal.

This January 12, 1944.

George H. Armistead, Jr., William Waller, Attorneys for Crescent Amusement Company, et al.

Horace Frierson, U. S. District Attorney; S. E. Wasson, Asst. U. S. District Attorney.

[fol. 3314] Public Law 195—78th Congress

Chapter 332—1st Session

S. 630

An Act

To Amend Section 107 of the Judicial Code, as amended, to Change the Terms of the District Court for the Middle District of Tennessee

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That effective January 1, 1944, so much of the second sentence of section 107 (c) of the Judicial Code, as amended, as precedes the proviso is amended to read as follows: "Terms of the district court for the Nashville division of said district shall be held at Nashville on the fourth Monday in January and the fourth Monday in September; for the Columbia division at Columbia on the first Monday in May and the second Monday in November; and for the Northeastern division at Cookeville on the second Monday in June and the first Monday in December."

Approved December 3, 1943.

Attest: A True Copy. L. B. Ormes, Clerk, U. S. District Court, Middle District of Tennessee, by H. M. Hutchison, D. C. (Seal.)

[fol. 3315] CERTIFICATE OF CLERK

UNITED STATES OF AMERICA,
Middle District of Tennessee,
Nashville Division, ss:

I, L. B. Ormes, Clerk of the District Court of the United States, in and for the Middle District of Tennessee, do hereby certify that the foregoing pages, numbering from one to thirty-three hundred and fifteen, inclusive, the same being divided into fifteen volumes, numbering from one to fifteen inclusive, contain a true, correct and complete record as called for in the plaintiff's praecipe which were duly filed by the attorneys for the plaintiff herein on July 16, 1943 and October 27, 1943, and also as requested by defendants' designations of additional portions of the record, and praecipes, which were filed by defendants' attorneys herein on July 27, 1943; August 13, 1943; November 5, 1943; and November 26, 1943.

I further certify that this record is in accordance with the stipulations, filed in this cause, which are herein included, except there appears a duplication of portions of the record which was determined necessary by the undersigned trial clerk; therefore, the stipulation filed January 12, 1944, is not fully adhered to.

I further certify that the annexed and foregoing original exhibits, composing a part of this record by direction of court order dated January 11, 1944, are original exhibits as filed on their respective filing dates during the trial of this case.

I certify further that the foregoing pages are a complete record, as requested by said plaintiff and defendants in this cause set out in the caption hereto, as the same appears from the records in my office and the file in this action.

Witness my hand as Clerk and Seal of said Court at Nashville, Davidson County, Tennessee, district and division aforesaid, on this 27th day of January, A. D. 1944, and of the Independence of the United States of America the 168th year.

L. B. Ormes, Clerk. (Seal.)

[fol. 3316] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1943

Nos. 662-663

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION—Filed February 17, 1944

The appellant, United States of America, intends to rely upon each of its two assignments of error and adopts them as its statement of points to be relied upon. It will urge that the District Court erred:

(1) In holding that an injunction against future theatre acquisitions by the defendants, which merely restrained such acquisitions when they occurred in a town where there was already a theatre and were accompanied by coercion or predatory practices, was adequate to prevent threatened elimination of competition by acquisition of competing independent theatres.

(2) In not holding that the Government was entitled to an injunction prohibiting such acquisitions except after an

affirmative showing before the Court that such an acquisition would not unreasonably restrain competition.

Said appellant herewith designates as necessary for printing in the record, the complaint as amended, the answers of Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Cumberland Amusement Com-[fol. 3317] pany, Lyric Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, Muscle Shoals Theatres, Louis Rosenbaum and Nettie Sudekum, the proposed decree submitted by plaintiff in accordance with the Court's decision of March 3, 1943, the order of April 20, 1943, setting a hearing on objections to the decree for May 6, 1943, the transcript of said hearing on May 6, 1943, the petition of defendants Rockwood Amusement Company, Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., for modification in findings and conclusions, filed on March 23, 1943, the petition of defendant Cumberland Amusement Company for reconsideration and modification of findings and conclusions, filed on March 23, 1943, supplemental petition of defendant Rockwood Amusement Company for reconsideration and modification of findings and conclusions filed on March 31, 1943, the motion of defendant Crescent Amusement Company to amend findings and make additional findings, filed on May 27, 1943, the order of August 30, 1943, overruling objections to findings, all of the appeal papers filed by said appellant and the orders allowing its appeals.

It has omitted from the foregoing designation the answer of Crescent Amusement Company to the supplement to the complaint, the Court's findings and conclusions and the final decree inasmuch as said documents are included in the portion of the record specified for printing by the appellees herein (appellants in No. 664). It has omitted the objections to the findings made by defendant Rosenbaum as he has filed no appeal.

The foregoing designation calls for the printing of all of volumes I and II of the record except pages 19 to 169, inclusive, 320 to 325, inclusive, and 345 to 360, inclusive.

Wendell Berge, Assistant Attorney General.

Service of a copy of this document is acknowledged this 7th day of February, 1944.

William Waller, Attorney for Appellees.

[fol. 3317a] [File endorsement omitted.]

[fol. 3318] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1943.

No. 664

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY, AND DESIGNATION OF PARTS OF RECORD UNNECESSARY FOR CONSIDERATION—Filed February 1, 1944

Appellants, The Crescent Amusement Company, et al, intend to rely upon each of their formal assignments of error, and adopt same as their statement of the points to be relied upon, but for convenience and brevity propose to group the discussion of said points as follows:

1. Plaintiff contended in the District Court that defendant exhibitors (Appellants here) exercised "control" over the licensing of films by the eight major distributors, Paramount, Fox, Warner, Loew's RKO, United Artists Columbia and Universal, and that by the exercise of said control defendant exhibitors were able to and did unreasonably restrain, suppress and eliminate the competition of competitors referred to as independent exhibitors. The District Court did not find or conclude that plaintiff's contentions in these respects were supported by the evidence. Appellants contend that there was a fatal variance between the allegations and the Findings (as well as the [fol. 3319] proof) and that the decree cannot stand for that reason.

2. The District Court found that in several instances a distributor discriminated against an independent exhibitor in the licensing of films. It was found, in effect, that in making deals with a defendant exhibitor rather than with an independent, the distributor was influenced by its desire for the business of the defendant exhibitor in other towns in the circuit, and that the discrimination was therefore the result of coercion on the part of defendant exhibitors. It is the contention of appellants that such discrimination by the distributors would not warrant the conclusion that defendant exhibitors violated the Sherman Act and would not justify paragraphs (8), (12), (13), (15), (16),

(18) and (21) of the decree, even if the complaint had been filed on that theory.

3. It is the contention of appellants that the findings of discrimination should be disregarded in this Court as entitled to no weight whatever for these additional reasons: (1) because they are based almost entirely on incompetent evidence consisting of inter-office memoranda and communications from one employee of a distributor to another employee of the same distributor, and appellants had nothing to do with said communications and were not parties to them; (2) because the findings are copied from plaintiff's brief and hence are entitled to no greater weight than their source, which was an admittedly partisan document. *Process Engineers, Inc. v. Container Corporation of America*, (C. C. A. 7, 1934) 70 F. (2d), 487; *United States v. Forness* C. C. A. 2, 1942), 125 F. (2d) 928.

[fol. 3320] 4. It is the contention of appellants that the Findings of discrimination are contrary to the weight of the competent evidence in the record, and that in these cases of alleged discrimination, the distributor in every instance had a good and valid reason for preferring to do business with the defendant exhibitor rather than the independent, wholly aside from the desire of the distributor to get additional revenue by making a circuit deal.

5. All other questions aside, appellants contend that paragraphs (8) and (12) of the decree are not adapted to carrying out the purposes of the Sherman Act and should be eliminated from the decree. The effect of these paragraphs is to permit distributors to exercise "leverage" on appellants in negotiating film deals, in that distributors are left free to condition the licensing of films in competitive situations upon the agreement of appellants to license pictures in other situations at film rentals and on terms dictated by the distributors. Appellants are deprived of the right to insist that film rentals and terms for competitive situations be agreed upon at the same time that film rentals and terms for other situations are agreed upon. The effect is to aggrandize the distributors at the expense of appellants. In this connection it should be stated that plaintiff evidently had the same view of the matter when the complaint was filed. There was a prayer asking for an injunction against the *distributors*, but not against the

exhibitor defendants. After five of the distributors had been dismissed as defendants, and without any amendment of the prayer, plaintiff at the conclusion of the trial asked for an injunction against the exhibitor defendants which is now found in the decree.

[fol. 3321] 6. All other questions aside, appellants contend that paragraphs (13), (15), (16), (18) and (21) of the decree are harsh and punitive rather than equitable and remedial, and should be eliminated. By these paragraphs of the decree each corporate appellant is required to divest itself of any stock ownership in any other appellant corporation, and also in certain corporations which were not parties to the cause; and Messrs. Sudekum and Stengel are permitted to be connected with only one appellant corporation. It is the contention of appellants that these divestiture provisions of the decree have no tendency whatever to correct any of the evils or supposed evils alleged to exist in the business of exhibiting motion pictures, and would entail a substantial financial sacrifice without corresponding benefit to the public.

7. The District Court held that so-called "franchise" agreements between certain of defendant exhibitors and certain distributors (who were indispensable parties to a suit to invalidate such agreements but were voluntarily dismissed from the case by plaintiff) were illegal and void. In paragraph (1) of the decree, the District Court enjoined appellants from entering into further franchise agreements with said distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them." Appellants contend that franchises are not illegal *per se;* that it is not a violation of the Sherman Act to have franchise agreements with three distributors at the same time (there being the eight major distributors as well as other so-called independent distributors whose product is [fol. 3322] able to the independent exhibitor); and that the language of paragraph (1) of the decree does not afford an ascertainable standard of conduct. Appellants further contend that there was no allegation in the complaint to the effect that a franchise was in any different category from a one-year deal, and that the decree in this respect is outside the issues in the case and is *coram nonjudice and void.*

Said appellants herewith designate, as considered unnecessary for the consideration of the points on which appellants intend to rely, the following parts of the transcript of the record as certified by the Clerk of the United States District Court for the Middle District of Tennessee on January 27, 1944:

1. Sections I, II and III, being paragraphs 1-17, inclusive, of Exhibit A to answer of The Crescent Amusement Company et al. to supplement to complaint, found at pages 496-505, inclusive.

2. Sections V, VI and VII, being paragraphs 90-187, inclusive, of Exhibit A to answer of The Crescent Amusement Company et al. to supplement to complaint, found at pages 522-562, inclusive.

3. Pages 565 and 566.

[fol. 3323] 4. Pages 1954-1961, inclusive, and pages 1963-2244, inclusive, being exhibits sent up in their original form pursuant to consent order of the District Court.

5. Paragraphs 1-23, inclusive, of motion to strike portions of plaintiff's evidence and exhibits, found at pages 2246-2255, inclusive.

6. Pages 3039 -a-b-c; Pages 3040 -a-b; Pages 3041 -a-b; and Pages 3045-3048, inclusive, being exhibits sent up in their original form pursuant to consent order of the District Court.

7. The following duplications: Pages 326-344, inclusive; Pages 361-389, inclusive; Pages 425-439, inclusive; Pages 470-471, inclusive; and Pages 3297-3299, inclusive.

Documents included in the transcript at pages 3290-3296, inclusive, are in the wrong place: these documents should be included in the printed record immediately after page 3240 of the transcript and immediately preceding the document commencing at page 3241 of the transcript.

George A. Armistead, Jr., William Waller, Attorneys for Appellants.

[fol. 3324] Service of a copy of this document is acknowledged this February 1st, 1944.

Charles Fahy, Solicitor General.

[fol. 3324a] [File endorsement omitted.]

[fol. 3325] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

Nos. 662, 663, and 664

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—February 28, 1944

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the cases on the merits.

Endorsed on Cover: File No. 48,155, 48,156, 48,157. D. C. U. S., Middle Tennessee, Term No. 662. The United States of America, Appellant, vs. Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., et al. Term No. 663. The United States of America, Appellant, vs. Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., et al. Enter Geo. H. Armistead, Jr. Term No. 664. Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., et al., Appellants, vs. The United States of America. Filed February 1, 1944. Term No. 662, O. T. 1943; 663, O. T. 1943; 664 O. T. 1943.

FILE COPY

Supreme Court, U. S.
FEB 1 1944
CHARLES ELMORE CROPLEY
CLERK

No. 662

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Middle District of Tennessee

CIVIL ACTION No. 54

UNITED STATES OF AMERICA, PLAINTIFF

v.

CRESCENT AMUSEMENT COMPANY ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on May 17, 1943. A petition for appeal was filed on July —, 1943, and is presented to the District Court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat.

572660—44

823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Interstate Circuit v. *United States*, 306 U. S. 208.

United States v. *American Tobacco Co.*, 221 U. S. 106, 188.

United States v. *Reading*, 226 U. S. 324, 373.

United States v. *Delaware Hudson Co.*, 253 U. S. 26, 63–64.

STATUTES INVOLVED

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2):

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUE AND THE RULING BELOW

On August 11, 1939, the appellant filed its complaint charging the defendants with violating Sections 1 and 2 of the Sherman Act by monopolizing and unreasonably restraining competition in the exhibition of films in towns in Alabama, Kentucky, and Tennessee. The exhibitor defendants are a group of affiliated corporations engaged in operating motion picture theatres and their principal officers, all of which were charged with combining their theatres in licensing films from the major distributors for the purpose of eliminating independent competitors. The complaint, as amended, also alleged that these defendants had used coercive and predatory practices in acquiring independent theatres and monopolizing the business of exhibiting films in numerous communities. The complaint prayed that the combination of exhibitor corporations in question be declared illegal, that the combination be dissolved and that

the defendants, be enjoined from continuing their illegal monopolies and from continuing to combine their theatres for the purpose of compelling licensing discriminations against their competitors. The prayer for relief also included the following request, which is the only one directly involved in this appeal:

> 7. That the defendant exhibitors and each of them be enjoined and restrained from acquiring any additional theaters or financial interests therein, except where they shall establish to the satisfaction of this Court that such acquisitions will not unreasonably restrain competition or create or tend to create a monopoly in the licensing of feature pictures for first-run or second-run exhibition or in the operation of first-run or second-run theaters in any of the towns in which they operate theaters.

Trial of the case was begun on July 7, 1941, and the taking of evidence was concluded on August 29, 1941. Briefs were then filed, together with proposed findings of fact and conclusions of law, and oral argument was had on December 1, 1941. On March 3, 1943, Judge Elmer Davies, sitting in the Middle District of Tennessee, rendered a decision which sustained most of the factual allegations of the complaint and concluded that the United States was entitled to a decree enjoining the defendants from continuing to violate the act in the manner alleged and proved

and requiring them to dissolve the combination of corporations described in the complaint, which he found to be unlawful, by a divestiture of stock interests. A copy of his findings of fact and conclusions of law is attached. No opinion was rendered.

The court found, under the heading "Elimination of Competition," at pages 8 to 46 of his decision, that the defendant exhibitors had, during the period from 1936 to 1940, acquired at least ten theatres in ten different towns for the purpose of eliminating independent theatre competition and had threatened at least seven more independent operators with a similar elimination by film licensing discriminations and threats of unfair competition. The court concluded that they had violated the Sherman Act by:

> A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

In conclusion of law No. 20, the court also held, in accordance with a request for such holding in the Government's brief, that there should be a provision in the decree:

> * * * restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville,[1] ex-

[1] Nashville was excluded from the suit by the complaint.

> cept after an affirmative showing that such acquisition will not unreasonably restrain competition.

Accordingly, the Government on May 6, 1943, presented for entry a decree including a provision in these terms. The court, however, despite this conclusion of law, indicated at the hearing that it did not desire to include this provision because it did not wish to be faced with the problem of having to make further decisions each time an exhibitor defendant might wish to acquire a theatre.

On May 17, 1943, the court entered a final decree, a copy of which is attached, in which it gave the following relief with respect to theatre acquisitions:

> (19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

Paragraph (9) of the decree enjoins each exhibitor from

* * * coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

THE QUESTION IS SUBSTANTIAL

The appellant believes that the District Court erred in declining to enter a provision in conformity with its decision of March 3 and in substituting paragraph (19) of the decree quoted above. Upon the record of repeated illegal theatre acquisitions made in this case, it was clearly not sufficient merely to enjoin the defendants from acquiring theatres where they repeated the illegal practices used in the past. But even if the court had made this provision against acquisitions coextensive with the prohibitions of the Sherman Act, itself, the provision would have been inadequate to protect the public from the destruction of competition in the remaining independent areas. Once the elimination of such competition occurs, the filing of a contempt proceeding can never restore the pre-existing competitive situation. Hence, the only adequate relief against persons adjudged to have repeatedly violated the Act by illegally acquiring and illegally threatening to acquire independent theatres is a provision which will prevent the elimination of such competition before the elimination occurs.

The question of securing adequate relief against theatre acquisitions by large circuits which elimi-

nate independent competition is one which is vital to the enforcement of the antitrust laws in the motion picture field. This question is directly involved in three other pending suits, (1) *United States* v. *Schine Chain Theatres et al.*, filed August 7, 1939; in the District Court for the Western District of New York, in which the two-year temporary order was entered on May 19, 1942, and which will come on for trial on May 19, 1944; (2) *United States* v. *Griffith Amusement Company et al.*, filed April 28, 1939, in the District Court for the Western District of Oklahoma, which is awaiting trial pending the disposition of preliminary motions, and (3) *United States* v. *Paramount Pictures Inc., et al.*, filed in the District Court for the Southern District of New York, on July 20, 1938, in which a consent decree was entered on November 20, 1940, which comes up for modification or trial of the issues on November 20th of this year. The first two suits named above are against large theatre circuits and involve substantially the same practices and pray for substantially the same relief as that asked in this case. The third case is against the major film distributors and their theatre-operating subsidiaries. It alleges the use of similar practices to those involved in the *Crescent* suit for the purpose of eliminating independent competition, and, in addition to dissolution of the offending theatre circuits, prays

for divorcement of the distribution from the exhibition end of the business.

Experience under the temporary order in the *Schine* case and the consent decree entered in the *Paramount* case has demonstrated that the problem of the widespread elimination of independent theatre competition by the large circuits cannot be solved by action taken after the acquisitions occur. It is, as a practical matter, impossible to restore by decree or court order a competitive theatre situation after the competiiion in question has been eliminated by acquisition of the competing theatre or theatres. Unless the Government is given the remedy which the court in this case concluded that it was entitled to but rejected on administrative considerations, the Government believes that it will be unable to secure the continued existence of independent theatre competition which the Sherman Act contemplates. This issue is one of substance and calls for decision by this Court.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

No. 663

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Middle District of Tennessee

Civil Action No. 54

UNITED STATES OF AMERICA, PLAINTIFF

v.

CRESCENT AMUSEMENT COMPANY ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on May 17, 1943. A petition for appeal was filed on October 27, 1943, and is presented to the District Court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36

Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Interstate Circuit v. *United States*, 306 U. S. 208.

United States v. *American Tobacco Co.*, 221 U. S. 106, 188.

United States v. *Reading*, 226 U. S. 324, 373.

United States v. *Delaware Hudson Co.*, 253 U. S. 26, 63-64.

STATUTES INVOLVED

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2):

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine

or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUE AND THE RULING BELOW

On August 11, 1939, the appellant filed its complaint charging the defendants with violating Sections 1 and 2 of the Sherman Act by monopolizing and unreasonably restraining competition in the exhibition of films in towns in Alabama, Kentucky, and Tennessee. The exhibitor defendants are a group of affiliated corporations engaged in operating motion-picture theatres and their principal officers, all of which were charged with combining their theatres in licensing films from the major distributors for the purpose of eliminating independent competitors. The complaint, as amended, also alleged that these defendants had used coercive and predatory practices in acquiring independent theatres and monopolizing the business of exhibiting films in numerous communities. The complaint prayed that the combination of exhibitor corporations in question be declared illegal, that the combination be dissolved, and that the defendants be enjoined from continuing their

illegal monopolies and from continuing to combine their theatres for the purpose of compelling licensing discriminations against their competitors. The prayer for relief also included the following request, which is the only one directly involved in this appeal:

> 7. That the defendant exhibitors, and each of them, be enjoined and restrained from acquiring any additional theaters or financial interests therein, except where they shall establish to the satisfaction of this Court that such acquisitions will not unreasonably restrain competition or create, or tend to create, a monopoly in the licensing of feature pictures for first-run or second-run exhibition or in the operation of first-run or second-run theaters in any of the towns in which they operate theaters.

Trial of the case was begun on July 7, 1941, and the taking of evidence was concluded on August 29, 1941. Briefs were then filed, together with proposed findings of fact and conclusions of law, and oral argument was had on December 1, 1941. On March 3, 1943, Judge Elmer Davies, sitting in the Middle District of Tennessee, rendered a decision which sustained most of the factual allegations of the complaint and concluded that the United States was entitled to a decree enjoining the defendants from continuing to violate the act in the manner alleged and proved and requiring them to dissolve the combination of corporations

described in the complaint, which he found to be unlawful, by a divestiture of stock interests. A copy of his findings of fact and conclusions of law is attached. No opinion was rendered.

The court found, under the heading "Elimination of Competition," at pages 8 to 46 of his decision, that the defendant exhibitors had, during the period from 1936 to 1940, acquired at least ten theatres in ten different towns for the purpose of eliminating independent theatre competition and had threatened at least seven more independent operators with a similar elimination by film-licensing discriminations and threats of unfair competition. The court concluded that they had violated the Sherman Act by:

> A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

In conclusion of law No. 20, the court also held, in accordance with a request for such holding in the Government's brief, that there should be a provision in the decree:

> * * * restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville,[1] except after an affirmative showing that such acquisition will not unreasonably restrain competition.

[1] Nashville was excluded from the suit by the complaint.

Accordingly, the Government on May 6, 1943, presented for entry a decree including a provision in these terms. The court, however, despite this conclusion of law, indicated at the hearing that it did not desire to include this provision because it did not wish to be faced with the problem of having to make further decisions each time an exhibitor defendant might wish to acquire a theatre.

On May 17, 1943, the court entered a final decree, a copy of which is attached, in which it gave the following relief with respect to theatre acquisitions:

> (19) That the exhibitor defendants, and each of them, be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents, or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

Paragraph (9) of the decree enjoins each exhibitor from—

> * * * coercing, or attempting to coerce, independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

On August 30, 1943, the Court modified its findings of fact and conclusions of law in certain respects not material here, in response to motions made by the defendants within the time allowed by law, but made no change in its decree. By the same order the Court, on its own motion, modified the language quoted above from its original conclusion of law number 20, in accordance with the decree entered on May 17, to read as follows:

> * * * restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents, or servants are guilty of coercing, or attempting to coerce, any such independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

THE QUESTION IS SUBSTANTIAL

The appellant believes that the District Court erred in declining to enter a provision in conformity with its decision of March 3 and in substituting paragraph (19) of the decree quoted above. Upon the record of repeated illegal theatre acquisitions made in this case, it was clearly

not sufficient merely to enjoin the defendants from acquiring theatres where they repeated the illegal practices used in the past. But even if the court had made this provision against acquisitions coextensive with the prohibitions of the Sherman Act itself, the provision would have been inadequate to protect the public from the destruction of competition in the remaining independent areas. Once the elimination of such competition occurs, the filing of a contempt proceeding can never restore the preexisting competitive situation. Hence, the only adequate relief against persons adjudged to have repeatedly violated the Act by illegally acquiring, and illegally threatening to acquire, independent theatres is a provision which will prevent the elimination of such competition before the elimination occurs.

The question of securing adequate relief against theatre acquisitions by large circuits which eliminate independent competition is one which is vital to the enforcement of the antitrust laws in the motion-picture field. This question is directly involved in three other pending suits, (1) *United States* v. *Schine Chain Theatres et al.*, filed August 7, 1939, in the District Court for the Western District of New York, in which a two-year temporary order was entered on May 19, 1942, and which will come on for trial on May 19, 1944; (2) *United States* v. *Griffith Amusement Company et al.*, filed April 28, 1939, in the District Court for the Western District of Oklahoma,

which is awaiting trial pending the disposition of preliminary motions; and (3) *United States v. Paramount Pictures Inc., et al.*, filed in the District Court for the Southern District of New York, on July 20, 1938, in which a consent decree was entered on November 20, 1940, which comes up for modification or trial of the issues on November 20th of this year. The first two suits named above are against large theatre circuits and involve substantially the same practices and pray for substantially the same relief as that asked in this case. The third case is against the major film distributors and their theatre-operating subsidiaries. It alleges the use of similar practices to those involved in the *Crescent* suit for the purpose of eliminating independent competition and, in addition to dissolution of the offending theatre circuits, prays for divorcement of the distribution from the exhibition end of the business.

Experience under the temporary order in the *Schine* case and the consent decree entered in the *Paramount* case has demonstrated that the problem of the widespread elimination of independent theatre competition by the large circuits cannot be solved by action taken after the acquisitions occur. It is, as a practical matter, impossible to restore by decree or court order a competitive theatre situation after the competition in question has been eliminated by acquisition of the competing theatre or theatres. Unless the Gov-

ernment is given the remedy which the court in this case concluded that it was entitled to but rejected on administrative considerations, the Government believes that it will be unable to secure the continued existence of independent theatre competition which the Sherman Act contemplates. This issue is one of substance and calls for decision by this Court.

Respectfully submitted.

CHARLES FAHY;
Charles Fahy,
Solicitor General.

Nov. 25, 1943.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 19

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

STATEMENT AS TO JURISDICTION.

GEO. H. ARMISTEAD, JR.,
D. L. LANSDEN,
WILLIAM WALLER,
Counsel for Appellants.

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Expediting Act of February 11, 1903, Section 2, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29)	2
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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 54.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CRESCENT AMUSEMENT COMPANY, ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the defendants, The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum and Kermit C. Stengel, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on May 17, 1943. A petition for appeal was filed on October 28, 1943, and is presented to the District Court herewith.

Jurisdiction.

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is con-

ferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case;

Interstate Circuit v. *United States*, 306 U. S. 208;

United States v. *American Tobacco Co.*, 221 U. S. 106, 188;

United States v. *Reading*, 226 U. S. 324, 373;

United States v. *Delaware Hudson Co.*, 253 U. S. 26, 63-64.

Statutes Involved.

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2):

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The Issues and the Rulings Below.

On August 11, 1939, United States of America filed its complaint charging the defendants with violating Sections 1 and 2 of the Sherman Act: (1) by combining with each other and with each of eight distributors to monopolize and unreasonably restrain competition in the exhibition of films in towns in Alabama, Kentucky and Tennessee; (2) by combining separately with the eight distributors as a group to accomplish the same purpose; and, (3) by combining with each other to coerce the distributors with the purpose and effect of monopolizing and unreasonably restraining competition as aforesaid. By an amendment plaintiff voluntarily dismissed the complaint as to five of the eight distributors who had been made defendants, and eliminated the allegation that the distributors had combined among themselves. This left in the case nine alleged conspiracies or combinations, viz., a combination of the defendant exhibitors as a group with each of the eight distributors, and a ninth conspiracy among the exhibitors themselves to coerce the distributors.

The gravamen of plaintiff's case was that independent exhibitors had been excluded from the film market and thus had been excluded from the business of exhibiting motion picture films. Bills of particulars were ordered and plaintiff specified certain independent exhibitors who had thus been excluded. Trial of the case was begun on July 7, 1941, and the taking of evidence was concluded on August 29, 1941. Briefs were filed and oral argument had on December 1, 1941. On March 3, 1943, Judge Elmer Davies, United States District Court Judge, filed findings of fact and conclusions of law. On May 17, 1943, a final decree was entered. Defendants made timely motions to amend the findings of fact and conclusions of law and on August 30, 1943, amended findings and conclusions were filed in which cer-

tain of defendants' motions were granted but the other overruled.

There were findings that defendant exhibitors had acquired certain theatres formerly operated by so-called independent exhibitors but there is no finding that any such independent exhibitor sold out because of a shortage of product. In some instances it was expressly found that the prices charged by the distributors for films were increased when competition entered the town and that this increase in cost of films was one reason for the independent's unwillingness to continue to operate.

The findings contain references to instances referred to as "sell-aways" where a particular distributor licensed its product to an independent exhibitor while the latter had a monopoly in the particular town, and then licensed a later year's product to the defendant exhibitor after the latter entered the town. There are also included in some of these findings quotations from inter-office letters and memoranda, which plaintiff obtained from the files of the five distributors who were voluntarily dismissed as defendants, containing statements that the product was licensed to the defendant in the competitive situation in order to get the business of the defendant in other towns. Defendant objected to these inter-office communications when they were introduced, and after they had been introduced provisionally, moved at the conclusion of plaintiff's evidence in chief to strike them on the ground that they were not competent evidence against defendant exhibitors, and for the further reason that the mere fact that the communications were written and received by officers and employees of the respective distributors was not evidence of the truth of the contents of said communications. In each of the cases of alleged discrimination by a distributor against an independent exhibitor, there was positive evidence from the policymaking officers and employees of the distributors that

the films were licensed to the defendant exhibitor rather than the independent exhibitor because it was better business to do so wholly aside from the question of making a circuit deal for other towns. For example, the independent usually had a very inferior theatre and in many cases was financially irresponsible and did not have a record of complying with prior contract terms.

Appellants make no question on this appeal as to the applicability of the Sherman Act to the business of exhibiting motion pictures. They make the factual defense that there was no evidence of conspiracy, no evidence of coercion, no evidence of discrimination except in the sense of choice of a customer by a distributor for the latter's own justifiable business reasons, and no evidence of exclusion of any independent exhibitor because of a shortage of product. There was no evidence and no contention by plaintiff that any defendant exhibitor had ever licensed any films which were not actually exhibited.

In the final decree of May 17, 1943, defendant exhibitors were enjoined in both paragraphs (8) and (12) from combining closed situations with competitive situations in licensing films. The language of said two paragraphs is different and leaves defendants an indefinite standard of conduct. Although each defendant exhibitor is apparently enjoined from refusing to license pictures from any particular distributor in non-competitive situations unless the distributor also licenses its films to it in competitive situations, the distributors are left free to exercise the corresponding leverage on defendant exhibitors. That is to say, the distributor is left free to say to appellants: Unless you take our pictures for every theatre which you operate, at such and such prices, we will not license you pictures for exhibition in any town where you have competition. Appellants insist that this is unfair and improper and contrary to ordinary principles of equity jurisprudence.

Another issue, involving trade practices, is raised by paragraph (1) of the decree which enjoins defendant exhibitors from "continuing in combination with each other and with each of the distributors, Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them." This language does not specify an ascertainable standard of conduct and it is not clear whether the making of franchises is held to be illegal *per se*, nor is it clear what a franchise is. The word "franchise" has been generally applied to long term as distinguished from short term contracts. It is the contention of appellants that a franchise is not *per se* illegal especially if clearance provisions are subject to readjustment and if such franchises are not in effect at any one time with more than half the distributors currently producing pictures. From the standpoint of an exhibitor, a long term contract may have valid business advantages in that the exhibitor is assured a supply of pictures without having to negotiate at frequent intervals over prices; and the distributor has a corresponding advantage in having an outlet for its pictures. In a rising market such a franchise has a financial advantage to the exhibitor, and in a falling market to the distributor, just as in the case of a long term lease of real estate.

By subsequent paragraphs of the decree each defendant exhibitor is required to divest itself of stock ownership in certain other corporations engaged in the business of operating motion picture theatres in other and non-competitive localities. It is insisted by appellants that this is a harsh and unnecessary provision and under present tax laws may amount to a practical confiscation of their property. Certainly it is not a violation of the Sherman Act for a corporation operating theatres in one part of Tennessee to own stock in a corporation operating theatres in another part of Tennessee.

The Questions Are Substantial.

While appellants raise no question of the applicability of the Sherman Act to the business of exhibiting motion pictures, but expressly pretermit this question, they submit that the questions raised are substantial in that they affect their right and privilege to conduct their business in a lawful and proper manner.

The licensing of motion picture films by exhibitors from distributors is and always has been a matter of horse-trading. The effect of the portions of the decree complained of is to take away from appellants and give to the distributors a very decided advantage in this trading. While the decree may give certain advantages to independent exhibitors as compared with appellants in towns where there is competition, the actual effect is to hurt them both to the advantage of the distributors who are left with full opportunity to play one off against the other. The defensive weapon of the operator of the chain theatre is taken away from him in that he is forced to license films in non-competitive situations without knowing whether these same pictures will be available for his use in competitive situations.

The question of the legality or illegality *per se* of franchises is an important one for the industry. At the present time pictures are being sold by some of the distributors in blocks of five because of a provision in a consent decree signed by these distributors. If this provision should be modified and the distributors should again make long term contracts which contain no illegal clauses or features, appellants should be free to negotiate on this basis. In any event the injunction as to franchises should be clarified so that appellants can know what they may and may not legally do.

The requirement that defendant exhibitors divest themselves of stock ownership in each other (as well as in two

corporations which were not even made defendants) is not, as appellants contend, a suitable or equitable remedy under the facts in this case but amounts to a harsh and unnecessary punishment. Assuming that there are practices in the motion picture industry which should be remedied or corrected, it is submitted that this is not the equitable or proper way to do it.

It is realized that the questions raised are questions which would ordinarily be determined by an intermediate Court rather than by the Supreme Court. However, Congress has seen fit to enact that appeals in cases of this character go direct to the Supreme Court. Under these circumstances, it is submitted that any question which would ordinarily be substantial in an appeal to the Circuit Court of Appeals is necessarily substantial where the only right of appeal is to the Supreme Court.

Possible Defect in Jurisdiction.

Attention of the Court should be called to the following matters:

The final decree was entered on May 17, 1943, and defendants made timely motions to amend the findings and conclusions in a substantial way, viz., the motions if granted in full would have required substantial changes in the decree. Without waiting the action of the Court on these motions, plaintiff prayed for and was allowed an appeal on July 16, 1943. Defendants promptly filed a motion to dismiss the appeal as premature, relying upon the case of *Leishman* v. *Associated Wholesale Electric Co.*, decided February 15, 1943, 318 U. S. —, 87 L. Ed. 495, 63 S. Ct. 543. Thereafter on August 30, 1943, the Court filed amended findings and conclusions but did not modify the decree. Defendants' motion to dismiss the appeal has not been acted upon and has not been abandoned by plaintiff. Under

the circumstances, it is questionable whether the Court had jurisdiction to file amended findings and conclusions.

If the Court lost jurisdiction of the case for the purpose of filing amended findings and conclusions when the Court allowed plaintiff's appeal on July 16, 1943, the present appeal is premature. However, if plaintiff's pending appeal be regarded as void and of no effect whatever, the Court did have jurisdiction to file amended findings and conclusions on August 30, 1943, and this appeal, made within sixty days of said date, is proper.

Respectfully submitted,

(S.) GEO. H. ARMISTEAD, JR.,
(S.) D. L. LANSDEN,
(S.) WILLIAM WALLER,
Counsel for Appellants,
Address: American Trust Bldg.,
Nashville, Tennessee.

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Nos. 17, 18, and 19

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, APPELLANT

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 17, 18

THE UNITED STATES OF AMERICA, APPELLANT

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 19

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion, but filed conclusions of law (R. 1473–9) and detailed findings of fact (R. 1352–1473).

JURISDICTION

The judgment of the district court was entered on May 17, 1943 (R. 1480). Timely motions filed by the defendants to amend the findings of fact and conclusions of law on which this judgment was based were ruled upon on August 30, 1943.[1] The Government's petition for appeal in No. 17 was filed and allowed on July 16, 1943, and its petition for appeal in No. 18 was filed and allowed on October 27, 1943.[2] The petition for appeal in No. 19 was filed and allowed on October 29, 1943 (R. 1505, 1520).

The jurisdiction of this Court is invoked under Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. sec. 29, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. sec. 345. This Court on February 28, 1944, postponed further consideration of the question of its jurisdiction in these cases to the hearing of the cases on the merits (R. 1537).

QUESTIONS PRESENTED

1. Whether the appeal in No. 17 was premature and therefore ineffective and whether, if so, the

[1] R. 108, 118, 120, 122, 1485, 1489.

[2] R. 1495, 1496, 1499, 1500. The Government does not object to dismissal of its first appeal as premature if its second appeal is found to be timely (*infra*, pp. 26–33).

district court had jurisdiction to allow the appeal in No. 18.

2. Whether the provisions of the judgment relating to the acquisition of new theatres by the defendant exhibitors adequately prevent and restrain them from again violating the Sherman Act.

3. Whether the district court erred in prohibiting each of two individual defendants from exercising control over more than one defendant exhibitor and in prohibiting each defendant exhibitor from retaining or acquiring an interest in any other defendant exhibitor.

4. Whether the district court erred in enjoining the defendant exhibitors from combining with each other and with a major distributor in making franchise contracts which have the purpose and effect of maintaining the defendant exhibitors' monopolies and preventing competition with them.

5. Whether the district court erred in prohibiting the defendant exhibitors from using circuit buying power, in licensing films, to restrain competition between them and operators of independent theatres.

6. Whether the evidence adequately supports all essential allegations of the complaint.

7. Whether the admission of any incompetent evidence or the court's method of formulating its findings invalidates its findings or requires reversal of the judgment which it entered.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * (15 U. S. C. sec. 1.)
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * (15 U. S. C. sec. 2.)
>
> * * * * *
>
> SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * (15 U. S. C. sec. 4.)

STATEMENT

PRIOR PROCEEDINGS IN THE CASE

The United States brought this suit against nine affiliated companies (referred to as the defendant exhibitors) operating motion picture theatres in some 70 small towns (referred to as Crescent towns) in Alabama, Arkansas, Kentucky, Mississippi, and Tennessee; against four officers of these companies; and against the eight major distributors[3] of motion picture films, charging them with conspiring to restrain interstate commerce in motion picture films and to monopolize the exhibition of films in the area in which defendant exhibitors operate, in violation of Sections 1 and 2 of the Sherman Act. The principal allegations of the complaint are:

The defendant exhibitors have collectively contracted with each major distributor to obtain for themselves, in all Crescent towns, the right to priority of exhibition of all feature pictures selected by the defendant exhibitors. The priority rights thus obtained have enabled the defendant exhibitors to restrain and suppress competition by preventing other exhibitors from obtaining the first-class pictures required for successful theatre operation and by preventing competitors from

[3] In the case of three of these distributors (Paramount, Universal, and Warner), both the parent company and the subsidiary engaged in distributing its films were named as defendants (R. 3–5).

exhibiting feature pictures released by the major distributors except those which the defendant exhibitors had rejected or had previously exhibited. By these means competition in Crescent towns has been practically eliminated. Independent exhibitors have been induced to sell to the defendant exhibitors under the latters' threat to open competing theatres and to prevent independents from procuring desirable pictures. By such tactics a large number of independent exhibitors have been forced out of the motion picture business. (R. 8–10.)

After a consent decree had been entered against five of the major distributors in *United States* v. *Paramount Pictures, Inc.* (R. 198–226),[4] the United States dismissed the present suit against these five distributors and eliminated from the complaint paragraphs 50 to 53, inclusive, which charged the major distributors with conspiring with each other to impose certain restraints, but it did not eliminate the charge that each of them had conspired with the defendant exhibitors to restrain and to monopolize trade in Crescent towns (R. 7, 9, 19).

The case was tried in the summer of 1941 and orally argued in December 1941. On March 3, 1943, the court filed its findings of fact and con-

[4] This suit, pending in the federal district court in the southern district of New York, charged the major distributors with various violations of the Sherman Act (R. 177–197).

clusions of law (R. 1352–1479). The latter set forth that seven of the nine defendant exhibitors, three of the four individual defendants, and one major distributor, United Artists,[5] had violated the Sherman Act substantially as charged in the complaint (R. 1476–7). Final judgment giving effect to the court's conclusions was entered on May 17, 1943 (R. 1480–4). The judgment prohibits the various acts and practices which the court had held to be illegal; requires each defendant exhibitor to divest itself within a year of any interest in any other such defendant (except Strand Enterprises, Inc.); prohibits the defendants Sudekum and Stengel from controlling or acting as an officer of more than one defendant exhibitor; and prohibits the defendant exhibitors from acquiring any new theatre (outside of Nashville) in any town where there already is a theatre unless the owner makes a voluntary offer of sale and no exhibitor defendant has coerced or has attempted to coerce such sale by predatory practices.

Several motions to amend the findings and conclusions, filed by the defendants within 10 days of entry of judgment, were ruled upon on August 30, 1943 (R. 108–139, 1489–95). On that date the court amended certain findings and conclusions in

[5] The court found that the evidence did not establish a violation of the Sherman Act by Columbia or Universal, the two other major distributors remaining as defendants, and that the complaint should be dismissed as to them (R. 1457–64, 1474–5).

respects not material here but made no change in its judgment. Conclusion of law No. 20 was amended so as to accord with the relief against new theatre acquisitions granted by the judgment, which relief was narrower than that set forth in the court's original conclusion No. 20 (R. 1479, 1484).

In Nos. 17 and 18 the Government has specified as error the court's refusal to enter an injunction against future theatre acquisitions in accordance with the court's original conclusion of law No. 20 (R. 1497–9).

In No. 19 the defendants* have specified as error the injunction against acting in combination in making franchise contracts for films for the purpose of injuring competitors or maintaining a monopoly; against combining closed towns with competitive situations in licensing films, for a like purpose; and against conditioning the licensing of films in a competitive situation upon the licensing of films in other situations (R. 1518). They also attack the provisions of the judgment which require divestiture of stock in affiliated corporations and which permit the defendants Sudekum and Saengel to control and to act as an officer of only one defendant exhibitor (R. 1519). Certain portions of the court's findings and certain rulings on evidence are also assigned as error (R. 1506–17).

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* United Artists, Muscle Shoals Theatres, and Louis Rosenbaum have not joined in the appeal.

THE FACTS AND ISSUES NOT NOW IN DISPUTE

The court's findings are largely undisputed. Of 187 findings, the defendants have assigned specific error to only particular sentences or paragraphs in 16 findings (R. 1506–14).[1] The Government submits that there is adequate supporting evidence for all of the findings to which specific error is assigned, and a brief statement of such evidence is set forth in Appendix A, *infra*, pp. 74–77. Moreover, the disputed findings merely furnish additional illustrations of practices which are fully established by other findings.

The district court's findings are so comprehensive and detailed and are so largely undisputed that the Government believes that it will not be necessary for this Court to examine the portions of the evidence which have been included in the record on appeal. For the convenience of the Court, a table of contents of the findings, with record citations, is given in Appendix B, *infra*, pp. 78–79. All record citations in this brief refer, unless otherwise indicated, to the district court's findings.

The conclusions of law and the provisions of the judgment based thereon which have not been as-

[1] The defendants have also generally assigned error to all findings and parts of findings which follow the language of the brief which the Government submitted to the court (R. 1514; see R. 1522) and to such findings and parts of findings as are "predicated upon" unsworn statements made by employees of distributors and other "third persons" (R. 1515).

signed as error establish the following violations of the Sherman Act: The defendant exhibitors have agreed to divide the territory in which each may operate (C. 11, J. 2[1]) and have combined to suppress competition therein (C. 12, J. 3); they have combined in licensing films from major distributors for the purpose of maintaining their respective monopolies and preventing competition (C. 13, J. 4); they have maintained unreasonable monopolies in the towns in which each operates (C. 9A, J. 7); and they have eliminated actual and potential competition by predatory practices (C. 9C, J. 9) (R. 1476–7, 1480–2).

Defendants likewise do not question the application of the Sherman Act to the business of exhibiting motion pictures as it is carried on by the defendants (cf. *Binderup* v. *Pathe Exchange*, 263 U. S. 291; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208) and the court's findings show that this business involves a regular interchange of films in interstate commerce. Prior to the beginning of the motion picture season representatives of each major distributor solicit from exhibitors contracts for the distributor's feature pictures for the coming season, these contracts being subject to approval or rejection by the home office in New York. The films covered by a contract are forwarded from New York, New Jersey,

[1] "C. 11" refers to conclusion of law No. 11 and "J. 2" refers to paragraph 2 of the judgment. Like abbreviations are used in the further references in the above paragraph.

or California to the distributor's exchanges serving the area.[9] The exchanges deliver the films to the exhibitor and after exhibition he ordinarily returns the film to the exchange from which it came. About 90% of the film rentals paid by the defendant exhibitors is paid to the major distributors. (R. 1356–7.)

THE DEFENDANT EXHIBITORS—THEIR AFFILIATION AND MONOPOLY POSITION

Crescent, the principal defendant exhibitor, owns 50% of the capital stock of Cumberland and Lyric (R. 1359).[10] The majority of Crescent's stock is owned by the defendant Sudekum, his wife, his brother, and his two sons-in-law, the defendants Stengel and Baulch (R. 1358). Crescent also owned 62½% of the stock of Muscle Shoals from its organization in 1924 to 1937, since which time the business has been conducted as a partnership in which Sudekum's wife has a half interest (R. 1359). Stengel is the record holder of all the

[9] These exchanges are located at Atlanta, Cincinnati, Indianapolis, Memphis, New Orleans, and St. Louis (R. 1353–6). All except the Memphis exchange are thus in a State other than those of the Crescent towns.

[10] The following abbreviated titles are used herein: Crescent for Crescent Amusement Co.; Cumberland for Cumberland Amusement Co.; Lyric for Lyric Amusement Co., Inc.; Cherokee for Cherokee Amusements, Inc.; Kentucky for Kentucky Amusement Co., Inc.; Muscle Shoals for Muscle Shoals Theatres; and Rockwood for Rockwood Amusement Co.

stock of Rockwood and Rockwood owns 50% of the stock of Cherokee and Kentucky and of five other theatre corporations (R. 1361). Rockwood has operated as a virtual branch of the Crescent business under the immediate supervision of Stengel (R. 1371).[11]

As admitted by the defendants' answer, Sudekum is president of Crescent, Cumberland, and Lyric and Stengel is an officer and a director of Kentucky and Cherokee (R. 3, 14). Sudekum is paid $10,400 a year by Cherokee for his "advice" (R. 1364).

On August 11, 1939, the date the complaint was filed, the defendant exhibitors and their affiliates were operating theatres in 78 towns and had competition in only five.[12] This represented over 100% expansion in five years' time; on August 11, 1934, they had been operating in 32 towns, in six of which there was competition. They are

[11] Rockwood's executive offices have been in the same building as those of Crescent, being first donated by and later leased by the latter. Sudekum gave to Stengel the equipment of one of the two theatres with which Rockwood started in business and gave him the half interests in two theatre corporations which Rockwood now owns. Individual theatres have been transferred from Crescent subsidiaries to Rockwood. (R. 1371.)

[12] The figures given in this paragraph do not include Nashville. The conspiracy in which the defendants were engaged did not embrace Nashville due to the different situation existing there, where certain major distributors were operating theatres.

operating in all but nine of the 45 towns in Tennessee having a population between 2,500 and 10,000. (R. 1362–3.) On August 11, 1939, Crescent alone was operating 49 theatres, Cumberland 13, Rockwood 12, and companies in which Rockwood had a half interest, 25 (R. 1358, 1360–2). Five years earlier Crescent had been operating 29 theatres and Cumberland seven; the operations of Rockwood and its affiliates at the earlier date are not stated (*ibid.*).

During the five-year period prior to suit Crescent's growth in earnings and surplus was out of all proportion to the increase in its gross receipts and assets. Comparing the fiscal year ended June 30, 1939, with that ended June 30, 1934, Crescent's total assets and gross receipts less than doubled but its surplus increased 30 times and its net earnings[13] more than five times. During the entire period its annual net earnings averaged about 35% on its capitalization. (R. 1429–30.) Rockwood, which was organized in 1936, experienced a like phenomenal growth in earnings and surplus. Comparing the calendar year 1939 with the calendar year 1937, Rockwood's total assets and gross receipts approximately tripled, but its surplus increased about eight times and its net earnings 31 times. During the three-year period

[13] The net earnings referred to in this paragraph mean net earnings exclusive of dividends received.

its annual net earnings averaged about 12 times its original capital investment. (R. 1429–30.)[14]

ELIMINATION OF COMPETITION THROUGH USE OF CIRCUIT BUYING POWER

The facts previously recited show the opportunity possessed by the defendant exhibitors to exercise "circuit buying power" and to earn monopoly profits. Use of this power means that the operator of a chain of theatres negotiates exhibition contracts for a particular theatre in one area on the basis of the buying power of his other theatres in other areas. Such power is primarily measured, not by the number of theatres involved, but by the proportion between those where there is no competing theatre, i. e., closed towns, and those which are faced with opposition. Thus if a circuit controls 10 closed towns and one theatre in a town where there is competition the distributor may be denied access to any of the closed towns unless it satisfies the demands of the circuit in the competitive situation.[15] Where, as in this

[14] A supplementary finding, made at defendants' request, states that popcorn sales and screen advertising accounted for a "large part" of Rockwood's profits (R. 1493). But the revenue from screen advertising appears to be directly attributable to Rockwood's monopoly position in all the towns in which it operated (R. 1361). This obvious source of revenue would not have been generally neglected by exhibitors had they not found that under competitive conditions this practice adversely affected patronage.

[15] As an illustration of this, see the report of a United Artists salesman explaining the failure to continue licensing

case, the circuit's policy is to absorb competitors, the demands will include restricting the independent's ability to license films to the extent necessary to prevent him from offering effective competition. As competition is thus eliminated circuit buying power progressively expands.

Not only were Crescent and Rockwood able independently to exercise circuit buying power, but the defendant exhibitors frequently acted together in making license agreements (R. 1368–71). Because of their close association in ownership and management, the weight of the buying power of the entire group could be brought to bear at any desired point.

In numerous instances competitors were eliminated after the defendant exhibitors had, through their circuit buying power, succeeded in limiting the supply of films of the major distributors available to the independent for first-run and for second-run showing. This occurred both in cases where a circuit theatre was opened in opposition to an established independent theatre and in cases where the independent opened in oppposition to an

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its pictures to a theatre in Rogersville, Tennessee, after one of the defendant exhibitors, Cumberland, had opened a theatre there (R. 1384): "In Rogersville Hill [of Cumberland] has opened a new theatre and we will have to play with Hill because this is the only spot of his entire fifteen towns where there is any opposition at all; and Hill has demanded that we approve all contracts or none."

existing circuit theatre.[16] Upon purchase, the independent theatre was closed.[17] As part of the terms of acquisition, the independent exhibitor was usually required to enter into an agreement not to engage in the motion-picture business for periods ranging from 5 to 25 years (R. 1365–8). In some cases the area covered by such agreement was much larger than that served by the acquired theatre and was substantially coextensive with the area of the defendant exhibitors' operations; in other cases the agreement applied to a more limited area (*ibid.*). The court found that these agreements demonstrated the defendant exhibitors' "clear intention to monopolize theatre operation" (R. 1367).

In certain instances the former independent was, in effect, made a junior partner in circuit operations. This happened when the independent theatre or theatres were transferred to a new corporation with half the stock going to a defendant exhibitor and the other half to the prior owner. Cumberland, Cherokee, and Lyric were formed in this way. (R. 1363–4.)

The ordinary film-licensing agreement covers a

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[16] Examples of the former situation are Brownsville (R. 1372–8), Earlington (R. 1379–83), Rogersville (R. 1383–8), McKenzie (R. 1388–9). Examples of the latter are Paris (R. 1373–8), Hopkinsville (R. 1391–4), Athens (R. 1399–1402), Union City (R. 1403–12).

[17] R. 1378, 1383, 1388, 1394, 1402, 1412.

single season's product, but the defendant exhibitors jointly entered into long-term franchise contracts with certain major distributors which conferred upon them, for the duration of the respective franchises, important exclusive film-licensing privileges (R. 1430).[18] By these franchises the defendant exhibitors were given the right to first-run exhibition of all feature pictures which they chose to select in substantially all of their towns.[19] Clearances establishing the time lag prior to subsequent exhibition in the same or nearby towns were fixed.[20] The opportunity of competitors to obtain feature pictures for exhibition following runs in defendants' theatres was further restricted by repeat provisions which gave defendant exhib-

[18] The Paramount franchise ran for five years (R. 1431). Warner franchises have been in effect for 13 years by virtue of a two-year franchise, extended first for five years and then for two years, followed by a four-year franchise (R. 1439–40). Fox has entered into two successive three-year franchises (R. 1451, 1453).

Not all the defendant exhibitors were parties to all franchise contracts. The Paramount franchise, embodied in substantially identical contracts, covers the theatres of Crescent, Lyric, Rockwood, and Rockwood's subsidiaries (R. 1430, 1437). The latest Warner franchise is in the form of separate contracts for each town and covers Crescent, Lyric, Muscle Shoals, Rockwood, Kentucky, and Cherokee towns (R. 1439–40). The latest Fox franchise covers all Crescent, Lyric, Muscle Shoals, and Rockwood towns (R. 1453).

[19] R. 1431, 1439, 1440, 1443–4, 1451, 1452, 1453.

[20] R. 1432–4, 1446–7, 1452, 1456.

itors the option of showing a picture in their theatres a second time.[21]

The Paramount franchise was contrary to the company's general policy (R. 1438). The deal was made because the Sudekum circuit had virtually eliminated competition in its area and the contract was a way of getting back into the circuit after Sudekum had refused, following a dispute with Paramount over operation of its theatre in Nashville, to license its product for four of the five preceding seasons (R. 1431, 1438). The first Fox franchise likewise followed a season during which Fox had been unable to sell to the Sudekum circuit, and Fox entered into the franchise because it would receive a substantially larger return thereunder than that obtained from independents in the same area although in the particular towns in which the independents operated they paid higher rentals than the Sudekum theatres (R. 1448–9, 1451–2). The Warner franchise was tied to the elimination of potential theatre competition between Crescent and Warner in Nashville (R. 1439).

Keeping or threatening to keep a distributor's product out of a circuit's closed towns unless its demands as to competitive towns are met operates

[21] R. 1432, 1441, 1442, 1446, 1451–2, 1453–4. Under the Paramount franchise the repeat showing could be as much as 120 days after the first showing (R. 1437). Competitors would be excluded from showing the picture during the period of the repeat-run option (R. 1437–8).

to eliminate all competition in licensing films in the latter situation. The result is that, because of wholly extraneous factors, the independent theatre is denied opportunity to obtain films on a competitive basis. This is illustrated by the following letter from Paramount's eastern sales manager to the manager of its Indianapolis exchange explaining why Paramount gave the Crescent theatre in Madisonville clearance for the 1935–6 season over the independent theatre in the adjacent town of Earlington which previously had received clearance over Madisonville (R. 1381):

> If Madisonville were the only town involved in the Sudekum deal I agree with you that they would not be entitled to any protection over Earlington. However that is not the case. We have finally been successful in closing a deal with the Sudekum Circuit, which we have been unable to sell for a number of years * * *: but since there is much more involved than just Madisonville, the Company is desirous of securing the film rental we have not had for several years from the Sudekum towns, and it was necessary to include in the Madisonville deal the Earlington protection.

Another example is Loew's refusal to license its 1935–6 product to an independent in Brownsville who had been using its product "ever since he has been in business and paid excellent rentals," after a Crescent theatre had been opened there (R.

1374–8). Sale of the independent theatre to Crescent followed shortly, in April 1936 (R. 1378). What happened is briefly stated in a letter from the manager of Loew's Memphis exchange to its southern district manager (*ibid.*):

> I know Mr. Lawing [the independent] personally and know this is the party Mr. Sudekum sat down on top of in Brownsville, Tennessee, and finally ran him out of town. Mr. Lawing is a very good theatre operator, but cannot buck such opposition as Sudekum.

SPECIFICATION OF ERROR TO BE URGED IN NOS. 17 AND 18

The district court erred in entering paragraph (19) of the judgment and in failing to enjoin the defendant exhibitors from acquiring an interest in any additional theatre outside of Nashville, Tennessee, except after affirmatively showing to the court that the acquisition will not unreasonably restrain competition.

SUMMARY OF ARGUMENT

I

The Government is inclined to believe that the motions to amend the district court's findings which were pending when the court allowed the Government's first appeal from the judgment rendered that appeal (No. 17) premature. But if this is so, this Court has jurisdiction of the Government's second appeal (No. 18), which the dis-

trict court allowed after its judgment had become final. The allowance of an invalid appeal does not deprive a court of all further jurisdiction in the cause. Allowance of an abortive, premature appeal does not deprive the court of power to allow a second appeal after its judgment has ripened into finality. *Ohio Public Service Co.* v. *Fritz*, 274 U. S. 12.

II

In view of the defendants' use of circuit buying power to eliminate competition, the extent to which they in fact eliminated competition, and the court's conclusion that the defendant exhibitors were maintaining unlawful monopolies in the areas in which they respectively operated, dissolution of the defendant exhibitors would have been an appropriate remedy. The minimum appropriate relief was to prohibit further expansion unless the legality of any proposed acquisition was first affirmatively shown. The district court originally concluded that the plaintiff was entitled to such relief. However, in the hearing on the judgment to be entered the court expressed reluctance to assume the burden of passing upon the legality of theatre acquisitions and the judgment which was entered merely prohibits acquisitions which are the product of "predatory practices" by the defendants.

We submit that in this respect the judgment

fails to grant adequate relief and is otherwise open to serious objection. It sanctions, by implication, acquisitions not involving predatory practices but within other prohibitions of the judgment. The prohibition, being framed in terms of trade practices rather than being specific, means that a contempt proceeding for violation involves the delays and difficulties of an original proceeding to enforce the statute. For these and other reasons the possibility of a fine for contempt is not an effective deterrent. And even if a fine is ultimately imposed this does not restore the competition previously eliminated or make the acquired theatre once again competitive. It does not carry out the purpose of equity proceedings under the Sherman Act—to prevent and restrain future violations of the statute.

III

The various defendant exhibitors, each operating a theatre chain, are affiliated and under common control. They have agreed upon a division of areas of operation, have obtained preferences over competitors by combined use of circuit buying power, and have otherwise acted in unison. As long as the inducement to combined action, by reason of common ownership and control, continues, the general injunctive provisions of the judgment against certain practices will not effectively open up and keep open the door to fair competitive opportunity in the area in which the

defendant exhibitors operate. The defendants make the argument that the required divestiture is not in the public interest because it would weaken their bargaining power in dealings with distributors. But it is, and must be assumed to be, in the public interest to prevent the stifling of competition and monopolization as to exhibiting motion pictures which the record reveals. Defendants' argument further ignores the fact that each defendant exhibitor will have, notwithstanding divestiture, greater resources than its competitors, and other bargaining advantages over them.

IV

The judgment enjoins the defendant exhibitors from combining with each other and with a major distributor in making franchise contracts for the purpose of maintaining their present theatre monopolies and preventing competition. The franchises being one of the principal means employed in effectuating the general scheme to monopolize and restrain trade, the prohibition against use of such means was properly phrased in terms of purpose and effect. The facts would have warranted outright prohibition of this means. The defendants have no ground for complaining of the indefiniteness of the prohibition since it is the provisions alleged to be unduly indefinite which narrow the scope of the prohibition to the defendants' advantage.

V

The judgment prohibits the defendant exhibitors from using circuit buying power to restrain competition in the licensing of films. When one of two exhibitors in a town operates theatres in other towns in which he has no competition and threatens not to license a distributor's pictures in his closed towns unless he is given the first-run showing and other preferences in the competitive town, irrespective of the equal or better terms offered by the competitor, such practices, when successfully pursued, eliminate competition between the two exhibitors in the licensing of the distributor's pictures. The court's prohibition of these practices is not to be condemned because the judgment does not in terms prohibit distributors from using reverse leverage against the defendant exhibitors.

VI

The defendants contend that the Government failed to prove the allegations of the complaint as amplified by the bills of particulars. This issue is not within defendants' assignment of errors and it was not raised below. The supporting argument ignores the fact that findings made by the court which the defendants have not questioned as lacking in evidentiary support demonstrate that there was ample proof of all essential allegations of the complaint. We submit that the defendants have erroneously interpreted the com-

plaint and have misconstrued the effect and scope (as applied to the complaint) of the bills of particulars filed by the Government.

VII

A. The receipt in evidence of the inter-office communications between officers or employees of major distributors does not constitute ground for reversal. These communications were supplementary proof of facts found by the court which were adequately supported by other evidence. The court's evidentiary ruling, if error, was therefore harmless error. The defendants were not denied opportunity to cross-examine as to the truth of the statements in these communications. In addition, the communications were properly received in evidence under the principle that the acts or declarations of a co-conspirator are admissible against his fellow conspirators. The distributors were charged with being, and, except for two, were shown to be, co-conspirators with the defendants who have appealed.

B. The action of the district court in formulating many of its findings in language corresponding to that in the Government's brief does not deprive the findings of the usual presumption of correctness. The court's consideration of the case was painstaking and judicious and the comparatively minor amendments to the findings requested by the defendants attest their substantial accuracy.

ARGUMENT

I

THIS COURT HAS JURISDICTION EITHER OF THE APPEAL IN NO. 17 OR OF THAT IN NO. 18

The district court entered final judgment in this case on May 17, 1943 (R. 1480). On the sixtieth day after judgment the Government, being in doubt as to whether certain pending motions to amend the court's findings operated to extend the time for appeal, applied for and was allowed an appeal (No. 17) from the court's judgment (R. 1495, 1499). The appellees have moved to dismiss this appeal upon the ground that it was premature.

The district court ruled on the motions to amend its findings on August 30, 1943 (R. 1489). Within 60 days from this ruling both the Government and certain defendants applied for and were allowed appeals from the judgment entered on May 17, 1943, these appeals being, respectively, Nos. 18 and 19 (R. 1496, 1500, 1505, 1520). Appellees in No. 18 filed a statement opposing the jurisdiction of this Court upon the ground that the district court, by allowing the Government's first appeal and issuing citation thereon, lost jurisdiction of the cause and was without power to allow a further appeal. The jurisdictional statement filed in support of No. 19 suggests that if the district court lost jurisdiction of the cause by allowing the Government's first appeal,

it may have been without power to rule thereafter on the pending motions to amend the findings, in which event the appeal in No. 19 would be premature.

The position of the Government is that if its appeal in No. 17 was premature, the conclusion that that appeal is a nullity removes all doubt as to the validity of its appeal in No. 18. While the Government is now inclined to believe that the appeal in No. 17 was premature, the facts and considerations which appear to us to be pertinent will be briefly set forth.

NO. 17

Where a timely motion to amend the trial court's findings raises "questions of substance" so that the granting of the motion would necessarily alter "rights already adjudicated" the time for appeal runs from the order disposing of the motion. *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203. The Court in that case said (p. 206) that a motion which seeks to amend findings "in more than purely formal or mechanical aspects" tolls the appeals statute. The decision does not definitely indicate what test is to be applied in determining whether the requested amendments affect the substance of the judgment. Conceivably the test might be whether the issues raised by the motion have any substantial merit. If this is the test the Government doubts that the motions to amend which were pending when the appeal in

No. 17 was taken raised "questions of substance." Probably, however, the question of substance is to be determined by examining the scope of the issues which the motion raises on its face. Cf. *Zimmern v. United States,* 298 U. S. 167. If this is the proper test, the appeal in No. 17 was undoubtedly premature.

On the tenth day after judgment (within the time allowed by Rule 52 (b) of the Rules of Civil Procedure) various defendants filed a motion to amend the court's findings (R. 1485).[22] The motion states that each defendant "adopts and relies upon" the amendments to findings requested in (1) a motion to amend the findings filed on the same day by Crescent and (2) certain petitions to amend the findings filed in March 1943 by Rockwood, Cherokee, Kentucky, and Cumberland.

The Crescent motion which was thus adopted requested (1) specified changes in parts of 12 of the court's 187 findings, (2) elimination of all findings and parts of findings described as "adopted from" the Government's brief, and (3) elimination of all findings and parts thereof "predicated upon" unsworn statements made by employees of distributors and other "third persons" (R. 122–139). The Government doubts whether these requests raised any question of substance affecting the judgment. As to the first, the find-

[22] The motion also prayed that the court's conclusions of law and judgment be amended "consistently with" the amendments to the findings therein sought.

ings in which change was sought were merely supplementary to other findings which fully established every element of law violation encompassed by the judgment. As to the second, the fact that findings were couched in the language of the Government's brief clearly does not destroy their validity (*infra*, pp. 71–73). The objection to such of the findings as were predicated upon allegedly inadmissible evidence probably fails because of insufficient specification and certainly does not show that the findings to which it relates were material to the judgment.

The prior petitions filed by Rockwood, Cherokee, Kentucky, and Cumberland, which the motion to amend adopted, requested changes in the court's findings which, if granted, would have required that the complaint be dismissed as to these four companies (R. 108–121). Possibly the action of the court in later entering judgment against these companies is to be construed as a rejection of all parts of their pending petitions which were inconsistent with the court's judgment and, if this is so, there is a question whether requested changes in findings, upon which the court has already ruled adversely, raise questions of substance respecting the judgment.

NO. 18

If the appeal in No. 17, because premature, does not confer jurisdiction upon this Court it plainly did not oust the district court from jurisdiction

over the cause. An appeal cannot be at one and the same time a nullity in the appellate court but binding upon the court from which the appeal was taken.

Ohio Public Service Co. v. *Fritz*, 274 U. S. 12, squarely upholds the power of a court to allow a second appeal notwithstanding its earlier allowance of a premature appeal, which had not been dismissed or vacated, from the same judgment. The Ohio Supreme Court entered final judgment in June 1925. While an application for rehearing was pending, the court allowed a writ of error to this Court and issued citation and a supersedeas bond was filed.[23] After the court had denied the application for rehearing, it allowed a second writ of error. The case came before this Court on both writs and the defendant in error contended in its brief (pp. 10–11) that the first writ must have been abandoned when application was made for a second, and that the latter came too late because more than 90 days after entry of judgment. This Court briefly disposed of the jurisdictional question by saying (pp. 12–13):

> These two writs of error were sued out at different stages of the same cause; the first while a timely application for rehearing was pending; the second after this had been denied. Under the circumstances, plaintiff in error may rely upon the latter writ and No. 210 will be dismissed.

[23] Record in No. 210, October Term, 1926, pp. 1, 4, 12, 13.

When a party is uncertain whether appeal from a final judgment of a district court lies to this Court or to the circuit court of appeals, he may be allowed an appeal to both courts, and the appeal to the circuit court of appeals is valid if this Court does not have jurisdiction of the appeal taken to it. *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 582; *Columbia Gas & Electric Corp.* v. *American Fuel & Power Co.,* No. 814, October Term, 1943, decided May 22, 1944. Since in these cases one of the appeals necessarily preceded the other, the decisions mean that a court, when it allows an appeal, does not lose power to allow the same party a second appeal. While there cannot be appellate jurisdiction under both appeals, determination of the absence of jurisdiction under one establishes the appellate jurisdiction under the other.

Allowance of appeal does not deprive a court of further jurisdiction in the cause if the appeal was not authorized by statute, and a court which has improvidently allowed such an appeal may vacate its order of allowance (*Benitez* v. *Bank of Nova Scotia,* 109 F. (2d) 743, 747 (C. C. A. 1)).[24] The power to vacate implies the power to act, as

[24] An appeal before judgment which has become final is as much outside the authority of the appeals statute as an appeal taken, as in the *Benitez* case, after time for appeal has expired.

The court in the *Benitez* case dismissed two appeals but rendered decision on a third appeal taken from another order of the district court. This was the decision reversed in 313 U. S. 270.

in the instant case, upon the assumption of the nullity of the earlier order of allowance.

Even assuming *arguendo* that a court which had allowed a premature appeal would be deprived of jurisdiction in the cause until prematurity had been judicially determined; this would be the effect only where the premature appeal had been docketed with the appellate court. Filing the record with the appellate court is an essential step in perfecting an appeal. *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135, 137; *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 35. In the instant case the record called for by the appeal in No. 17 had not been filed with this Court at the time the district court allowed the appeal in No. 18.[25]

Appellees in their statement opposing jurisdiction cited *Draper* v. *Davis*, 102 U. S. 370, and *Ensminger* v. *Powers*, 108 U. S. 292, 302–303, as holding that a court has no power to proceed in a cause while an appeal from its judgment is pending. But in each of these cases the pending appeal was concededly valid. The cases therefore have no application to the issue being presently considered, namely, the effect on the jurisdiction of the district court of allowance of an appeal which

[25] The time for filing the record in this Court pursuant to the appeal taken in No. 17 had been duly extended by orders of the district court (R. 1502). The record in all three appeals (Nos. 17, 18, 19) was ultimately filed in this Court on February 1, 1944.

was ineffective to vest jurisdiction in the appellate court. *In re McLean Store Fixtures Corp.*, 70 F. (2d) 217, 219–220 (C. C. A. 1), which appellees also cited, is even more remote from the issue. The court there held that it was without jurisdiction to entertain a motion for rehearing which had been filed not only after an appeal had been taken from its judgment but also after the time allowed for taking an appeal had expired.

II

THE DISTRICT COURT ERRONEOUSLY FAILED TO IMPOSE AS A CONDITION ON THE ACQUISITION BY A DEFENDANT EXHIBITOR OF ANY NEW THEATRE THAT IT FIRST AFFIRMATIVELY JUSTIFY THE ACQUISITION

The purpose of an equity suit by the Government under Section 4 of the Sherman Act is not punishment for past offenses but, in the words of that section, "to prevent and restrain" future violations of the act. The rule is well established that in such proceedings the Government is entitled to effective relief and that the court is "bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461; *Local 167* v. *United States*, 291 U. S. 293, 299. And in determining whether effective relief has been granted, serious consideration must be given to the question whether the judgment is so framed

that its prohibitions will, in actual practice, be enforced and applied. This Court's statement with reference to substantive violations of the statute that "Realities must dominate the judgment" (*Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360) is, we submit, equally applicable to the question of relief.

The district court found that the defendants had, within a six-year period, eliminated competitors in 20 towns [26] and potential competition in two other towns,[27] and that in several other towns they had made various threats, sometimes supplemented by film licensing discriminations, in an attempt to induce the sale to them of independent theatres.[28] It also concluded that each of five defendant exhibitors was maintaining an unreasonable monopoly of the exhibition business in the area in which it operated (R. 1476). Under these circumstances, dissolution or partial dissolution of these exhibitors would have been an appropriate remedy. Cf. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106. Or the lower

[26] Huntsville, Fayetteville, Union City, Greenville (Tennessee), Maryville, Newport, Gadsden, Brownsville, Paris, Hopkinsville, Earlington, Rogersville, McKenzie, Spruce Pine, Morristown, Harriman, Athens, Copperhill, Greenville (Kentucky), Central City (R. 1363–4, 1366–7, 1387–8, 1390, 1395, 1402, 1425–6).

[27] Hickman, Decatur (R. 1428).

[28] Gallatin, Mount Pleasant, Scottsville, Russelville, Jefferson City, Lexington, Livingston (R. 1412, 1419–20, 1426–7).

court, in view of the "dangerous probability" that the exhibitors would continue their illegal expansion policy, might have prohibited all new theatre acquisitions.[29]

Instead of these more drastic curbs, the Government in the brief submitted at the close of the trial merely requested that any new acquisition be prohibited unless the defendant exhibitor first made an affirmative showing as to its legality. The district court in the conclusions of law which it filed in March 1943 adjudged that this relief was appropriate and necessary. Conclusion No. 20 (R. 1479) sets forth that the United States is entitled to a decree—

> restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, except after an affirmative showing that such acquisition will not unreasonably restrain competition.

The judgment subsequently entered did not, however, embody this relief. As shown by the hearing on the proposed judgment, the court was reluctant to assume the burden of ruling upon the

[29] The complaint in the *Paramount* case prayed that the theatre-owning distributors be required to divest themselves of either their theatres or their production and distribution facilities and prayed that a preliminary injunction issue restraining them from making any theatre acquisitions pending entry of final decree (R. 195–7). Such relief was not granted by the consent decree entered in November 1940 but it is requested in an application for modification of the decree filed by the United States on August 7, 1944.

validity of all new theatre acquisitions (R. 54, 94, 96). All that the judgment provides (par. 19, R. 1484) is that no defendant exhibitor shall acquire a financial interest in any additional theatre outside Nashville in any town where there already is a theatre—

> unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.[20]

The Government submits that the above relief is inadequate and defective (1) because the substantive prohibition is far too narrow and limited and (2) because from a practical, procedural standpoint the scales are weighted, not against those who have been found to have violated the law, but against the Government, with the result that even the limited prohibition imposed cannot be effectively enforced.

As to the substantive prohibition, only two conditions are imposed on further expansion of the defendants' theatre chains. One is that the owner "voluntarily offer" to sell his theatre. This condition, if it means that the independent

[20] Paragraph 9 enjoins each defendant exhibitor from coercing or attempting to coerce independent theatre operators to sell to it, by predatory practices (R. 1482).

must be the party who initiated the negotiations leading to sale, has no practical significance since the chain is known to be always a prospective purchaser. If "voluntarily" means that the sale must not have been induced by any restraint prohibited by the judgment, the limitation duplicates, without in any way fortifying, other provisions of the judgment.

The second limitation on acquisitions, that the purchasing defendants should not have been guilty of "predatory practices," appears to sanction all new acquisitions except those tainted with this one type of illegal restraint. By implication at least, acquisitions induced by any other type of restraint are permissible. If this is its effect, the condition narrows and largely destroys, so far as acquisitions are concerned, the general prohibitions of the judgment, including the prohibition (par. 7, R. 1482) against "creating or maintaining an unreasonable monopoly of the business of operating theatres." We submit that paragraph 19 impairs the effectiveness of other provisions of the judgment and that, unless modified, it should be stricken.

From the standpoint of procedure, the deficiencies of paragraph 19 are even more serious. Since the defendants have been adjudged guilty of illegally monopolizing the business of exhibition, the judgment clearly should impose upon them

the burden of showing that any new theatre acquisition meets the requirements of the judgment. Instead of this, paragraph 19 places upon the Government the burden of establishing beyond a reasonable doubt that the acquisition is barred by the judgment.[a]

We submit that limitations imposed on new acquisitions enforceable only by contempt proceedings long after the event fail to achieve the declared purpose of equity proceedings under the Sherman Act—to prevent and restrain violations of the statute. The acquisition of a competing theatre immediately terminates its competition. Punishment for contempt on account of an improper acquisition (in practical actuality, a money fine) does not restore the competition eliminated up to the time of the fine and cannot make the acquired theatre again competitive.

Prohibitions in which purpose or effect is an element or which are directed against trade practices necessarily described in general terms have the weakness that a contempt proceeding for their violation is, in substance, a proceeding to enforce the Sherman Act itself and therefore subject to the delays and uncertainties of such an action. As illustrative of this, see the cases referred to be-

[a] The Government can enforce the judgment only by bringing a contempt proceeding. Since such a proceeding is criminal (*United States* v. *Goldman*, 277 U. S. 229), the Government would have to show beyond a reasonable doubt that the judgment had been violated.

low.[32] What may be termed the trade practices of the defendants which the court found illegal could be dealt with only by this type of prohibition; but in the case of theatre acquisitions it is entirely feasible to impose an absolute bar, to be lifted upon a showing as to the legality of any proposed acquisition.

Not only is the efficacy of the relief given by paragraph 19 subject to the usual weaknesses attaching to prohibitions framed in general terms, but there are special considerations strongly indicating the probable ineffectiveness of this particular prohibition.[33] The facts relating to violations

[32] In *United States* v. *Balaban* (Crim. No. 31230, D. C. N. D. Ill.), a contempt proceeding was begun in November 1938 for violation of a decree entered against the major distributors and a large theatre circuit affiliated with one of them. The case was referred to a master for the taking of evidence. His report was filed in May 1940. Before any hearing on exceptions to the report, the matter was settled as part of the consent decree entered in *United States* v. *Paramount Pictures, Inc.* (see *supra*, p. 6) and resulted in entry of judgment in December 1940 against three of the eight defendants imposing fines totaling $10,000.

In *United States* v. *Goldman*, 277 U. S. 229, a contempt proceeding was filed in November 1925 alleging violations of a judgment entered in a Sherman Act case. The taking of testimony before a special examiner continued until September 1927. Later the district court dismissed the action on the ground that it was barred by the statute of limitations and this Court reversed. The case ended in November 1928 by finding one defendant guilty and imposing a $2,000 fine.

[33] The ineffectiveness to which we refer is in addition to the ineffectiveness resulting from the narrowness of the substantive prohibition, which has already been discussed (*supra*, pp. 36–7).

are not likely ever to come to the attention of the Government since an independent who has sold his theatre to a defendant exhibitor will not be disposed to register a complaint and thereby, in effect, repudiate the sale which he has agreed to make. And as far as the defendants are concerned, the possibility of a fine for contempt is not an effective deterrent. Such possibility operates as a real deterrent only as against defendants conscious of violation of the judgment. But the ambiguities of the prohibitions of paragraph 19 are such (*supra*, pp. 36–7), and conduct within its scope is susceptible of such varied interpretations, that it is doubtful that the defendants would ever view their conduct as within the bar of that paragraph.

The fact that the relief sought by the Government might somewhat restrict the independents' sales market and thus prevent them from obtaining the maximum selling price is not a valid objection. Any judgment in a Sherman Act proceeding which curbs a defendant's business activities may incidentally prevent third persons from making advantageous deals with him. The propriety of any particular relief is not to be judged solely with respect to the interests of those engaged in the trade or commerce affected by the judgment. Protection of the general consuming public against the evils associated with monopolization of trade, such as high prices and limitation of product, is a primary objective of the Sherman Act, and the

statute must be applied in the light of this objective.[34]

The Government's proposal, which would require the district court to pass upon the validity of all theatre acquisitions prior to their consummation, does not impose any novel or undue burden upon the court. Similar requirements are found in a number of decrees entered in proceedings under the Sherman Act. A decree, entered by consent in 1916 prohibiting acquisition, without prior court approval, of the business or plant of a competitor, was before this Court in *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137. Two other similar Sherman Act consent decrees are described below.[35]

Under judgments entered in litigated cases brought under the Sherman Act, courts have fre-

[34] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50, 58; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 42–43; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, 500–501.

Monopolization of exhibition threatens consumers (motion picture patrons) not only with high and controlled admission charges but also with restriction in choice of product (entertainment). Irrespective of whether local management is likely to provide entertainment better suited to the needs and desires of the local community than chain operation of motion picture theatres, the consuming public is injured when, through destruction of competition, it is denied opportunity to select between competitive offerings.

[35] In *United States* v. *Schine Chain Theatres, Inc.*, 31 F. Supp. 270 (W. D. N. Y.), the court refused, as a matter of discretion, to grant a preliminary injunction restraining theatre acquisitions, but it later entered an order with the consent of the parties prohibiting the defendant theatre

quently assumed heavy judicial burdens. The judgment entered on the mandate of this Court in *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383, provided that any controversy arising between any railroad applying for joint ownership or use of the terminal properties and the proprietary companies should be submitted to the district court for determination.[36] In numerous judgments requiring dissolution courts have assumed the burden of passing upon exceedingly complex plans of dissolution.[37] The judgment entered in *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N. D. Ohio), appeals pending, Nos. 2–11, this Term, requires the district court to exercise extensive supervision over carrying out

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chain, during a two-year period that trial was postponed, from acquiring any new theatre unless the court first approved the acquisition.

A consent decree entered in March 1944 in *United States* v. *Solvay Process Co.* (D. Kans., Civil Action No. 2046) prohibits the defendants from acquiring facilities for the manufacture of soda ash in the State of Kansas unless they show to the satisfaction of the court that the acquisition will not unreasonably restrain or prevent any competitor or potential competitor from producing soda ash.

[36] *Decrees and Judgments in Federal Antitrust Cases*, 98–99. The judgment in this case also came before this Court in *Ex parte United States*, 226 U. S. 420, and in *United States* v. *Terminal Railroad Assn.*, 236 U. S. 194.

[37] See judgments in *United States* v. *American Tobacco Co.*, 221 U. S. 106, *Decrees and Judgments in Federal Antitrust Cases*, 165–191; in *United States* v. *Du Pont de Nemours & Co.*, 188 Fed. 127 (C. C. D. Del.), *Decrees and Judgments in Federal Antitrust Cases*, 193–205; in *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.), judgment (not reported) entered May 8, 1944.

the judgment and also over the acts of the receiver appointed to conduct Hartford-Empire's business during the pendency of any appeal and until the court should be satisfied that there was due compliance with its judgment.

The fact that the district court, moved in part at least by considerations of mere judicial convenience (R. 94–96), finally declined to afford a remedy co-extensive with its original conclusion as to the scope of the injunction to which the United States was entitled, should not, we submit, be regarded by this Court as persuasive. In Sherman Act cases in which this Court has approved the conclusions of the district court as to the nature and character of the defendant's violation of the statute, this Court has not hesitated to review and modify the remedy to be granted. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78–82; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188. Cf. *Continental Insurance Co.* v. *United States*, 259 U. S. 156; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 728.

III

THE DISTRICT COURT PROPERLY REQUIRED SEPARATION IN OWNERSHIP AND CONTROL OF THE DEFENDANT EXHIBITORS

The judgment (par. 13) requires each defendant exhibitor to divest itself of any interest in any such other defendant or "affiliated" corporation and prohibits acquisition of an interest in any such

defendant or corporation (R. 1483).[38] Sudekum and Stengel are each prohibited (pars. 15, 16) from controlling or acting as an officer of more than one defendant exhibitor or affiliated corporation (*ibid.*). One year from the entry of the decree is allowed (par. 18) for conforming to these requirements (R. 1484).

In considering the justification for these provisions it should be borne in mind that it is undisputed that all the defendant exhibitors are controlled by Sudekum and his family and that Sudekum dictates the general policies which these corporations pursue (*supra*, pp. 11–12). It is likewise undisputed that these corporations have combined with each other in various ways to suppress competition. They have agreed upon a division of operating territory and have combined with each other and with certain distributors in licensing films and making franchise contracts for the purpose of maintaining their theatre monopolies and preventing competition (Conclusions 10, 11, 13; R. 1476–7). By franchise contracts jointly negotiated on behalf of several of them they have obtained important privileges and advantages over competitors covering periods of more than one season.[39]

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[38] Strand Enterprises, Inc., is excepted from the defendant exhibitors to which this prohibition applies (par. 13) and certain named corporations are excluded from the words "affiliated corporations" (par. 17).

[39] Fngs. 115–133, R. 1430–1457. See also note 18, *supra*, p. 17.

As long as the defendant exhibitors continue under common control they will be so managed as to avoid competition with each other. Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 328. In addition, there will be both opportunity and tendency for these exhibitors to support each other in their dealings with distributors in obtaining unfair and unwarranted advantages over independents. The general prohibitions of the judgment against combination and agreement, enforceable only by proceedings having the character of original proceedings for violation of the Sherman Act (*supra*, pp. 38–39), will be of little effect unless the judgment also prohibits the affiliation and common control which induce joint action and agreement. Such prohibition is plainly justified under the principle that the United States is entitled to relief reasonably adapted to prevent continuation of the defendants' former violations of the statute.

This Court in Sherman Act cases has frequently required divestiture, usually together with injunctive relief against particular practices.[40] Concerning reasons for applying the remedy of divestiture, Judge Learned Hand said in *United*

[40] *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

States v. *Corn Products Refining Co.*, 234 Fed. 964, 1018 (S. D. N. Y.):

> In all cases where the history of the combination has been such as this, the Supreme Court has declined to rest upon injunctions alone. The difficulties of proof, the delay, the cumbersome inquiry necessary to ascertain again whether the defendants shall have actually discontinued, all make against such a limitation. * * * Yet it is a reasonable assurance to take that, when an innate proclivity has so abundantly manifested itself over a period of years, it shall be disabled from further opportunity.

The defendants attack the divestiture provisions of the judgment upon a number of grounds. One contention (Br. 116) is that the required sale of stock of controlled companies will subject them to heavy federal income taxes. But an otherwise appropriate remedy against future illegal conduct is not barred on this account. The fact that defendants' illegal monopolization and restraint of trade have proved extraordinarily profitable confers upon them no immunity from the application of general provisions of law, whether of the antitrust laws or of the tax laws.

Defendants cite (Br. 117–118) two decisions[41] holding that under the facts presented dissolu-

[41] *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656 (N. D. Ohio); *United States* v. *American Can Co.*, 234 Fed. 1019 (D. Md.). Cf. *United States* v. *Sugar Institute, Inc.*, 15 F. Supp. 817 (S. D. N. Y.), dissolution of a trade association not required.

tion of the defendant corporation, which had violated the Sherman Act, was not requisite relief. The need for the remedy of divestiture depends upon the particular circumstances involved and defendants show no parallelism between those in the instant case and those in the cited decisions. Defendants' reference (Br. 122–123) to the fact that divestiture was not required by the consent decree entered in the *Paramount* case is even less pertinent. A consent decree is the product of agreement between the parties. By this particular decree the Government obtained, without trial of the issues, extensive relief against various acts and practices. In return, the Government in effect agreed to forego, for a limited period of time, the divestiture which it believed that a trial of the issues would show to be required.[42]

The defendants contend (Br. 114–115) that divestiture was improper at least as to those of the affiliated corporations which were not shown by the evidence to be very deeply implicated in the practices found illegal by the district court. This argument ignores the fact that Sudekum's control over all of the affiliated corporations was undisputed, that the findings and evidence abundantly show use of the power given by this control to restrain and eliminate competition, and that the corporations particularly referred to (Cumberland and Lyric) were formed (R. 1363) as an

[42] The Government, as previously stated (n. 29, *supra*, p. 35), is currently demanding such divestiture.

incident to elimination of competition. The power given by control having been abused and the opportunity for future like abuse being the same as to all controlled corporations, it was appropriate and necessary to sever the ownership and control of all.

The defendants urge (Br. 117) that the distributors' resources exceed those of the defendant exhibitors and that the exhibitors' bargaining power will be weakened if, as a consequence of divestiture, each exhibitor can bring to the bargaining table only his own limited resources. The implied conclusion is that this result is inequitable and not in the public interest. The argument fallaciously assumes that the business relationships between the defendant exhibitors and the distributors are alone to be considered. But what is of primary public interest is that independents be protected against restraints imposed by the defendant exhibitors acting in combination. From this standpoint the judgment, so far from being inequitable, will leave each defendant exhibitor with far greater resources than any competitor and it will also be left with a substantial territorial monopoly.

The defendants (Br. 123–124) state that persons not parties to the cause own a half interest in various affiliated corporations and may be adversely affected if the defendant exhibitor is required to dispose of his half interest, and defend-

ants contend that what may be termed the minority stockholders are therefore indispensable parties. This objection to the divestiture provisions of the decree was not raised in the district court although there was ample opportunity to do so,[43] and there may therefore be some question whether the objection is open to consideration now. However that may be, we submit that the objection is wholly without merit. The judgment does not operate upon the stock owned by any non-defendant. No legal right of his is infringed by reason of the fact that some other stockholder of the corporation is required to dispose of his stock. *Morgan* v. *Struthers*, 131 U. S. 246. The minority stockholders of the affiliated corporations were no more necessary parties than are the stockholders of any corporation against which a judg-

[43] As to opportunity to make the objection, the following is pertinent: The court's conclusions of law, filed more than two months before judgment, set forth that the plaintiff was entitled to a decree requiring each defendant exhibitor to divest itself of any interest in any defendant or affiliated corporation (R. 1479). The proposed judgment which the plaintiff submitted to the court and to the defendants approximately a month before the judgment contained a paragraph in the same language as that of paragraph 13 of the judgment, the paragraph requiring divestiture (R. 24–25, 26, 1483).

As to failure to raise below the issue of absence of necessary parties, it should be noted that in the hearing on the proposed judgment the defendants' argument was merely that minority stockholders might be injured by divestiture, not that they were indispensable parties if this relief were to be granted (R. 70, 72, 75).

ment is entered in a Sherman Act proceeding, which judgment adversely affects the value of their stock. In *United States* v. *American Tobacco Co.*, 221 U. S. 106, there were substantial minority interests in the corporations which had been brought under common control pursuant to a conspiracy to restrain and monopolize interstate commerce. See 221 U. S. 106, note 1 at pp. 144–148. These minority stockholders were not parties to the action, but it was held (pp. 187–188) that dissolution should be decreed by compelling a separation of the corporations brought under common control.

The only authority cited by the defendants is *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199. In that case Minnesota brought an original action in this Court alleging that the acquisition by Northern Securities of a majority of the stock of two competing railroads brought about a consolidation of these railroads in violation of the laws of Minnesota. The relief sought was that Northern Securities be enjoined from voting the stock of these railroads. Since this relief would have trespassed upon the railroads' right to have their directors elected by the vote of all stockholders, the railroads might well be deemed indispensable parties. Furthermore, the strictness of the rule there laid down may well have been motivated in part by the fact that complete relief could not in any event be secured in this Court,

since one of the railroads was a Minnesota corporation and could not have intervened without ousting this Court's jurisdiction. The decision, we submit, must be confined to its particular facts. In any event *Northern Securities Co.* v. *United States*, 193 U. S. 197, involving the same transaction, conclusively establishes that Corporation A may be required to divest itself of the stock which it owns in Corporation B although minority stockholders of Corporation B are not parties to the cause."[*]

IV

THE PROVISIONS OF THE JUDGMENT RELATING TO THE MAKING OF FRANCHISE CONTRACTS ARE APPROPRIATE AND NECESSARY

The district court concluded that the franchise contracts made by certain defendant exhibitors with Fox, Paramount, and Warner had had the purpose and effect of maintaining the exhibitors' theatre monopolies and preventing others from competing with them (R. 1476). The court accordingly prohibited, by paragraph 1 of the judgment, any future like use of this means of restraining and monopolizing trade (R. 1480). This paragraph, which the defendants have assigned as error, enjoins six of the defendant ex-

[*] The judgment in effect required Northern Securities to dispose of its stockholdings in two railroads and only a few of the other stockholders of these railroads were parties to the action.

hibitors from continuing in combination with each other and with Fox, Paramount, or Warner in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them, and from entering into any similar combinations having similar purposes. The defendants contend that the court should have specified the provisions of the franchise contracts which it considered illegal and should have confined its prohibition to such provisions.

Since the franchise contracts were one of the means by which the defendants carried into effect their general scheme to eliminate competition and monopolize exhibition, the court correctly couched its prohibition in terms of purpose and effect. This form of prohibition has the further justification that it recognizes that, just as a franchise contract is entered into as a whole, so its legality is to be determined by considering the total effect of all of its provisions and not by considering each separate provision as if it stood in isolation. We think that the court's treatment of franchise contracts is more open to criticism upon the score of undue leniency than upon the score of undue severity.

A contract to give to one exhibitor the right to first-run exhibition of all of a distributor's feature pictures is one for exclusive supply. When several distributors make such contracts with the

exhibitor, the groundwork for monopolization of exhibition is laid. When, as in this case, the contracts run for periods of several years and give this exclusive supply to affiliated corporations themselves operating theatre chains, the restraint on competition is clearly unreasonable and illegal. All competition in the licensing of the distributor's features is eliminated in every city in which the chains operate. This is so because, unless there be a parallel competing chain, no competitor in any city involved can make an equivalent offer, i. e., one with the same approximate territorial coverage.

The defendants' franchise contracts had not only these but other elements of undue restraint.[45] They granted the exhibitor an option to give a repeat showing of any picture. The effect of this was practically to bar competitors from even second-run exhibition of the distributor's pictures.[46] The contracts, being made not for one season but for several, froze the competitive situation for their duration. Any new competitor who

[45] See *supra*, pp. 17–18; R. 1430–57.

[46] The most popular pictures would be the ones selected for repeat showing and in small towns two showings would exhaust a picture's drawing power. As to other pictures, the time given the exhibitor for exercise of his option would postpone availability for second-run exhibition, always an important factor. The district court found that the Paramount franchise involved "the complete elimination of any second as well as first-run competition" in the towns covered by the franchise (R. 1438).

might arise was precluded from any opportunity to bargain for first-run showings or for modification of the contract's clearance provisions respecting second-run showings. The restraining effect of such contracts upon potential competition is obvious.

In addition to the foregoing, the defendant exhibitors jointly negotiated their franchise contracts, and the contracts covered the chain operations not of one corporation but of several. They thus were the product of the use, in combination, of the circuit buying power of the several participants.

The defendants object to paragraph 1 upon the ground that it does not furnish them with an "ascertainable standard of conduct." In view of the elements of illegal restraint inherent in the defendants' franchise contracts and the use which the defendants made of them to restrain trade, their outright prohibition would have been warranted. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254. The fact that the court imposed a less clearly defined but more limited prohibition gives the defendants no ground for complaint. Upon a proper showing of need for determining the scope of the prohibition, the court can be called upon to construe its judgment."[17]

[17] Paragraph 20 authorizes any party to apply to the court at any time for such order or decree as may be necessary or appropriate for the "construction" of the decree (R. 1484).

V

THE PROVISIONS OF THE JUDGMENT PREVENTING USE OF CIRCUIT BUYING POWER TO RESTRAIN COMPETITION ARE APPROPRIATE AND NECESSARY

The defendants have assigned error to paragraphs 8 and 12 of the judgment. The former enjoins each of five defendant exhibitors from combining, in licensing films, its closed towns with its competitive situations for the purpose and with the effect of compelling the major distributors to license films on a noncompetitive basis in competitive situations and to discriminate against the exhibitors' competitors (R. 1482). The latter enjoins each defendant exhibitor from conditioning the licensing of films in a competitive situation upon the licensing of films in any other theatre situation (R. 1482–3). Both paragraphs are designed to prevent use of circuit buying power to restrain competition.

If A and B operate theatres in a certain town and A also operates theatres in closed towns, i. e., where he has no competition, and if A can threaten not to license a distributor's pictures in his closed towns unless he receives the distributor's pictures for first-run showing in the town in which A and B both operate and irrespective of whether B makes an equal or better offer, such tactics, provided the distributor yields to A's pressure, completely eliminate all competition between A and B for first-run exhibition of the distributor's films.

Similar threats and pressure may exclude B from even second-run exhibition or result in clearance provisions so burdensome to B as to render his competition ineffective. Such use of a local monopoly of exhibition to obtain agreement by a distributor to impose restraints upon the exhibitor's competitors is a restraint of trade prohibited by the Sherman Act. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227, 229–230.

The defendants do not deny that such use of circuit buying power may eliminate competition. They seem to argue that notwithstanding this fact the prohibitions of the judgment should be set aside because the results produced will be inequitable and not in the public interest.

As the basis of the claim of inequity, the defendants assert (Br. 97–98) that under the judgment a defendant exhibitor will be barred, when negotiating with a distributor, from using the leverage of its closed towns to obtain advantages in its competitive towns, whereas the distributors will not be barred from using the leverage of the exhibitor's competitive towns in obtaining terms favorable to the distributor in the exhibitor's closed towns.* Defendants thus suggest that a distributor could, with impunity, refuse to deal

* As to the distributors' suggested use of leverage, it should be noted that, since only a very small proportion of the defendants' theatres are in competitive towns (*supra*, p. 12), there would be little actual leverage for a distributor to use against a defendant exhibitor.

with them except upon terms which would violate the judgment. Even if this situation could arise, this would not show error. A judgment against defendants who have violated the Sherman Act prohibiting them from illegally restraining trade is not rendered invalid by reason of the fact that the judgment does not prohibit some other persons from engaging in illegal restraints injurious to the defendants. Furthermore, any single distributor attempting to use leverage would subject himself to the risk of losing the exhibitor's business.[49] If several distributors agreed among themselves to make a common demand, this would clearly violate the Sherman Act and render them liable to prosecution and to triple damage suits. *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208.

The defendants also argue (Br. 104–105) that competition between exhibitors is not in the public interest and that they should therefore not be prohibited from using circuit buying power to restrain competition. They assert that an exhibitor who has a local monopoly can drive a better bargain with distributors than can an exhibitor facing competition, and that the former, paying less for his pictures, will pass on the sav-

[49] The defendant exhibitors can procure films adequate to their needs without having those of any particular major distributor; they have several times in the past declined to license the films of a major distributor for an entire season (R. 1379, 1389, 1431, 1451).

ing to the general public in the form of lower admission charges.

Even if this were the effect of the judgment, it would be irrelevant. The courts must apply the policy laid down by Congress without assuming to judge whether in any particular instance the results produced are good or bad. As to the policy laid down in the Sherman Act, there is no doubt. It is that "competition not combination, should be the law of trade." *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465. The Act is "based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397.

The defendants' argument must also be rejected because it involves the false assumption that an exhibitor in a closed town will pass on to the public any saving in the cost of his pictures. If lack of competition enables him to buy cheaper, it much more conclusively enables him to sell higher, that is, to collect higher admission charges from the public. The exhibitor's lower costs because of absence of competition simply go to increase his profits.[30]

The defendants contend that paragraphs 8 and 12 of the judgment affect the rights of the

[30] Cf. the extraordinary profits which the defendant exhibitors, operating very largely in closed towns, have earned (*supra*, pp. 13–14).

major distributors and that they are therefore necessary parties. The defendants, however, do not show in what way the rights of the distributors are affected. Indeed, defendants vigorously assert, as we have already stated (*supra*, p. 48), that these paragraphs confer upon the distributors an inequitable advantage in their dealings with the defendants.

The need for relief of the kind given by paragraphs 8 and 12 is recognized in the consent decree entered against five major distributors in the *Paramount* case. The decree provides (Section X, pars. A, B; R. 207–9) for arbitration of any complaint by an independent exhibitor that a distributor has refused to license to him features on a specific "run" because of having granted such run to a competing circuit. It provides (Section X, par. D; R. 210) that if the complaint is found to be justified the award shall permit the distributor to license such run only by a contract not a part of any contract—

> for the licensing of features for exhibition in any other theatre or conditioned upon the licensing of features for exhibition in any other theatre.[51]

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[51] In an application to modify the above decree filed August 7, 1944, the Government has requested the elimination of Section X and has proposed a provision reading: "No decree defendant shall condition the licensing of films in one theatre or a group of theatres upon the licensing of films in another theatre or group of theatres."

VI

THERE IS NO FAILURE OF PROOF AS TO ANY ESSENTIAL ALLEGATION OF THE COMPLAINT

The defendants contend (Br. 21–43) that the Government failed to prove the allegations of the complaint as amplified by the bills of particulars. There is no such assignment of error and we do not believe that the issue raised is open for consideration. We shall nevertheless consider it on its merits.

Since the present contention rests, as we later point out (*infra*, pp. 63–67), on an interpretation of the complaint which ignores most of its essential allegations, we shall first briefly review these allegations and state the manner in which they were established.

The complaint, after naming the defendants, defining certain terms used, and describing the business involved (R. 1–7), sets forth the charge of illegal conduct in paragraphs 45–55 under the heading "Violations Alleged" (R. 7–10). Paragraph 45 charges violation of Sections 1 and 2 of the Sherman Act in general terms and paragraphs 46–49, 54 and 55 then amplify this charge.[52]

Paragraph 46 alleges that the defendant exhibitors refrained from competing with each other pursuant to agreements to allocate their respec-

[52] Paragraphs 50–53 were eliminated from the complaint by a later amendment (R. 19).

tive areas of theatre operation. The district court so concluded (R. 1476–7) and enjoined such agreement (R. 1480–1). Neither this conclusion nor this injunctive provision has been assigned as error.

Paragraph 47 alleges that the defendant exhibitors have collectively contracted with each major distributor for all feature pictures required for exhibition at all theatres operated by them. Paragraph 48 alleges that by these contracts the exhibitors have combined with each other to compel each major distributor to grant to all of them in all of the towns in which they operate the exclusive privilege (a) of selecting such of the distributor's feature pictures as they may desire and (b) of receiving clearance over competitors on these pictures.

The court's findings as to the franchise contracts with Fox, Paramount, and Warner, which have already been discussed (*supra*, pp. 17–18, 52–54), in themselves establish the practices alleged in paragraphs 47 and 48. Many other instances and details of joint action taken by defendant exhibitors to procure film licenses and privileges from the distributors are shown by findings 32, 33, 34, 36 and 37 (R. 1368–1372). No error has been assigned to these findings or to any material part of the findings relating to franchise contracts. Defendants' brief does not attempt to show failure of proof as to them.

Paragraph 49 alleges that the exclusive priv-

ileges described in paragraph 48 have enabled the defendant exhibitors unreasonably to restrain, suppress, and eliminate the competition of other theatre operators in Crescent towns by (a) preventing them from obtaining enough first-class pictures for successful operation, (b) forcing them to exhibit feature pictures previously exhibited or rejected by the defendant exhibitors, (c) preventing them from showing feature pictures of major distributors with first-run clearance, and (d) preventing them from exhibiting such pictures with second-run clearance in any town where a defendant exhibitor operates a second-run theatre. Paragraph 54 alleges that by reason of the defendant exhibitors' control of the most desirable motion pictures they have been able practically to eliminate competition in Crescent towns; that sale of independent theatres to them has been induced by the threat of opening competing theatres and preventing the independent from procuring desirable pictures; and that by such tactics a large number of independents have been forced out of the motion-picture business.

Findings 38–110 (R. 1372–1428) abundantly establish the allegations of paragraphs 49 and 54 even if no consideration is given to those parts of the findings to which error is assigned. Moreover, such parts have adequate support in the evidence (Appendix, *infra*, pp. 74–77).

Paragraph 55 alleges that use of circuit buying

power, in the manner previously alleged, constitutes in itself a violation of the Sherman Act. This presents a legal rather than a factual question.

We have shown that there is no failure of proof as to the essential allegations of the complaint. The defendants arrive at the contrary conclusion by a tortuous path. First, they erroneously conclude that the only proof and findings which will support the complaint are those which (1) relate to a competitor who was actually put out of business and (2) were set forth in the Government's bills of particulars. Using these tests, they find only nine "situations" within them. They then discuss these situations, not from the standpoint of the evidence in support of the findings which the court made, but from the standpoint of (1) the number of distributors whose pictures were or might have been available to the competitors eliminated and (2) whether the court made any finding repeating verbatim the language of the bill of particulars relating to the competitor in question.

We submit that the erroneous assumptions and conclusions in the argument advanced are many and fundamental.

(1) The argument completely ignores all findings and proof as to franchise contracts. These alone are sufficient to support the Government's complaint.

(2) The argument erroneously assumes (Br.

26–27) that only proof and findings as to competitors who have been eliminated support the complaint. The violation of Section 1 of the Act alleged in paragraph 45 is that the defendant exhibitors combined unreasonably to "restrain" interstate commerce. Paragraph 49 alleges that the exclusive privileges obtained by the defendant exhibitors from distributors have enabled them unreasonably to "restrain, suppress, and eliminate" the competition of independents. These allegations of combination to "restrain" trade and competition embrace restraints which do not go to the point of complete elimination of competitors. It hardly need be added that the restraints prohibited by the Sherman Act are not confined to those which render it impossible for a competitor to survive.

(3) The argument erroneously assumes (Br. 22–23, 26–27) that only proof and findings which were set forth in the bills of particulars furnished in response to the defendant exhibitors' motion support the complaint. Of the paragraphs charging illegal combination and monopolization (45–49, 54, and 55), defendant exhibitors' motion was granted (except in minor, immaterial respects) only as to paragraph 49 (R. 143–7, 152).[53] Accordingly, even if the bills of particulars had the effect of limiting proof to the particulars fur-

[53] The motion was also granted as to paragraph 43, which alleges certain consequences of the illegal conduct thereafter charged. The allegation in paragraph 43, in so

nished, this limitation applies only to paragraph 49 and a failure of proof as to it would show no general failure of proof. However, the bills of particulars do not have the limiting effect ascribed to them. The function of such a bill, as the court ruled in granting in part the motions for bills of particulars, is not to furnish information on evidentiary matters but to enable the defendants to prepare responsive pleadings (R. 149). To receive evidence not particularized in the bills was the equivalent of permitting an amendment of the pleadings. Since no objection was made to the admission of evidence on the ground that it was not within the pleadings, no objection, following trial, can be made on this ground.[54]

(4) As to the nine situations which defendants discuss, the argument is erroneously made (Br.

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far as it is an essential one, is covered by the allegations of paragraph 49.

Certain parts of the defendant exhibitors' motion were denied for the reason that the court was granting practically the same requests on motion of five of the defendant distributors (R. 148–9, 152). The bills of particulars furnished in response to the court's order on the latter motion were not included in the record on appeal.

[54] Rule 15 (b) of the Rules of Civil Procedure provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

The only objection to evidence on the ground that it was outside the pleadings was as to evidence involving transactions occurring after the filing of the complaint. This objection was met by filing a supplement to the complaint (R. 20).

29–38) that proof of restraint of trade is lacking if it appears from the findings that the pictures of several distributors were or might have been available to the independent. The question of the number of distributors whose pictures were withheld from competitors by defendants' combination simply goes to the extent of the injury inflicted. If the defendants combined for the purpose of injuring or destroying independents by depriving them of fair competitive opportunity, effectuation of the conspiracy by barring them from the pictures of even one distributor need not be shown; what the statute condemns is the illegal combination or conspiracy.[55] In fact, the proof in the present case showed very substantial effectuation of the conspiracy—the defendant exhibitors, through the exercise of circuit buying power, obtained important exclusive privileges and preferences from leading major distributors.[56] Defendants rely (Br. 22, 29) upon the allegation in paragraphs 40–42 that theatres in Crescent towns require for

[55] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, note 59 at pp. 224–225.

[56] While there are eight major distributors, defendants themselves point out (Br. 4) that Columbia, Universal and United Artists refer to themselves as the "Little Three" and to the others as the "Big Five". It is significant that for the most part the pictures which the defendants' brief indicates as being available to competitors were those of the Little Three. Where an exhibitor had been showing in his theatre principally pictures of two or three of the leading distributors, loss of the pictures of even one of them might spell the difference between success and failure.

their successful operation a substantial number of the feature pictures of three or more of the major distributors. This does not qualify the subsequent allegations of illegal restraint so as to confine them to instances in which competitors are unable to obtain the feature pictures of at least six of the eight major distributors.

(5) As to the nine situations discussed, the defendants erroneously argue (Br. 30–38), at least by implication, that findings are to be ignored unless they include the exact language of the bill of particulars.[57] Obviously the utmost that might be required is that it appear from the findings as a whole that there existed the kind of situation described in the particulars.

VII

THE DEFENDANTS' GENERAL OBJECTIONS TO THE COURT'S FINDINGS ARE UNFOUNDED AND IMMATERIAL

A. FINDINGS BASED UPON ALLEGED INCOMPETENT EVIDENCE

Defendants assign error to all findings and parts of findings predicated upon "unsworn statements", written or oral, made by employees of distributors (R. 1515). There is no further specification of the findings or parts of findings so predicated except for seven illustrations given

[57] As to each of the nine situations defendants make a statement similar to the following (Br. 32): "There is no Finding that Dozier 'had trouble procuring pictures and was forced to sell,' as alleged in the bill of particulars".

in defendants' brief (pp. 69, 73, 74–5, 76, 88, 91, 138–40).

The evidence to which defendants object consists of letters or reports written in the regular course of their duties by certain employees of the major distributors to other employees or officers of the same company revealing reasons for its discrimination against an independent theatre in favor of a Sudekum theatre. The distributor's relations with the theatres involved, what the distributor actually did, and the character and extent of the defendants' circuit buying power were otherwise proved. The other evidence thus fully established the actual discrimination and warranted the inference that the discrimination was induced by defendant exhibitors for the purpose of restraining competition. Accordingly, since the inter-office communications represented merely supplementary proof on the latter point, no ground for setting aside any material finding of the court would be shown even if the statements in the communications were deemed incompetent evidence.

The basis for the general common-law rule against admission of hearsay evidence is that the party against whom it is offered is denied opportunity to cross-examine as to the truth of the statements made. Wigmore, *Evidence* (3d ed.), Sec. 1362. The defendants were not denied this opportunity with reference to the inter-office com-

munications received in evidence. Most of the writers testified in the case.[58] As to communications written by persons not called as witnesses, the reason for their not being called was that the defendants voluntarily stipulated that the writer, if called to the stand, would testify that he had written the communication in question pursuant to his official duties and that the letter had been received by the addressee.[59] It follows, therefore, that defendants' objection to the competency of the evidence is purely technical. The defendants did not avail themselves of the opportunity to question the authors of the inter-office communications, who were friendly to the defendants in this litigation,[60] as to the truth of the statements made in their communications (see Def. Br. 69, 76).

Aside from these considerations, the inter-office communications were clearly competent evidence against the defendants under "the principle that

[58] In five of the seven illustrations referred to in defendants' brief, the writers of the communications testified (Br. 69, 76, 88, 91, 138–40).

[59] See R. 723–4, 725, 726, 727, 728, 729–30.

[60] The writers were employees of the major distributors, all of whom were originally named defendants. Five were dismissed as defendants in connection with the entry of a consent decree against them in another Sherman Act proceeding brought by the Government. Two of the other three remained defendants throughout the trial. Columbia was dismissed as a defendant by order of the court at the close of the Government's case.

when any number of persons associate themselves together in the prosecution of a common plan or enterprise, * * * the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249.

The distributors were all charged with having combined with the defendant exhibitors to restrain and monopolize interstate commerce (R. 7) and this charge was not withdrawn when the Government dismissed five distributors as defendants and eliminated the charge, made in paragraphs 50–53 of the complaint, that the distributors had combined with each other, as well as with the defendant exhibitors, to restrain and monopolize interstate commerce. Not only were the distributors charged with being co-conspirators with the defendant exhibitors but, as the court's findings show, the evidence fully supported this charge except as to Columbia and Universal. The distributors' declarations were therefore admissible against the defendant exhibitors and this is equally so as to the declarations of distributors who were dismissed as defendants. *Delaney* v. *United States*, 263 U. S. 586, 590. And the declarations of an officer or employee of a distributor, acting on behalf of his corporate principal and within the scope of his authority, are the declarations of the distributor for whom he acts. *Xenia*

Bank v. *Stewart*, 114 U. S. 224, 228–229; *Riverside Fibre & Paper Co.* v. *O. C. Keckley Co.*, 32 F. (2d) 23, 26 (C. C. A. 7).

B. FINDINGS CORRESPONDING TO THE LANGUAGE OF THE GOVERNMENT'S BRIEF

The defendants have assigned error to all findings and parts of findings "adopted from" the Government's brief and to the conclusions based upon such findings (R. 1514–5). The parties have stipulated that, with some exceptions, findings 11–67, 70–81, 83–98, 100–110, and 114–133 "correspond with language" in the Government's brief in the district court, except that at intervals sentences or paragraphs in the applicable parts of the brief are omitted from the findings (R. 1522).

Defendants contend (Br. 77–80), not that the above facts render the findings invalid, but that they rob the findings of "a presumption of correctness." While it might have been better judicial practice to limit findings more nearly to findings of ultimate fact than was done in this case, we believe that full consideration of the district court's action will show that its findings are entitled to the usual presumption of correctness.

If findings are made in the detail here undertaken it is natural and appropriate for the court to employ, as an aid in formulating the findings,

the briefs and other papers submitted to it by the parties. In the present case the inference is strong that the court carefully checked and weighed those statements in the Government's brief which it incorporated in its findings. As to Universal, for example, the court's findings were contrary to the factual conclusions presented in the Government's brief. In those findings which correspond to the language of the brief, separate paragraphs and sentences appearing in the brief are omitted from the findings. A substantial number of findings are not based upon any language in the Goverment's brief.

The brief which the Government submitted to the district court contained complete record references for the statements made therein. The findings were filed more than 14 months after oral argument of the case following trial (*supra*, p. 6). It is only fair to presume that the court in preparing its findings satisfied itself, from its examination of the record citations in the Government's brief and from its recollection of the impression made by certain witnesses, as to the substantial accuracy of the language of the brief which it incorporated in the findings.

The comparatively minor amendments to the findings requested by the defendants (R. 108–15, 118–38) go far to attest the accuracy of the findings. The court's action on the requested amendments (R. 1489–93) and its general open-

mindedness disclosed at the hearing on the judgment to be entered (R. 27–108) further attest that the court's consideration of this case was painstaking and judicious.

CONCLUSION

It is respectfully submitted that the district court should be directed to modify paragraph 19 of the judgment as requested in the Government's specification of error (*supra*, p. 20), and that the judgment of the district court should otherwise be affirmed.

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SEPTEMBER 1944.

APPENDIX A

THE EVIDENCE IN SUPPORT OF FINDINGS TO WHICH SPECIFIC ERROR HAS BEEN ASSIGNED [1]

Assignment 1.—The statement (Fng. 39) as to Lawing's inability to secure pictures from the major distributors for his theatre at Paris, Tenn., is supported by his direct testimony (R. 302–4). Some qualification of the statement, but no essential modification, is suggested by Lawing's cross-examination and by two other findings of the court, to which defendants refer (Br. 81–82).

Assignment 2.—The statement (Fng. 44) of the reasons for not accepting Connors' explanation of Loew's sell-away of Lawing's theatre at Brownsville, Tenn., is a permissible inference from facts stated in findings 43, 44 (earlier part), and 45 (R. 1374–8), to which no error is assigned.

Assignment 3.—The statement (Fng. 45) that Lawing offered Loew's at Brownsville at least as good as deal as did Crescent is supported by evidence (R. 308). It also represents a comparison of Lawing's and Crescent's offers (Exs. L–9, L–18). Since defendants did not include these exhibits in the record on appeal they are not in a position to attack the finding as unsupported by evidence.

Assignment 4.—This relates to failure to make a supplementary finding. We are not aware of evidence supporting the proposed finding and defendants' brief does not refer to this assignment.

[1] R. 1506–1514.

Assignment 5.—The statements (Fng. 48) concerning Dozier's 1935–6 contract with Paramount are supported by direct evidence (R. 342, 364–5, 375–6).

Assignment 6.—This relates to failure to make a supplementary finding as to the film rentals paid to Warner by Miller in 1936–7 and by Cumberland in 1937–8. The proposed finding would not refute or discredit the court's finding that, for the 1937–8 season Miller's offer was at least as good as Cumberland's.

Assignment 7.—The statement (Fng. 59) that Paramount, after giving an independent theatre clearance over one operated by Rockwood for the 1937–8 season, gave the latter clearance the next season because of Sudekum's pressure is supported by the letter (R. 655) quoted in part in finding 59 (R. 1390).

Assignment 8.—The statement (Fng. 63) that when a Paramount salesman wrote an independent in October 1937 that its pictures were not available to him because of Paramount's deal with Sudekum for his circuit, the salesman was referring to Paramount's franchise contract with the Crescent circuit (dated July 28, 1938, as of November 1, 1937) is a legitimate inference since there was no agreement between Crescent and Paramount for the 1936–7 season.

Assignment 9.—The statement (Fng. 70) that the repeat-run provisions of Paramount's franchise to the Crescent circuit constituted one reason why Paramount advised an independent that its pictures were not available to him second-run is a legitimate inference from the letter quoted in finding 70 (R. 1397).

Assignment 10.—The statement (Fng. 81) that the negotiation and execution of a rider to the Paramount franchise contract relating to Union City, Tenn., showed that Crescent intended to eliminate Henry as a competitor there and that Paramount was willing to cooperate is a legitimate inference from other facts set forth in finding 81 (R. 1403) and those set forth in finding 84 (R. 1410), to which no error has been assigned.

Assignment 11.—The statement (Fng. 100) that Curry did not attempt to negotiate with Paramount because it was well understood that Crescent had a first-run franchise and a second-run option is supported by direct testimony (R. 472). The further statement (Fng. 100) that five major distributors held the independent theatre in Alabama City, Ala., behind the Crescent theatre because of pressure which Sudekum was able to exert on these distributors is an obvious inference from the facts stated in findings 95–99 (R. 1421–4), to which no error has been assigned.

Assignment 12.—The statement (Fng. 118) that Morgan in negotiating Rockwood's franchise from Paramount knew what its effect would be upon competitors in certain cities is a legitimate inference from Morgan's intimate knowledge of the business and his discussion with Sudekum of the franchise's probable effect on relations between Paramount and certain independents (R. 650, 653–6).

Assignment 13.—The statement (Fng. 119) that the repeat-run clause in the Paramount franchise, both as it originally stood and as modified, was completely effective in preventing sale of its fea-

ture pictures second run to Crescent's competitors is supported by the letter quoted in finding 70 (R. 1397).

Assignment 14.—The statements (Fng. 122) as to the Warner franchise and its effect are justified by facts stated in findings 120–121 and other facts stated in finding 122 (R. 1438–1442), to which no error has been assigned.

Assignment 15.—The statements (Fng. 127) with reference to the Fox franchise are supported by the letter quoted in finding 127 (R. 1448–9).

Assignment 16.—The statement (Fng. 133) that an obvious purpose of the Fox, Paramount, and Warner franchises was to provide an ostensibly valid reason for discriminating in favor of the Sudekum circuit is a proper inference from facts, to which no error has been assigned, stated in findings 115–132 (R. 1430–1456).

APPENDIX B

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RKO	7	1355-6.
Warner	8	1356.
General method of licensing	9	1356-7.
Importance to exhibitors	10	1357.
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Other joint activities	35-37	1371-2.
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Buchanan at Athens, Ala	74-79	1399-1402;
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W. O. Taylor at Dresden, Tenn	90-91	1418-9.
Page at Columbia, Tenn	92-93	1419-20.
Perdue at East Gadsden, Ala	94-100	1420-5.

[1] The headings and subheadings are those of the court except that we have added, for more convenient reference, the subheads in Section A; the last subhead in Section B, all subheads in Section C, and the first and last subheads in Section E.

Where any finding was amended, the record citation includes the amended finding.

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F. Columbia	134–143	1457–60.
G. Universal Pictures Company, Inc	144–147	1460–1.
H. Universal Film Exchanges, Inc	148–163	1461–4.
I. United Artists	164–180	1464–71.
J. Strand Enterprises, Inc	181–187	1471–3.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 17

THE UNITED STATES OF AMERICA,
Appellant,

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION TO DISMISS.

GEO. H. ARMISTEAD, JR.,
WILLIAM WALLER,
Counsel for Appellees.

ARMISTEAD, WALLER,
DAVIS & LANSDEN,
Of Counsel.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE MIDDLE DISTRICT OF TENNEISEE,
NASHVILLE DIVISION

CIVIL ACTION NO. 54.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE CRESCENT AMUSEMENT COMPANY, ET AL.,

Defendants.

MOTION OF THE CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ROCKWOOD AMUSEMENTS, INC., CHEROKEE AMUSEMENTS, INC., KENTUCKY AMUSEMENT COMPANY, INC., ANTHONY SUDEKUM, AND KERMIT C. STENGEL, TO DISMISS THE APPEAL.

The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, and Kermit C. Stengel move to dismiss the appeal filed by the plaintiff in this cause, on the ground that the appeal is premature in that at the time of the filing of the appeal there was pending and undisposed of by the Court a motion of The Crescent Amusement Company to amend the findings of fact and to make additional findings, which

motion was filed on May 27, 1943, and likewise there were pending and undisposed of motions of defendants, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, to amend the findings and for additional findings, which motions were filed on May 27, 1943. Also there were pending and undisposed of a petition of Cumberland Amusement Company filed on March 23, 1943, a petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., filed on March 23, 1943, and a supplemental petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusements, Inc., filed on March 26, 1943.

These motions and petitions were not addressed to mere matters of form, but raised questions of substance since their purpose was to seek a reconsideration of "certain basic findings of fact and the alteration of the conclusions of the Court. In short, the necessary effect was to ask that rights already adjudicated be altered." The judgment of the Court, therefore, was not final, which is essential to appealability.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 18

THE UNITED STATES OF AMERICA,
Appellant,
vs.
THE CRESCENT AMUSEMENT COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

WILLIAM WALLER,
GEO. H. ARMISTEAD, JR.,
D. M. LANSDEN,
Counsel for Appellees.

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 54

UNITED STATES OF AMERICA

v.

THE CRESCENT AMUSEMENT COMPANY, ET AL.

MOTION TO DISMISS PLAINTIFF'S APPEAL

The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, move the Court to dismiss the appeal of the plaintiff filed on October 27, 1943, on the grounds (1) that the Court had no jurisdiction to grant the appeal, and (2) plaintiff's appeal does not raise a substantial question.

The grounds of the foregoing motion to dismiss are more fully stated in the accompanying statement opposing jurisdiction on appeal.

[Signed] WILLIAM WALLER,
GEO. H. ARMISTEAD, JR.,
D. L. LANSDEN,
Attorneys for Defendants,
Address: American Trust Bldg.,
Nashville, Tenn.

A copy of this motion is received and accepted this November 5, 1943.

[Signed] HORACE FRIERSON,
United States District Attorney for the Middle District of Tennessee.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

Civil Action No. 54

UNITED STATES OF AMERICA

vs.

THE CRESCENT AMUSEMENT COMPANY, ET AL.

STATEMENT OPPOSING JURISDICTION ON APPEAL BY THE PLAINTIFF TO REVIEW THE JUDGMENT OF THE DISTRICT COURT.

The final decree in this case was entered on May 17, 1943, and the defendants made timely motions to amend the findings and conclusions in a substantal way, viz., the motions if granted in full would have required substantial changes in the decree. Without awaiting the action of the Court on these motions, plaintiff prayed for and was allowed an appeal on July 16, 1943, and citation was duly issued and served on the defendants. Defendants promptly filed a motion to dismiss the appeal as premature, relying upon the case of *Lieshman* v. *Associated Wholesale Electric Co.*, decided February 15, 1943, 318 U. S. —, 87 L. Ed. 495, 63 S. Ct. 543. Thereafter on August 30, 1943, the Court filed amended findings and conclusions but did not modify the decree. Defendants' motion to dismiss the appeal has not been acted upon and the appeal has not been abandoned by the plaintiff but has been kept alive by orders extending the time for filing the record in the Supreme Court.

On October 27, 1943, plaintiff filed a second appeal.

Defendants take the position that since the first appeal had not been dismissed or abandoned after having been granted by the District Court, and after citation on appeal had issued, the District Court lost jurisdiction to take further steps in the cause, such as the granting of a second appeal. *In re McLean Store Fixtures Corp.*, 70 F. (2d) 217; *Draper* v. *Davis*, 102 U. S. 370, 26 L. Ed. 121; *Ensminger* v. *Powers and Wife*, 108 U. S. 292.

We do not think that the case of *Ohio Public Service Co.* v. *Ohio Ex Rel Fritz*, 274 U. S. 12, is determinative. In that case two writs of error were sued out at different times. The first one was issued while an application for rehearing was pending, and the second after the petition had been acted upon and denied. The Court held that plaintiff in error might rely upon the latter writ and that the first one would be dismissed. The opinion does not show whether or not the first writ was properly prosecuted, and as the facts in the opinion concerning same are so meager, we assume that there was some reason why the District Court retained jurisdiction to act upon the petition for rehearing before the actual dismissal of the first writ.

The cases cited above very clearly hold that after an *appeal* has been granted by the District Court and citation issued, the District Court loses jurisdiction until the appeal is dismissed or abandoned.

If incorrect in the foregoing position, defendants urge that the question raised by Plaintiff's appeal is not a substantial one.

It is true that in the findings and conclusions filed August 30, 1943, conclusion No. 20 was to the effect that plaintiff was entitled to an injunction restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, except after an affirmative show-

ing that such acquisition will not unreasonably restrain competition. However, the Court filed amended findings and conclusions on August 30, 1943, in which this conclusion was reconsidered and modified. The decree is in accordance with the modified conclusion which is to the effect that each exhibitor defendant may acquire additional theatres if no coercion or predatory practices are used. In other words, if some theatre owner desires to dispose of his theatre, it was the opinion of the Court that the defendant exhibitors should be permitted to negotiate for its purchase.

There is nothing in the Court's decision to the effect that the mere acquisition of additional theatres is or can be illegal in and of itself. The Court, however, concluded that it is illegal to acquire a theatre from someone else by a threat, express or implied, that a competing theatre will be opened. This being the decision of the Court, the injunctive remedy granted is wholly adequate; and it would be outside the scope of the decision to require the Court to pass upon the acquisition of other theatres where the sale is purely voluntary. How could it "unreasonably restrain competition" for one of the exhibitor defendants to purchase a theatre, which is a non-competing theatre, from some owner who "for business reasons of his own" wishes to sell it? If such an injunction is appropriate in the case at bar, it would be appropriate in the case of every small independent chain of theatres in the United States, and would simply mean that the District Courts of the country would be giving approval or disapproval to transactions of an ordinary business nature without any rule or standard to guide them. While it would appear from the statement of jurisdiction filed by plaintiff that the idea is to prevent defendant exhibitors from purchasing competing theatres, the assignments of error contain no such

limitation and the decree presented to the Court by pl
tiff contains no such limitation.

Respectfully submitted,

[Signed] WILLIAM WALLER,
GEO. H. ARMISTEAD, JR.,
D. L. LANSDEN,
Attorneys for Defendants
Address: American Trust Bldg.,
Nashville, Tennesse

A copy of the above statement opposing jurisdictio
received and accepted this November 5, 1943.

[Signed] HORACE FRIERSON,
United States District Attorney for
the Middle District of Tennesse

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Nos. 17, 18 and 19.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellees*.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, *Appellee*.

REPLY BRIEF FOR CRESCENT AMUSEMENT COMPANY ET AL.

GEO. H. ARMISTEAD, JR.,
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Nashville, Tennessee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 17, 18.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellees*.

No. 19.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, *Appellee*.

REPLY BRIEF FOR CRESCENT AMUSEMENT COMPANY ET AL.

PRELIMINARY STATEMENT.

The Government's case as set forth in its brief, is, as we analyze it, simply this:

(1) In each instance where a distributor made a circuit deal with a defendant exhibitor and included a town where the defendant had competition, it is a permissible inference that the distributor was influenced by the fact that it got

revenue from several towns instead of one town. Since the distributor may have feared that, unless the competitive situation were included in the deal, it would fail to obtain or retain the other business of the defendant, it is likewise a permissible inference that the distributor yielded to coercion or pressure when it included the competitive situation in the deal.[1]

(2) In each such case the deal made by the particular distributor with the defendant exhibitor necessarily reduced or limited the supply of films available to the competing exhibitor. This amounted to an unreasonable restraint of the latter's competition if the distributor did not give the independent the opportunity of competitive bidding.[2]

(3) It follows that, with respect to each such deal, there was an unlawful "combination" between the defendant exhibitor and the distributor to restrain the competition of the competing exhibitor.

Of course the keystone of the foregoing argument is the failure of the distributor to license films on a "local competitive basis" in each town where there were competing exhibitors. The argument is that an exhibitor is at a disadvantage in procuring films where his competitor owns more theatres in "closed towns". On this theory, it is obvious that every exhibitor in the United States who owns more theatres than his competitor in "closed towns" will necessarily violate the Sherman Act whenever a circuit deal is made, unless the exhibitor first demands and obtains evi-

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[1] The Government contends that documentary evidence in the record corroborates these inferences but that they are warranted even if the documentary evidence be held incompetent. (Gov. brief, p. 68)

[2] Elsewhere in the Government's brief (Footnote 56, p. 66), it is intimated that an unreasonable restraint results only if the defendant had been previously using the product of the particular distributor involved. On this theory it is necessary to examine only two situations, Brownsville, Tennessee, and Rogersville, Tennessee. Greeneville, Tennessee, need not be considered because there was no evidence of a "sell-away" by any distributor in that situation.

dence that his competitor has been given an opportunity to bid for the product.

We insist that the present theory of the Government is not the theory on which this case originally went to trial. It was not the case made out in the complaint and the bills of particulars; and we do not think it is a valid application of the Sherman Act.

It seems to us that before a violation of the Sherman Act on the part of the defendant exhibitors could properly be found, at least one of the following additional elements should have been present:

(a) Over-buying by the defendants for the purpose of preventing competitors from obtaining pictures;[3] or

(b) Contracts between the defendant exhibitors and the distributors unreasonably limiting the rights of the distributors to contract, completely and fully, with the other exhibitors, if they contract at all;[4] or

(c) Departure by the distributors from their established business methods and practices, coupled with evidence that this departure was induced by defendants for the purpose of restraining competition.[5]

None of these elements were present in the case at bar. Even if they had been present there would not necessarily have been a violation of the Sherman Act; but without any of these elements, we think the Government's case was clearly inadequate as a matter of law.

We shall now undertake to make specific reply to certain of the points made in the Government's brief.

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[3] The District Court regarded this element as important when he made a general statement of the applicable law in Conclusion 2, R. 1474. However, there was no evidence and no Finding that any such thing had occurred. (See our main brief, p. 44.)

[4] *United States* v. *Interstate Circuit* (D. C. Tex. 1937), 20 F. Supp. 868, 875-876.

[5] *Interstate Circuit* v. *United States* (1939), 306 U. S. 208, 218, 222-223.

"The Defendant Exhibitors—Their Affiliation and Monopoly Position":

(Gov. Brief, pp. 11-14)

It is incorrectly stated under this caption (p. 12) that Rockwood owns 50 per cent of the stock of "five other theatre corporations" in addition to 50 per cent of the stock of Cherokee and Kentucky. The Court made such a Finding but was asked to correct it.[1] It was partially corrected by Amended Finding 19.[2] It is also incorrectly stated (p. 12) that "Rockwood has operated as a virtual branch of the Crescent business." This is a mere inference improperly drawn from the facts stated in Footnote 11. The statement in the Footnote: "Individual theatres have been *transferred* from Crescent's subsidiaries to Rockwood," is correct, but only if it is meant that these theatres were *purchased* by Rockwood at their fair values.

The statement as to the increase in the number of theatres operated by Crescent and Cumberland (p. 13) is correct; but it should be pointed out that during the five-year period Crescent entered only five new towns[3] (not including Madison, Tennessee, which is a suburb of Nashville), and that Cumberland entered only three new towns. The principal expansion came about as the result of the organization of Rockwood which, with such of its affiliates as were made defendants, operate theatres in 24 small towns,[4] the majority with populations less than 2500.

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[1] R. 108.

[2] R. 1489. Plaintiff's counsel conceded that the correction should be made. R. 85.

[3] Brownsville, Tenn.; Earlington, Ky.; Franklin, Ky.; Gallatin, Tenn.; and Princeton, Ky. R. 1358.

[4] Rockwood 13; Cherokee 10; Kentucky 1. See R. 1361-1362. In our main brief, p. 116, it is said that the aggregate populations of the Rockwood and Cherokee towns were 83,242. This was a typographical error. The figure should have been 53,242. The average population was 2,315. A town of this size will not ordinarily support two competing theatres; and it is a fallacy to assume that the decree in this case will bring about such competition.

The statements as to growth in earnings and surplus of Crescent and Rockwood (p. 13) are also correct but, as we see it, are wholly irrelevant. The five-year period was one of rising industrial activity and "easy money." It is not unusual for surplus to increase in a greater ratio than earnings. For example, a corporation having a capital of $100,000 and a surplus of $1,000 will increase its surplus nine times by adding $8,000 to net worth. Nor is it unusual for a corporation to have earnings amounting to several times the original capital investment if it has started on a relatively small capital and relatively large borrowings.

In Footnote 14 (p. 14) it is suggested that screen advertising can be a source of revenue only where there is no competition in the town. There is no reason to think that two minutes of advertising in a two-hour program would adversely affect patronage in a competitive situation. There is nothing in the record in support of the argument made in the Footnote.[5]

The inference which is evidently invited from the statement of the expansion and earnings of the defendant exhibitors is that success is evidence of monopolization. We do not think this is a permissible inference. Substantial earnings may result from competent and efficient management. We refer the Court to Finding 111[6] and to the last paragraph of Amended Finding 113.[7]

[5] Since the argument is made, however, we think it fair to state that two minutes is the *maximum* permitted under the contracts with the advertising company. Many of these towns were too small to support even one theatre except for the fact that Stengel developed the technique of supplementing the operation with popcorn sales and screen advertising. R. 1275-1283, 1349, 1492-1493.

[6] R. 1428-1429.

[7] R. 1493.

"Elimination of Competition Through Use of Circuit Buying Power."

(Gov. Brief, pp. 14-20)

The first illustration given by the Government under this caption is with respect to Rogersville, Tennessee. This illustration is referred to in Footnote 15 (pp. 14-15).

The independent, Miller, had enjoyed a monopoly of exhibition in Rogersville. Cumberland's new theatre was opened in October, 1936. For the 1936-37 season, the evidence was undisputed[1] that Miller had film deals with Paramount, Warner, Columbia and Universal and the District Court found that he was also playing R.K.O. pictures.[2] Nevertheless the Government insists that Miller's competition was unreasonably restrained when United Artists made a deal with Cumberland.

The first coercion or pressure was that exercised by United Artists on Cumberland, in refusing to license pictures to Cumberland for its Rogersville theatre unless Cumberland also licensed the product for the theatres in its other towns. The only coercion or pressure deemed important by the District Court and the Government was Hill's demand that, after the deal had been made, it be approved as a whole or not at all.[3] The fact that Miller had the product of five out of the eight major distributors is deemed immaterial.

After referring to the Rogersville situation, the Government's brief proceeds (pp. 14-15):

> "Where, as in this case the circuit's policy is to absorb competitors, the demands will include restricting the independent's ability to license films to the extent necessary to prevent him from offering effective competition."

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[1] R. 430-432, 439-442.

[2] 1387.

[3] R. 1384, 1478. The practice is for the local salesman or exchange manager to agree with the exhibitor upon a deal which is then subject to final approval at the distributor's New York office before it becomes a contract.

No citation to the record or to any Finding of the District Court is made in connection with the foregoing statement. Evidently the Government has in mind not what was actually done in the case at bar, but rather a potential danger to independents.[4] There was no evidence in the case at bar of any "demand" by any defendant exhibitor which had any reference to the ability of its competitors to license films. All that the defendants did was to license the films which they themselves needed and actually exhibited in the normal course of business.

It is next stated, however, that "competitors were eliminated after the defendant exhibitors had, through their circuit buying power, *succeeded* in limiting the supply of films."[5] Success implies effort directed toward the accomplishment of an aim. In the case at bar, as heretofore pointed out, there was no evidence that the defendant exhibitors, in the licensing of films for their own use, had any aim other than the exhibition of pictures to their own patrons in normal course. There was no over-buying and no attempt to do anything which would limit the supply of films available to competitors.[6] Of course the effect of each licensing agreement was to limit the supply of films available to the competitor. It would be impossible to make a film deal without this result.

The fact that the defendant exhibitors afterward purchased the theatres of several of these competitors does not prove that the defendants licensed films for the purpose of

[4] In this connection see also p. 66 of the Government's brief where it is said that "effectuation of the conspiracy" need not be shown. This is technically true, but in the case at bar the conspiracy itself was never proved. The District Court merely drew an inference or legal conclusion that various "combinations" existed between particular exhibitors and particular distributors. The inference of a combination was, in each instance, drawn from a prior inference that the competition of a particular independent had been unreasonably restrained. If the basis for the inference or conclusion is removed, the inference or conclusion must also fall.

[5] All italics in this brief are ours.

[6] See Main brief, pp. 43-45.

forcing the competitors to sell. When there has been only one theatre in a town, such as Miller's theatre in Rogersville, the people of the town must go to that theatre to see motion pictures. When Cumberland built its new theatre the people had a choice. Miller's theatre was a makeshift affair with no modern conveniences. It was quite natural for many of his former patrons to attend the new theatre; and it was quite natural for Miller to desire to sell his theatre after he had lost his monopolistic position in the town. Miller was not forced to sell because of a shortage of product. On the contrary, he testified he had "plenty of pictures at the price."[7]

The facts were substantially the same in the other instances set forth in Footnote 16 (Gov. Brief, p. 16). For example, in Brownsville, Tennessee, the independent, Lawing, commenced to lose money as soon as the new Crescent theatre was opened in 1935. At this time Lawing had not completed his 1934-1935 contracts; and the sufficiency of his product is attested by the fact that he never did comply with his contracts with United Artists and Columbia and was very slow in complying with his contract with Loew's even after he was granted a reduction in film rentals.[8]

In short, it was not any limitation of the supply of films which induced these independents to sell out their theatres. It was merely the fact that competition took away or reduced the profits they had formerly enjoyed.[9] In towns which are not large enough to support two competitive theatres, one of them must inevitably fail.

The Government, in its brief (p. 18), regards the three franchise agreements as illustrations of "circuit buying

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[7] R. 442.

[8] R. 315, 323-324, 757-761.

[9] As to Earlington, see our main brief, pp. 31-32, 41. In McKenzie, the independent sold to Rockwood before the latter had opened a theatre or even negotiated for product. R. 1221-24, 1388. Paris is discussed in our main brief, pp. 80-82; Hopkinsville, pp. 32-33; and Union City, pp. 33-34. Athens is not involved because Muscle Shoals Theatres did not appeal.

power." As to the Paramount franchise, the evidence was that Paramount had broken a promise to Sudekum regarding the Nashville theatre, (or so Sudekum regarded it),[10] and Sudekum had done no business with Paramount since that occurred. We think this could be more properly regarded as the exercise of a not unusual human trait rather than as the exercise of "circuit buying power." As to the Fox franchise, it is true that in the preceding season Fox had been unable to sell Crescent at the film rentals demanded by it. Failure to make a deal is not unusual in the business world when the purchaser thinks the price is too high and the seller thinks the offer is too low. The statement that the independents paid higher film rentals than the Sudekum theatres under the franchise is not supported by competent evidence.[11] As to the Warner franchise, the Government does not assert that its execution was the result of circuit buying power, but refers to the elimination of "potential" theatre competition between Crescent and Warner in Nashville, a city which was expressly excluded from the scope of the complaint.[12]

In concluding the discussion of "elimination of competition through use of circuit buying power," the Government refers to the fact that Paramount gave the Crescent theatre in Madisonville, Kentucky, clearance over Dozier's theatre in Earlington, Kentucky, and that Loew's licensed its 1935-1936 product to Crescent in Brownsville instead of to Lawing. Quotations are made from two letters obtained by the Government from the files of Paramount and Loew's respectively. We respectfully refer the Court to our discussion of these situations in our main brief.[13]

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[10] R. 1028. The reference made in the Government's brief to the finding as to Paramount's "general policy" is based on Agnew's testimony, R. 1323, 1334-1335. The witness's statement as to "exceptional circumstances" (R. 1335) had reference to Nashville which was not involved in this case. Footnote 12, Gov. Brief, p. 12. This is the Government's only claim of departure by any distributor from its "general policy" or established business practices.

[11] Main brief, pp. 139-140.

[12] Footnote 12, Gov. Brief, p. 12.

[13] Main brief, pp. 73-74 as to Earlington; pp. 55-59, 69-72 as to Brownsville.

"This Court Has Jurisdiction Either of the Appeal in No. 17 or that in No. 18."

(Gov. Brief, pp. 26-33)

The Government's brief substantially concedes the prematurity of the appeal in No. 17. We think that undoubtedly it was premature. Moreover, this appeal was not perfected within the time allowed. The Government procured successive orders extending the time for docketing the record, but the last order expired on December 25, 1943, and the record was not filed in this Court until February 1, 1944.

It is contended by the Government with respect to No. 18 that if two appeals are taken "determination of the absence of jurisdiction under one establishes the appellate jurisdiction under the other" (p. 31). We do not think the cases cited by the Government establish this proposition. They merely establish the authority of this Court, when it dismisses an appeal improperly taken to this Court instead of to the Circuit Court of Appeals, to frame the mandate so as to preserve to the appellants their proper remedies; and if appellants simultaneously appealed to the proper court, this Court may sanction that appeal rather than direct the entry of a new order in the district court from which a new appeal may be taken. This authority will ordinarily be exercised only where the jurisdictional question has not been "obviously settled by prior decisions". (*Phillips* v. *United States* (1941) 312 U. S. 246, at p. 254). We think that this Court in *Leishman* v. *Associated Wholesale Electric Co.* (1943) 318 U. S. 203, removed any substantial doubt as to the practice where motions to amend Findings have been filed.

It is also contended by the Government, with respect to No. 18, that the court from which an appeal is taken does not lose jurisdiction until the record is docketed in the appellate court. We think the Government is mistaken in this contention. In *Midland Terminal Ry. Co.* v. *Warinner* (C. C. A. 8, 1923) 294 Fed. 185, it was held that a writ of

error was fully perfected when the petition for the writ and the assignment of errors were filed, the writ allowed and issued, and supersedeas bond approved and filed and the citation signed. A second writ of error was accordingly dismissed. In that case the record was not filed in the Circuit Court of Appeals until long after the second writ of error had been allowed. In *Miller* v. *United States* (C. C. A. 7, 1940) 114 F. (2d) 267, it was held that under the new Rules of Civil Procedure the district court loses jurisdiction upon the filing of the notice of appeal.

We think the proper practice in the case at bar would have been for the District Court to have refused the second petition for appeal except on the condition that the Government dismiss the former appeal. Only five days before this second petition for appeal was presented the Government had procured the entry of an order extending the time for filing the record in the first appeal until December 25, 1943. Of course, the Government could have proceeded with this appeal and invoked action on the motion to dismiss it. But the Government elected to appeal a second time while its first appeal was pending and a motion to dismiss it was undisposed of. We do not think a practice of this nature should be sanctioned. The party who has prayed and been allowed one appeal should be precluded from obtaining another appeal until the first appeal is either abandoned, vacated or dismissed. This is merely an application of the general principle which precludes a party from "blowing hot and cold" by maintaining inconsistent positions in a judicial proceeding. Cf. *Wachstetter* v. *State*, 42 Ind. 166.

If this Court approves the practice advocated by the Government, it will be an open invitation for successive appeals whenever there is the slightest doubt as to the finality of a judgment. Such appeals will, as a practical matter, deprive the district court of jurisdiction because the jurisdiction will never be settled until the appellate court determines it retroactively.

"The District Court Erroneously Failed to Impose as a Condition on the Acquisition by a Defendant Exhibitor of any New Theatre that it First Affirmatively Justify the Acquisition."

(Gov. Brief, pp. 33-43)

Under this heading the Government insists on a revision of paragraph (19) of the decree so as to require the District Court to pass upon whether the acquisition of additional theatres would "unreasonably restrain competition."

The Government in its brief (Footnote 26, p. 34) refers to the "elimination of competition" by defendant exhibitors. It is said that competition was eliminated in twenty towns. This elimination of competition, to the extent that there are specific Findings,[1] may be put into categories and illustrated as follows:

(1) Brownsville, Tennessee.[2] Here the independent was operating a makeshift theatre on a shoestring. Crescent built an up-to-date theatre in the town. Lawing commenced to lose money as soon as the Crescent theatre opened.[3] He wanted to sell out, and Crescent bought the theatre and closed it. We assume that the word "acquisition" does not refer to the building by Crescent of the new theatre in Brownsville, but rather to the purchase of Lawing's theatre.

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[1] There are no specific Findings as to Huntsville, Fayetteville or Gadsden. See Exhibit B, Gov. Brief, pp. 78-79. All the other situations referred to in Footnote 26, with the exception of Athens and Copper Hill, are discussed in our main brief. (See pages iv-v, Table of Contents, for page references.) Athens is not discussed because Muscle Shoals Treatres, the defendant exhibitor there involved, was not affiliated by stock ownership with any other defendant exhibitor and did not join in the appeal. At Copper Hill the exhibitor involved was Newport Amusements, Inc., in which half the capital stock is owned by Cherokee and the other half by J. W. Baird. This corporation was not made a defendant.

[2] Main brief, pp. 29-30 and 52-53.

[3] R. 315-317.

(2) Union City, Tennessee.[4] Here the independent, John Dee Henry, opened a second-run theatre at a time when Crescent's second-run theatre was temporarily closed because it was being occupied as a temporary court house while a new court house was under construction. A short while previously he had sold a theatre in his home town of Hickman, Kentucky and had told the purchaser, whom he had solicited to make the purchase, that he wanted to get out of the theatre business and devote his time to his insurance and mortgage loan business. When Henry's plans to open his theatre in Union City became known, Crescent also opened a new second-run theatre. After operating his theatre in Union City for a short while, Henry approached Crescent and offered to sell. The deal was made and Crescent purchased the theatre and closed it.

(3) Central City, Kentucky.[5] In this town the Selba Amusement Company operated a first-run theatre and Pittman operated a second-run theatre.[6] The Selba theatre was incompetently managed and Pittman, largely for that reason, had a profitable operation. The Selba Amusement Company offered its theatre for sale and Rockwood purchased it. Pittman immediately approached Rockwood and asked Rockwood to purchase his theatre too. He testified that he did not believe that he could operate it successfully in opposition to the Selba theatre under a competent management.[6] Rockwood purchased the theatre and employed Pittman as manager for the Selba theatre. It continued to operate the other theatre on a part time basis.[7]

The theatre acquisitions which fall into category (1) were, (in addition to Brownsville), Rogersville, Tennessee, Gregneville, Tennessee, and Earlington, Kentucky. These were situations where the independent was first in the town and was operating a first-run theatre.

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[4] Main brief, pp. 33-34 and 92-93.
[5] Main brief, pp. 36-37 and 111, Footnote 6.
[6] R. 284-285, 296.
[7] R. 287.

Several of the theatre acquisitions fall into category (2), where the independent opened a second-run theatre in opposition to an existing theatre or theatres operated by the defendant exhibitors, e.g., Hopkinsville, Kentucky; Paris, Tennessee; and Maryville, Tennessee. On the other hand there were instances where the independent opened such theatres and did not sell out to defendant exhibitors but finally closed the theatres, e.g., Tim Smith (Peerless Enterprises), in Morristown, Tennessee.

Category (3) is in its essence not distinguishable from category (2). In Central City, Kentucky, the independent desired to sell out because he did not think he could compete successfully. Such was also the case in the towns where the independents opened opposition theatres and subsequently decided that they would prefer to sell.

It is said in the Government's brief (p. 34) that the District Court found that defendants had, in several other towns

> "made various threats, sometimes supplemented by film licensing discriminations, in an attempt to induce the sale to them of independent theatres."

These independent theatres are listed in Footnote 28. An examination of the Findings discloses no "film licensing discriminations" against these independents. In none of these towns, with the exception of Gallatin, did the defendants ever operate a theatre; and the Finding as to Gallatin related to 1929 or 1930, long prior to the period involved in this case. What was done in all these instances was to inquire of the owners whether or not they wanted to sell. They all replied in the negative and that was the end of it. They are all still operating their theatres and only in Gallatin is there competition.

In other towns, as well as Gallatin, independents have continued to operate theatres in opposition to defendants.

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* Finding 87, R. 1412. Roth's inferior theatre was an open invitation to competition. Cf. Morgan's letter quoted in Finding 88, R. 1414, and Avey's letter quoted in Finding 89, R. 1417.

e.g., Franklin, Kentucky, where the independent was there first; and McMinnville, Tennessee and Harriman, Tennessee, where defendants were there first. Suppose that one of these independents should decide that he wants to sell his theatre. What criterion is the District Court to consider and follow if one of the defendants desires to purchase it?

It was the view of the District Court that it was proper for defendant exhibitors to acquire additional theatres except where, prior to the acquisition, there had been a "violation" of the Sherman Act which unreasonably restrained the competition of the independent and forced him to sell. The District Court took the view that such a "violation" occurred whenever a distributor discriminated against the independent in the licensing of films. Such discrimination by the distributor was evidently regarded as "predatory tactics" on the part of the beneficiary of the discrimination and a sale under such circumstances was regarded as not "voluntary." Hence the District Court in paragraph (19) of the decree enjoined further acquisitions of theatres where the sale is not voluntary or, expressing the same thought differently, where "predatory tactics" are employed. If paragraph (19) is to be revised, we think it should be revised merely to require the District Court to determine whether the purchase by a defendant exhibitor of the proposed additional theatre is in violation of the decree as it now stands and as it may be otherwise modified by this Court.

It should be noted that the revised paragraph (19) upon which the Government now insists corresponds with paragraph (20) of the proposed decree submitted by the Government after the Findings and Conclusions were filed.[9] On the hearing as to the form of the decree, the following colloquy[10] occurred between the District Judge and plaintiff's counsel:

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[9] R. 26, 1479.

[10] R. 59.

"Mr. Wright: Well, paragraph 20 again was put in this decree in order to comply with conclusion of law No. 20 of your Honor's decision.

The Court: Yes, sir, but I am not entirely satisfied in my own mind that I should have had that in the conclusion. *I adopted that from the proposed conclusion which you submitted* but what is the necessity for such a provision?

Mr. Wright: Well, the necessity for the provision lies in the fact that the decree's purpose is preventive and the only way that you can make it effective from the standpoint of preventing a recurrence of situations that have been condemned by the findings is to insist that before these defendants move into another situation that the matter be presented here.

The Court: Do you mean that I sit down here and supervise from now on the activities of the Crescent Amusement Company as to whether or not they should open up theatres in other towns?

Mr. Wright: Oh, not at all. I assume that the purpose of this is to prevent an expansion by the Company and whether there would be any occasion to use that proviso would be entirely up to them. If they were content to remain in the same places, the same size territory, there would be no occasion ever to resort to this Court, but certainly, in view of what has happened, there ought to be some prohibition against further expansion on their part.

The Court: Well, wouldn't they be entitled to extend their business so long as they didn't violate the Sherman Act?

Mr. Wright: No. In view of the history that was shown here, I would have said again that we were entitled, on the basis of these findings, to a flat prohibition against further acquisitions. This is a qualification again, which, it seems to me, is for their benefit."

In urging that there should be an affirmative showing that a new acquisition would not "unreasonably restrain competition", we think the Government is reading into the Sherman Act language which is not there. In his dissenting opinion in *Northern Securities Co.* v. *United States* (1904),

193 U. S. 197, 403, Mr. Justice Holmes cautioned against this type of reasoning, saying:

> "The first section makes 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations' a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used."

In undertaking to justify the proposed revision of paragraph (19) of the decree, the following statement is made in the Government's brief (pp. 40-41):

> "Protection of the general consuming public against the evils associated with monopolization of trade, such as high prices and limitation of product, is a primary objective of the Sherman Act, and the statute must be applied in the light of this objective."

In the case at bar there was no allegation, evidence or Finding that defendant exhibitors fixed admission prices in "closed towns" in excess of what was reasonable or in excess of normal admission prices charged by other exhibitors throughout the territory involved; nor was there any allegation, evidence or Finding that defendant exhibitors failed to exhibit the best pictures. On occasions certain of the defendant exhibitors were unable to agree with certain distributors on film rentals for particular seasons; and during the three-year period, 1932-1935, Crescent did not make deals with Paramount because of a disagreement between that company and Sudekum. With these exceptions there is nothing in the evidence to suggest that it was not the established practice of defendant exhibitors to exhibit the best pictures of each distributor. For the 1938-1939 season it affirmatively appears that not only did Crescent

and other defendant exhibitors have franchise agreements with Paramount, Warner and Fox, but they also had deals with the other five major distributors so that, in the so-called "closed towns", (viz. small towns where defendants operate the only theatre or theatres), the theatre-going public had the opportunity of seeing the best pictures of each distributor.[11]

This belated contention based on the public interest represents a shift from the theory of the complaint which was concerned only with so-called independent exhibitors. Paragraph 48(a) of the complaint (R. 8) attacked licensing contracts which gave defendants the privilege of selection. Selective deals permit the exhibitor to select and play the best pictures and eliminate the others. Good and efficient service to the public involves exhibition of the best pictures in good theatres and at reasonable admission prices. Such service is naturally a deterrent to competition. But if and when competition enters a town, the distributors will, in their own interest, take advantage of the competition to license their inferior pictures as well as their good pictures. It is at least arguable whether or not the public is thereby benefitted.

The evidence demonstrates that the monopolies of defendant exhibitors in the small towns involved in this case have resulted merely from the excellence of the service furnished the public. That such is the case is impliedly recognized in Finding 111 and the last sentence of Amended Finding

[11] See Finding 32, R. 1368-1369. As to United Artists, see Finding 165, R. 1466. It should be noted that United Artists is not itself engaged in the production of motion pictures but distributes pictures produced by others such as Selznick, Hal Roach, Wanger and Goldwyn. While Finding 165 emphasizes the difficulty which United Artists had in making deals with defendant exhibitors, the blame for not reaching a speedy agreement should not fall on the purchaser any more than on the seller who demands a figure which the purchaser thinks is too high. Why should a distributor such as United Artists (referred to in Finding 169, R. 1467-1469, as a "cooperative venture"), which acts as a common selling agent for a group of producers, stand in a more favorable light than a "combination" of exhibitors?

113.[12] Where adequate entertainment is being furnished the public, there is little or no incentive for competition. In the cases in which defendant exhibitors entered towns where independents had monopolies it appeared in every instance that the independent had been operating in a wholly inadequate theatre, e.g., Rogersville, Tennessee; Brownsville, Tennessee; and Greenville, Tennessee.[13]

The suggestion is also thrown out (Gov. Brief, p. 41. Footnote 34) that "local management" is to be preferred over "chain operation". Again there is no basis in the record for such an argument. Sudekum has been a lifelong resident of Tennessee.[14] Local management has been provided the various theatres.[15] On the other hand, there is no evidence that the so-called independent exhibitors whose competition was allegedly restrained had been residents for any substantial length of time of the towns in which they operated theatres. For example, Lawing rented a home in Brownsville when he opened a theatre there, but moved away shortly after he sold the theatre.[16]

In short, it seems to us that the Government's argument, not only with respect to this feature of the case but with respect to the case as a whole, is based on assumed or hypothetical facts, rather than on facts in the record, or even in the Findings, although these Findings were themselves copied, in the main, from plaintiff's brief in the District Court.[17] An argument based on unwarranted inferences and unproven assumptions is necessarily unreliable.

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[12] R. 1428-1429, 1493.

[13] Main brief, pp. 52-53.

[14] R. 944.

[15] One objection to "chain operation" is that managers are shifted when they become well acquainted with their customers or patrons. Sudekum follows a contrary policy. R. 960-964.

[16] R. 320; 329.

[17] R. 1522.

"The District Court Properly Required Separation in Ownership and Control of the Defendant Exhibitors."

(Gov. Brief, pp. 43-51)

Under this caption it is said in the Government's brief (p. 44):

> "It is likewise undisputed that these corporations have combined with each other in various ways to suppress competition. They have agreed upon a division of operating territory and have combined with each other and with certain distributors in licensing films and making franchise contracts for the purpose of maintaining their theatre monopolies and preventing competition (Conclusions 10, 11, 13; R. 1476-7)."

On the contrary this statement is most vigorously and earnestly disputed. It is true that some of these corporations have at times "combined with each other" in that, in some instances, licensing agreements have been jointly negotiated. These instances are listed in Finding 32[1] and also under the caption "E—Franchises".[2] These joint deals were not made, however, for the purpose of suppressing the competition of any independent. There is no Finding to that effect with respect to the deals listed in Finding 32; and the vice found in the franchises was not the joint negotiation but the other features which are discussed elsewhere in the briefs. The District Court held in Conclusion 18[3] that blanket contracts made by United Artists Corporation for the 1938-1939 and 1939-1940 seasons were not objectionable, although they were joint deals.

It is also true that Conclusion 13[4] reads as follows:

> "13. The said defendant exhibitors have violated the Sherman Act by combining with each other, and with the major distributors, Paramount, Fox, Warner,

[1] R. 1368.
[2] R. 1430-1457.
[3] R. 1478.
[4] R. 1477.

Loew's, RKO, and United Artists, in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them."

However, when Conclusion 13[5] is considered in conjunction with Conclusion 9[6] and with the portion of Conclusion 17[7] relating to Rogersville, Tennessee, it is apparent that the District Court merely meant by Conclusion 13 that each of the alleged illegal "combinations" was between one defendant exhibitor and one distributor, except where the particular film deal happened to be one in which another defendant exhibitor participated. The combination involving Rogersville, Tennessee, was between Cumberland and United Artists in 1936-1937 and in 1937-1938, and between Rockwood and United Artists in 1938-1939. This is made clear by examining Findings 32, 52 and 165-166[7] from which it appears that Cumberland made no deal with United Artists in conjunction with any other defendant exhibitor. Again, in Brownsville, Tennessee, the deal made by Loew's with Crescent for the 1935-1936 product was not the result of any combination between any of the defendant exhibitors. Actually it was not even a circuit deal by Crescent itself. Finding 43[8] merely says that "at *approximately* the same time, Loew's licensed that season's product to Crescent for exhibition in 16 other towns".

As to the franchises, there is no suggestion in the evidence or in the Findings that the "combination" among some of the defendant exhibitors in negotiating these franchises was for the purpose of putting pressure on the distributors with respect to any competitive situation. We

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[5] R. 1476.

[6] R. 1477.

[7] R. 1368, 1384-1386, 1465-1467. (The phrase "hereinafter mentioned" in the last paragraph of Finding 166 should have been "hereinbefore mentioned," because reference was evidently intended to Finding 52.)

[8] R. 1375.

see no difference from this standpoint between these franchise agreements and the United Artists' blanket deals which were expressly held valid by the District Court. Conclusion 10[9] of the District Court must be construed in *pari materia* with Conclusion 13 except to the extent that a distinction is made between one-year deals and deals for several seasons.

As to Conclusion 11[10] of the District Court that the defendant exhibitors had combined with each other "for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves", we have never understood the meaning of this language which is a rewording of paragraph 46[11] of the complaint. That there has been no division of territory is perfectly apparent when the locations of the theatres of the different defendant exhibitors are considered.[12] Conclusion 11 goes beyond Finding 28[13] which is the only Finding mentioning division of territory. All that Finding 28 means is that no two of the defendant exhibitors have theatres in the same town.

The Government further says in its brief (p. 45) that unless divestiture takes place

> "there will be both opportunity and tendency for these exhibitors to support each other in their dealings with distributors in obtaining unfair and unwarranted advantages over independents."

All that this statement can mean is that defendant exhibitors may, by the use of so-called "circuit buying power", resist more successfully than independents the demands of the distributors for increasingly high film rentals and onerous terms. The remedy of the independent is to

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[9] R. 1476.
[10] R. 1476-1477.
[11] R. 7-8.
[12] R. 230, 233.
[13] R. 1365.

join a cooperative or to combine, in some other way, with other exhibitors in negotiating with the distributors. We think the public interest would be better served in that way than by breaking up the independent circuits and cooperatives for the advantage of the distributors.

It is argued by the Government (pp. 47-48) that the divestiture provisions are proper because the subsidiary corporations, and particularly Cumberland and Lyric, were formed "as an incident to elimination of competition". Reference is made to Finding 24.[14] Of course, competition is eliminated when two competitors form a partnership or a corporation. Such elimination of competition, especially where the parties are engaged in a local business such as the exhibition of motion pictures, does not amount to an unreasonable restraint on interstate commerce. There is no Finding that the organization of these corporations was illegal. There is merely a Finding of the obvious fact that there was an elimination of competition. The District Court used the phrase "relieved themselves of the necessity of continuing to compete with each other", copying this language from plaintiff's brief.[15]

It is next argued by the Government that the divestiture provisions of the decree "will leave each defendant exhibitor with far greater resources than any competitor and it will also be left with a substantial territorial monopoly". This argument is not based upon any facts found in the record. Lyric will be left with theatres in only the town of Huntsville, Alabama (population 13,050); Kentucky will be left with theatres only in the town of Elizabethtown, Kentucky (population 3667); Rockwood will be left with theatres in 13 towns, all but three having populations of less than 3,000; Cherokee will be left with theatres in 10 towns, all but three having populations of less than 3000;

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[14] R. 1363.

[15] R. 1522.

and Cumberland will be left with theatres in 10 towns whose 1940 populations varied from 1500 to 5300.[16]

It is next argued by the Government that in a suit to require one corporation to divest itself of a 50 per cent ownership in the capital stock of another corporation, the other 50 per cent owner is not a necessary party. However this may be, the Government misunderstood our argument (our main brief, pp. 124-126). This procedural contention as to necessary parties was made only with respect to Newport Amusements, Inc., and Ruffin Amusements, Inc., which were not made defendants in the case. The Government apparently does not controvert our position with respect to these two corporations.

"The Provisions of the Judgment Relating to the Making of Franchise Contracts Are Appropriate and Necessary."

(Gov. Brief, pp. 51-54)

Under this heading the Government says (p. 53):

> "When, as in this case, the contracts run for periods of several years and give this exclusive supply to affiliated corporations themselves operating theatre chains, the restraint on competition is clearly unreasonable and illegal."

No citation of authority is given in support of the statement that a licensing agreement for a period of several years is illegal because of the period of time which is covered. Where one picture is licensed by a distributor to an exhibitor, no other exhibitor can license that same picture for exhibition in the same town on the same run. This is a contract for "exclusive supply" of that one picture in

[16] R. 1360-1362. Neither Crescent nor any of these other corporations operates theatres in the larger towns or cities in Tennessee, other than Nashville. R. 1358-1363. These other towns and cities are Memphis, Knoxville, Chattanooga, Jackson, Johnson City and Bristol.

the sense in which the phrase is used in the Government's brief. If the agreement is for a season's product or for the product of two or three seasons, the same result follows. Again, where a building is leased for one year, no one else can lease that same building for the same year. The supply of buildings in the town available for other tenants is thereby limited. If the lease is made for five years or ten years instead of one year, a similar result follows just as in the case of contracts for the licensing of films.

Obviously there would be an unreasonable restraint on competition if the defendant exhibitors had, either by making franchise agreements or by making deals for one year only, licensed more pictures than they needed for normal exhibition in their own theatres with the purpose of preventing competitors from obtaining them. But such was not the case and it is not contended that there was any over-buying. As a matter of fact the defendant exhibitors never had franchise agreements with more than three of the eight major distributors. The supply of films available to competitors was limited only to the same extent as would have been the case if defendant exhibitors had, at the beginning of each season, licensed an equivalent number of pictures from these same distributors or from other distributors.

In the *Interstate Circuit* case this Court stressed the fact that each of the eight distributors "knew that cooperation was essential to successful operation of the plan". (306 U. S. 226) In this case, too, each distributor must have known that a combination with defendants, to which the other distributors were not parties, could not be effective in suppressing independent competition. It would have been necessary to have a plan and the cooperation of the other major distributors. Actually there was no plan and no cooperation. The Government disclaimed any such contention when it eliminated paragraphs 50-53, incl., of the complaint.[1]

[1] R. 9. 19.

The argument is made (Gov. Brief, p. 53) with respect to the repeat-run clauses in the franchises: "The effect of this was practically to bar competitors from even second-run exhibition of the distributor's pictures". We deny that this was true and refer the Court to the discussion in our main brief (pp. 127-129). The reference made in the Government's brief (p. 54) to "clearance provisions respecting second-run showings" is misleading. The only clearance provisions were with respect to other towns. There were no provisions fixing the length of time between runs in the same town. Nor was there any instance in the case at bar where the independent "second-run" theatre in a particular town was superior to the defendant's "first-run" theatre or where, for any other reason, the independent merited a switch in the runs established by any distributor.

"The Provisions of the Judgment Preventing Use of Circuit Buying Power to Restrain Competition Are Appropriate and Necessary."

(Gov. Brief, pp. 55-59)

Under this heading paragraphs (8) and (12) of the decree are discussed. It is argued (p. 55) that if A (the circuit) "can threaten" not to license a distributor's pictures in his closed towns unless he receives the distributor's pictures for first-run showing in a town in which A and B both operate theatres (B being the independent), and irrespective of whether B makes an equal or better offer, "such tactics, provided the distributor yields to A's pressure, completely eliminate all competition between A and B for first-run exhibition of the distributor's films".

The only Finding by the District Court where any such "threat" was said to have been made was with respect to Rogersville, Tennessee, where United Artists yielded to Cumberland's "pressure". In that case, as already shown, United Artists made a circuit deal with Cumberland, in-

cluding Rogersville. The Finding is to the effect that United Artists then proposed to eliminate Rogersville from the deal, and Cumberland insisted that the deal be approved as a whole or not at all.[1]

It is true that, in other situations, the District Court apparently drew the "inference" of similar pressure, but there was no evidence, even of the hearsay type, of any threat not to license the distributor's pictures in the closed towns unless the competitive situation was included. The evidence relied upon by the Government consisted of inter-office communications taken from the distributors' files in which reference was made to the large amount of revenue which the distributor was procuring from defendant exhibitors as compared with the revenue which would be obtained from independents. In all these situations, however,—and we do not except Rogersville,—it was an equally permissible inference that the distributor would have dealt with the circuit rather than the independent even if no other revenue had been involved. Indeed this inference is far more logical than the contrary inference when there are taken into consideration the facts contained in Findings 111 and 112.[2]

The attention of the Court is particularly directed to the last paragraph of Finding 112 to the effect that where licensing agreements were made with the independent exhibitors the distributors found it necessary "to make large concessions from the contract terms originally agreed upon, or to accept cancellations of obligations to exhibit pictures as originally called for under the contract". For example, Lawing, at Brownsville, Tennessee, failed to play pictures which he had licensed from United Artists and Columbia[3] and, according to a letter written to Lawing by Willingham (Loew's District Manager at Memphis), Lawing's account with Loew's was "in a most deplorable condition".[4]

[1] R. 1384.
[2] R. 1428-1429.
[3] R. 323-324.
[4] R. 759-760.

Nevertheless the Government insists that there was an unlawful discrimination by Loew's against Lawing because the following season's product was licensed to Crescent in spite of an offer from Lawing which was "as good as, if not better than" the deal Loew's accepted from Crescent. Assuming that Lawing's offer was, on its face, as good as Crescent's offer,[5] it was natural for Loew's to prefer to make a deal which would be carried out by the exhibitor rather than one which would probably not be carried out.

The Government's brief then proceeds (p. 56):

> "Similar threats and pressure may exclude B from even second-run exhibition or result in clearance provisions so burdensome to B as to render his competition ineffective. Such use of a local monopoly of exhibition *to obtain agreement by a distributor* to impose restraints upon the exhibitor's competitors is a restraint of trade prohibited by the Sherman Act. *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 227, 229-230."

While we do not quarrel with the foregoing statement of the law, there was no Finding and no evidence in the case at bar that any defendant exhibitor ever *obtained agreement by any distributor* to impose restraints upon competing exhibitors as in the *Interstate Circuit* case. The decision of the District Court in that case with respect to such an agreement between an exhibitor and a distributor was stated as follows (20 F. Supp. 868, 875-6):

> "The distributor respondents have the legal right to contract for the exclusive exhibition of their copyrighted pictures to the respondent exhibitors . . . They must not, in their contracts with the exhibitor respon-

[5] Actually it was not as good. See pp. 57-58 of our main brief. As there stated, Exhibit L-18, which included Lawing's offer, was not brought up with the record on appeal, and in the Government's brief (p. 74), it is argued that defendants are therefore not in position to attack the finding as unsupported by evidence. In view of this technical insistence, the Court's attention is called to the fact that Exhibit L-18 was merely identified and was not offered or received in evidence (R. 777).

dents, contract away their right to contract, completely and fully, with other exhibitors, if they contract at all."

In the case at bar each distributor merely made contracts with one or more defendant exhibitors for the exhibition of its copyrighted pictures, and such contracts may be said to have been for "exclusive exhibition" in the sense previously used. That is to say, when a distributor licensed a first-run to an exhibitor, it could not license the same run to another exhibitor in the same town. Furthermore, the distributors simply followed their own established business practices and methods with respect to second-run contracts in those towns, and made no contracts with any defendant exhibitor which contracted away their rights to contract with other exhibitors.

This Court in the *Interstate Circuit* case laid great stress upon the fact that the distributors had complied with proposals which "involved a radical departure from the previous business practices of the industry and a drastic increase in admission prices of most of the subsequent-run theatres" (306 U. S. 222); that they put into effect "far-reaching changes in their business methods" (306 U. S. 223); and that the restrictions imposed upon the competitors of the defendant exhibitors "did not have their origin in the voluntary act of the distributors or any of them" (306 U. S. 228). In the case at bar we have exactly the opposite situation. Each of the distributors followed its own established practices and methods, and did so voluntarily. They were not restricted by any contracts or agreements with any of the defendant exhibitors.

In the foregoing discussion we have omitted reference to clearance provisions in licensing agreements. The statement heretofore quoted from the Government's brief is misleading in its reference to clearance. The illustration given by the Government was with respect to a town in which A (the circuit) and B (the independent) operate competing theatres. In no instance did any defendant exhibitor ever obtain "clearance" over a competing theatre in the same

town. The only clearance ever obtained by defendant exhibitors was with respect to neighboring towns; and the pleadings in the case, when considered with the bills of particulars, make no issue as to clearance.[6]

In its brief the Government says (p. 57):

> "The defendants also argue (Br. 104-105) that competition between exhibitors is not in the public interest, and that they should therefore not be prohibited from using circuit buying power to restrain competition."

This manner of paraphrasing the argument made in our main brief is typical of the manner in which the Government has tried this case from the outset. Of course, the argument actually made was quite different. Nothing was said about the use of circuit buying power to restrain competition. We deny that circuit buying power has been used in this case to restrain competition.

It is further said in the Government's brief (p. 58):

> "The defendants' argument must also be rejected because it involves the *false assumption* that an exhibitor in a closed town will pass on to the public any saving in the cost of his pictures. If lack of competition enables him to buy cheaper, it much more conclusively enables him to sell higher, that is, to collect higher admission charges from the public. The exhibitor's lower costs because of absence of competition simply go to increase his profits."

This argument is without basis in the pleadings or proof. Contrary to what appears to be the Government's view, the burden of both allegation and proof is on the Government even in a Sherman Act case and a defendant is entitled to reasonable "assumptions" unless and until they are shown to be "false". In this case, there was no contention by the plaintiff that the defendant exhibitors ever charged unreasonable admission prices or that they ever raised

[6] See complaint, R. 1-12; motion for bill of particulars and order, R. 140-153; and bills of particulars furnished in response to the order, R. 153-173. See also our main brief, pp. 22-24.

admission prices after competition in a town had been eliminated. As stated in our main brief (p. 105), the business of exhibiting motion pictures is competitive with other forms of amusement. Indeed, the attendance of places of amusement is in the nature of a luxury rather than a necessity. It is to the selfish interest of the exhibitor to fix admission prices low enough to fill the theatre. As to monopolistic profits, the Government disregards the fact that profits may accrue from competent management, good service to the public, and the like. There is nothing in the case at bar to justify the inference that the profits of the defendants have come from admission prices which were higher than they should have been.

Viewing the matter from a different angle, if the distributors have their will as to film rentals and terms, the exhibitors must absorb the increased cost or pass it on in the form of increased admission prices. The distributors and producers will earn larger profits or will pass on the increased revenue in the form of increased salaries to film stars and other employees. There will be a slight reapportionment of the national income at the expense of Tennessee and in favor of New York and California. But what objective of the Sherman Act will have been attained? As suggested in our main brief (pp. 101-102) the Government ignores in its argument the interpretation given the Sherman Act by this Court in a long line of cases ending in *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469.

The Government next argues (pp. 58-59) that the distributors were not necessary parties because they were not injuriously affected by paragraph (8) and (12) of the decree. This argument is based on the erroneous assumption that the equity principle requiring the joinder of necessary parties is solely for the protection of persons not joined. It is not so limited. In *Williams* v. *Bankhead*, 86 U. S. (19 Wall.) 563, 571, this Court said:

> "Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree

> made in his absence, he is not an indispensable party, but he should be made a party if possible, and the Court will not proceed to a decree without him if he can be reached."

Here the injunction against defendant exhibitors is unfair to them for the reason that the distributors were not also subject to injunctive relief with respect to the licensing of films in competitive situations as compared with closed situations. Nevertheless we must again call to the attention of the Court that although United Artists remained in the case as a party defendant and was found guilty of violating the Sherman Act, no injunctive relief was granted against that distributor.

One basis for the equity rule requiring the joinder of necessary parties who are subject to the jurisdiction of the Court is to avoid a multiplicity of suits. In Story's Equity Jurisprudence, Fourteenth Edition, Sec. 1981, it is said:

> "It is the great object of Courts of Equity to put an end to litigation, and to settle if possible in a single suit, the rights of all parties interested or affected by the subject-matter in controversy. Hence the general rule in equity is, that all persons are to be made parties who are either legally or equitably interested in the subject-matter and result of the suit, however numerous they may be, if they are within the jurisdiction, and it is, in a general sense, practicable so to do."

That the Government's procedure was calculated to bring about a multiplicity of suits is evident from Footnote 51 (Gov. Br. p. 59) in which attention is called to the fact that on August 7, 1944 the Government proposed, in the *Paramount* case, a provision similar to that which it originally sought in this case in paragraph 4 of the prayer.[7] If the Government desired that sort of relief it should have left the "Big Five" in the present case as defendants. In-

[7] R. 11.

stead the Government voluntarily dismissed the "Big Five" as defendants, but persuaded the District Court to enter a decree changing "distributors" to "exhibitors" as found in paragraph 4 of the prayer.[4] Now that the Government has again determined that an injunction against discriminatory licensing practices should operate directly on the distributors themselves, we submit that paragraphs (8) and (12) of the present decree should at least be suspended until such an injunction is obtained.

"There is no Failure of Proof as to Any Essential Allegation of the Complaint."

(Gov. Brief, pp. 60-67)

The Government contends that there is no assignment of error as to failure of proof and that this issue is not open for consideration. We think this is a mistaken view of the assignments of error. Error was assigned on numerous provisions of the decree.[1] If there was a failure of proof as to the essential allegations of the complaint, these provisions of the decree based on a new theory were necessarily erroneous. Our argument as to failure of proof is clearly within the scope of these assignments of error.

Actual and unreasonable restraint of competition was the gravamen of the complaint.[2] We think the complaint specifically set forth, under any fair construction, that there was no actual or unreasonable restraint of competition of any exhibitor so long as that exhibitor had available to him the product of three of the eight major distributors.

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[1] R. 1518-1520.

[2] See particularly paragraphs 40-43, 49 and 54. R. 7-10. It is conceded by the Government (Footnote 53, Gov. Br. pp. 64-65) that the essential allegation of paragraph 43 is covered by the allegations of paragraph 49. The first, third and concluding sentences of paragraph 54 also amount merely to a repetition of paragraphs 43 and 49. The second sentence of paragraph 54 charges that independents were induced by "threats" to sell their theatres. The remaining sentence of paragraph 54,—the fourth,—was stricken on motion of defendants. R. 142, 150, 152.

Otherwise paragraphs 40-42[3] of the complaint are meaningless.

The Government is incorrect in its statement (Gov. Br. p. 63) that the nine "situations" discussed in our main brief relate only to competitors who were "actually put out of business". Item 6 of each of the bills of particulars undertook to specify and give particulars as to each competitor whose competition was unreasonably restrained, as alleged in paragraph 49 of the complaint, even though he was not specified in item 1 which related initially to paragraph 43 of the complaint but also related by reference to paragraph 49.[4] One of the nine situations discussed is that involving the Dixie Theatre in East Gadsden, Alabama, which was still in business at the time of the trial. It so happens that this is the only theatre still in business (1) as to which particulars were given by plaintiff in item 6 of any of the bills of particulars, and (2) as to which proof was then offered which is the basis of a Finding by the District Court of discrimination against such theatre in the licensing of films.[5]

It is true that in item 6 of these bills of particulars plaintiff specified additional theatre operators whose competition was allegedly restrained by inability to obtain sufficient product, but the plaintiff was unable to offer any proof of discrimination against these other independents, viz., Ray Smith, Murfreesboro, Tennessee; James R. Wilson, McMinnville, Tennessee; Rube B. Page, Cleveland, Tennessee; and S. B. Ford, Lexington, Mississippi.[6] There are no Findings against defendant exhibitors in any of these situations.[7] The significance which we attached (in our main brief, pp. 26-27) to the fact that certain other independents mentioned in the Findings are "still in busi-

[3] R. 7.

[4] Main brief; Footnote 5, p. 23.

[5] Main brief, pp. 24-25.

[6] R. 158, 171, 173.

[7] See Exhibit B, Gov. Br. pp. 78-79.

ness" was that, as to them, there were no particulars furnished so as to bring them within paragraph 49 of the complaint, and they did not come within the second sentence of paragraph 54 because that paragraph contained no allegation as to *unsuccessful* "threats".

In its brief (pp. 63-67) the Government undertakes to point out five assumptions or conclusions in our argument which are said to be erroneous. These five points will be referred to in the same order:

(1) It is said (p. 63) that our argument "completely ignores all Findings and proof as to franchise contracts" and that "these alone are sufficient to support the Government's complaint".

It should be noted, however, that the complaint and bills of particulars make no distinction between franchise contracts and other licensing contracts. The Government's case was that, through licensing contracts, independents were deprived of films and their competition unreasonably restrained. The point made in our main brief was that the Government failed to prove these allegations. Certainly they were not proved merely by introducing the franchise contracts in evidence, because defendant exhibitors never had franchise contracts with more than three of the eight major distributors.

(2) Here it is repeated (pp. 63-64) that our argument erroneously assumed "that only proof and findings as to competitors who have been eliminated support the complaint". This point has previously been discussed. Several independents who were still in business were specified by plaintiff in item 6 of the bills of particulars,[8] but there was no proof or Finding as to any of them except the Dixie Theatre, East Gadsden, Alabama;[9] and there was no proof or finding that the competition of the Dixie Theatre had

[8] James R. Wilson, McMinnville, Tenn.; Dixie Theatre, East Gadsden, Ala., R. 171; and S. B. Ford, Lexington, Miss., R. 173.

[9] See Exhibit B, Gov. Br. pp. 78-79.

been unreasonably restrained as set forth in the bill of particulars in which it was mentioned.[40]

(3) It is next argued (pp. 64-65) that bills of particulars do not have the effect of limiting proof to the particulars furnished. Not only are bills of particulars entirely useless if they do not limit or circumscribe the issues, but actually they constitute a snare and a pitfall. Rule 12(e), Federal Rules of Civil Procedure, expressly provides that: "A bill of particulars becomes a part of the pleading which it supplements". That the rule simply adopts a practice of long standing, see *Bank of United States* v. *Lyman*, (C. C. Vt. 1848), 1 Blatch. (U. S.) 297, and authorities there cited. It necessarily follows that paragraphs 43 and 49 of the complaint could properly have been sustained only by proof substantially following items 1 and 6 of the bills of particulars.

Since the first, third and concluding sentences of paragraph 54 amount merely to a repetition of paragraphs 43 and 49,[41] the argument is without merit (Gov. Br. pp. 64-65) that proof outside the particulars became admissible under these allegations though not admissible under paragraphs 43 and 49. A bill of particulars must be treated as supplementing the pleading as a whole. The Government's argument is that if an allegation is repeated two or three times in a pleading, a bill of particulars may limit proof under the allegation found at one place in the pleading but will not limit proof under substantially the same allegation when repeated unless the Court orders the particulars to be repeated. The only essential allegation as to which particulars were not required was the second sentence of paragraph 54, in which it was charged:

> "Independent exhibitors have been induced to sell their theatres to defendant exhibitors under the threat, express or implied, that if they refused to sell, defendant exhibitors would open competing theatres in the same

[40] Main brief, p. 36.

[41] See Footnote 2, *supra*, p. 33.

town and prevent the independent exhibitor from procuring desirable pictures."

No evidence was offered of any "express" threat to prevent any independent from procuring desirable pictures, and there was no Finding that any "implied" threat of that nature induced a sale.

It is further argued by the Government (p. 65) that since no objection was made to the admission of evidence on the ground that it was not within the pleadings, no objection, following trial, can be made on this ground. But the evidence introduced by plaintiff as to alleged discriminations by specific distributors against specific independent exhibitors was relevant on the issues made by the pleadings as supplemented by the bills of particulars. If plaintiff was undertaking to show, for example, that Miller at Rogersville, Tennessee, suffered from a shortage of product, it was certainly relevant to show that he failed to obtain United Artists' product. The trouble with plaintiff's case was not that the evidence offered was irrelevant, but rather that it did not go far enough. Not until the conclusion of plaintiff's case could the defendants raise the question of failure of proof and they did so at that time by making motions to dismiss.[12] We do not understand what other course was open in an equity case tried without a jury.

(4) It is next contended (pp. 65-67) that we have erroneously assumed "that proof of restraint of trade is lacking if it appears from the findings that the pictures of several distributors were or might have been available to the independent". Of course, our argument in this connection was based on the allegations of paragraphs 40-42[13] of the complaint to the effect that, in order to successfully to operate, an exhibitor must be able to exhibit a substantial number of the feature pictures released by three or more of the eight major distributors each year.

[12] R. 937.
[13] R. 7.

The Government's present contention is set forth in Footnote 56 (Gov. Br. p. 66) as follows:

> "Where an exhibitor had been showing in his theatre principally pictures of two or three of the leading distributors, loss of the pictures *of even one of them* might spell the difference between success and failure".

Even if the complaint be construed, however, as alleging such a theory, there was still a failure of proof because there was no evidence and no Finding to the effect, for example, that Miller in Rogersville sold out because he did not get United Artists pictures, or that Lawing in Brownsville sold out because he did not get Loew's pictures. On the contrary Miller testified that when competition came into the town, the prices of pictures went up and for that reason he was unable to operate successfully;[14] and Lawing testified that he began to lose money from the time Crescent's theatre opened, notwithstanding the fact that he was necessarily playing pictures of distributors with whom he had made contracts long before Crescent's theatre opened and had ample product.[15]

In view of the statement that the loss of the pictures of even one distributor might spell the difference between success and failure of an *independent* exhibitor, it is significant that elsewhere in its brief the Government asserts: "The *defendant* exhibitors can procure films adequate to their needs without having those of any particular major distributor". (Gov. Br. p. 57, Footnote 49.)

It is further said in the Government's brief (p. 66) that defendant exhibitors have "obtained important exclusive privileges and preferences from leading major distributors". This statement doubtless means that the distributors have "discriminated" by making deals with defendant exhibitors which have thereby precluded them from licensing the same run to another exhibitor in the same town.

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[14] R. 442.

[15] R. 315. See *supra*, pp. 27-28.

There is not the slightest evidence that the film deals made by defendant exhibitors have been different in any respect from the type of deals made with other exhibitors throughout the country, including the independent exhibitors involved in the case at bar. It is true that franchise agreements have not ordinarily been made by the distributors except with exhibitors having a reputation of stability. It affirmatively appears, however, that Fox entered into franchise agreements with numerous independents.[16] The list included Newport, Tennessee, where J. W. Baird operated as an independent before the organization of Newport Amusements, Inc., and had a Fox franchise.

(5) The Government is not quite fair in asserting that we relied in our main brief upon the failure of the District Court to make any Finding "repeating verbatim the language of the bill of particulars relating to the competitor in question". It is true that in pointing out the failure of the District Court to make Findings in conformity with the allegations, we did quote verbatim the language of the bills of particulars. Our contention is, however, that the District Court made no Finding by the use of any language whatever,—whether in the exact words of the bills of particulars or otherwise,—that any of these theatre operators suffered from a shortage of product and were forced to sell.[17] Of course, no such Findings could have been made because there was no evidence to that effect.

Attention of the Court is invited to the failure of the Government to controvert the argument made in our main brief (pp. 42-43) that the decree in this case is predicated on minor combinations which were not found to have been in furtherance of any one of the nine large conspiracies or combinations alleged in the complaint. In addition to the authorities cited in our main brief see *Terry* v. *United States* (C. C. A. 9, 1925), 7 F. (2d) 28.

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[16] See defendants' exhibit 136, R. 1135, 1347-1348.

[17] If the last paragraph of Finding 127 be regarded as an exception, see Assignment of Error 15 and discussion in our main brief, p. 141; also pp. 60-61.

"The Defendants' General Objections to the Court's Findings Are Unfounded and Immaterial."

(Gov. Brief, pp. 67-73)

Under this heading the Government first refers to Assignment of Error No. 18[1] directed to Findings and parts of Findings predicated upon "unsworn statements," written or oral, made by employees of the distributors. For the convenience of the Court this assignment of error is as follows:

> "18. The Court erred in overruling the following general exception of defendants to the findings and conclusions filed on March 3, 1943:
>
> 'Defendant further excepts to all findings and parts of findings predicated upon unsworn statements, either written or oral, made by employees of distributors and other third persons, upon the ground that such unsworn statements are both hearsay and *res inter alios acta*. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings.'"

This assignment of error was followed by Assignment of Error No. 19[2] directed to the action of the District Court in overruling defendants' motion, made at the conclusion of plaintiff's evidence in chief, to strike the inter-office or inter-company memoranda and correspondence of each of the eight major distributors. Since this motion set forth the documentary evidence from the files of each distributor in separate paragraphs, but in the same language, we will quote only the description in the motion relating to Universal, which was as follows:

> "24. All inter-office or inter-company memoranda and correspondence of Universal. These exhibits were provisionally admitted, subject to being stricken if

[1] R. 1515; also R. 139.
[2] R. 1515; also R. 930, 937-938, 941.

plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Universal, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case."

It is said in the Government's brief (p. 68) that other evidence "fully established the actual discrimination and warranted the inference that the discrimination was induced by defendant exhibitors for the purpose of restraining competition." This argument can be based only upon the theory that the mere negotiation of a circuit deal, including a town where there is competition, warrants the inference of "actual discrimination," and that this inference then warrants the further inference mentioned.

On the other hand it is our view that, before there could be a proper inference of "actual discrimination," there should have been evidence that the independent exhibitor was both willing and able to pay the distributor more than it would receive from the defendant exhibitor in that particular town. In no instance was there such evidence.[3] It is our further view that, even if there had been such evidence, the further inference "that the discrimination was induced by defendant exhibitors for the purpose of restraining competition" would not have been proper unless, at the very least, it was also proved that the defendant exhibitor was aware of the discrimination. Here again there was no such evidence.

It is next argued (pp. 68-69) that the objection to the competency of the evidence is purely technical, because defendants might have cross-examined the authors of these

[3] The Government contends and the District Court found that Lawing's offer at Brownsville was "as good as, if not better than" the Crescent deal; but Lawing's past record indicated grave doubt as to whether he would have complied with his contract, if his offer had been accepted. See *supra*, p. 28.

communications as to the truth of the statements contained in them.[4] As a matter of fact defendants did cross-examine the first such witness along this line, viz., Willingham, who wrote the letter referred to on page 20 of the Government's brief. On the trial, plaintiff's counsel objected to this cross-examination of Willingham on the ground that his direct examination was limited to proof of the fact that he wrote certain letters in the course of his employment. It was argued that cross-examination as to the truth of the contents was outside the scope of the direct examination.[5] Now the Government says that failure to cross-examine subsequent witnesses, introduced for the same purpose, amounts to a concession that the contents of the letters were true. Even as to Willingham, who *was* cross-examined, the Government continues to rely on a letter written by him six months after the event, rather than on Willingham's own testimony on cross-examination which was corroborated by contemporaneous correspondence.[6]

We think the correct rule is that defendants were entitled to cross-examine these witnesses as to the truth of statements made in the letters and reports filed as exhibits by plaintiff, but were not bound to do so at their peril. Plain-

[4] It is also stated in the Governmentt's brief that the authors of the inter-office communications "were friendly to the defendants in this litigation." Doubtless the brief-writer means that, because the distributors had been accused of being parties to an unlawful conspiracy or combination to suppress independent exhibitors, the distributors were desirous of proving their innocence of this charge. But the distributors had no motive to withhold evidence, if any had been available, that defendant exhibitors had attempted, by threats or otherwise, to induce them to discriminate against these independent exhibitors. The distributors have the same complaint against defendants as does the Anti-Trust Division, viz., that defendants have more "sales resistance" than their competitors against the demands of the distributors for high film rentals and onerous terms.

[5] R. 746-749.

[6] R. 751-752, 757-764. The letter relied upon by the Government was introduced on re-direct examination and is found at p. 777 of the record.

tiff's counsel started out to introduce such communications on the theory that a conspiracy or conspiracies would be proved by independent evidence and that these communications would then become relevant as declarations made by co-conspirators in furtherance of the conspiracy or conspiracies.[7] On this theory it was not necessary for either party to prove the truth or falsity of the statements in the communications, because the communications themselves would have become relevant,—provided they otherwise came within the rule,—without reference to whether they were true or false.

The trouble is that the conspiracies were never proved by independent evidence; and the Government now undertakes to rely upon the statements contained in the communications as evidence of the alleged conspiracies or combinations. Following this theory it is necessary for plaintiff to take the fallacious position that the statements contained in the letters were themselves evidence with the same effect as if the writers of the communications had testified in open court to those facts.

It is conceded in the Government's brief (Footnote 58, p. 69) that in at least two of the illustrations referred to in defendants' main brief the writers of the communications were not even introduced as witnesses, viz., J. Emenheiser, who wrote a report referred to in Finding 52 (copied in Footnote 15, pp. 14-15, Gov. Brief), and Reagan, who wrote the letter referred to in Finding 48 (copied on p. 19, Gov. Brief). It is true that there was a stipulation that these letters were written and received, but there was no stipulation that their contents were true.

The following appears in the Government's brief (p. 70):

> "Not only were the distributors charged with being co-conspirators with the defendant exhibitors, but, as the court's findings show, the evidence fully supported this charge except as to Columbia and Universal."

[7] R. 368.

We respectfully challenge this statement. When the Findings are considered in connection with the Conclusions, it is clear that the District Court found that there was no "conspiracy" but only isolated "combinations" between individual distributors and individual exhibitors. With respect to United Artists the Court specifically said in Conclusion 17:[8]

> "There is no evidence that United Artists entered into a conspiracy with either Crescent, Rockwood, Cumberland, Sudekum, Stengel or Rosenbaum in any of these matters, yet to hold there was no discrimination in either of the above instances, would be ignoring the plain facts."

The Court accordingly concluded that United Artists had violated the Sherman Act by "combining" with Cumberland to eliminate Miller's competition at Rogersville.

This conclusion was necessarily based on Finding 52[9] in which the District Court relied mainly upon the report of J. Emenheiser, United Artists salesman. The Government now contends, in effect, that if the discrimination and combination are proved by the salesman's report, the report then becomes competent on the theory that the combination has been proved. Of course, the fallacy of this argument is that the combination was not proved by independent evidence. The only other evidence was the testimony of Richardson, United Artists Branch Manager in Atlanta, that he licensed the 1936-1937 product to Cumberland for its Rogersville theatre so that he could make a deal with Cumberland for the other towns in which that circuit operated.[10] There was absolutely no evidence, however, that Miller was willing and able to pay more for the United Artists pictures than Cumberland paid for Rogersville alone.

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[8] R. 1477-1478.

[9] R. 1384.

[10] In no other instance of alleged discrimination was there testimony corresponding to that of Richardson.

Two cases are cited in the Government's brief (pp. 70-71) to the effect that the declarations of an officer or employee of a distributor, acting on behalf of his corporate principal and within the scope of his authority, are the declarations of the distributor for whom he acts. These were not conspiracy cases. The Government has cited no case to the effect that every officer and employee of a corporation is a conspirator merely because the corporation itself, acting through other officers or employees, has become a party to a conspiracy. There was no evidence in the case at bar that the writers of any of these communications were the officers or employees of the respective distributors through whom those corporations had entered into the alleged conspiracies or combinations with any defendant exhibitor.

The next assignment of error discussed in the Government's brief (pp. 71-73) is No. 17,[11] which was as follows:

> "17. The Court erred in overruling the following general exception of defendants to the findings and conclusions filed on March 3, 1943:
>
> > 'Defendant excepts not only to the findings hereinbefore specifically conferred to, but to all findings and parts of findings adopted from the Government's brief and to the conclusions based upon such findings, upon the ground that the method thus used was improper and unfair to defendant exhibitors and did not constitute a weighing of the evidence by the Court. A copy of the Government's said brief is filed herewith as a part of these motions and reference made to same for purposes of comparison. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings.' "

It will be noted that defendant exhibitors excepted not only to the Findings adopted from the Government's brief, but also to the Conclusions based upon such Findings. The Conclusions upon which the decree against defendant ex-

[11] R. 1514-1515; also R. 139.

hibitors was predicated were based entirely on Findings adopted from the Government's brief,[12] to the extent that said Conclusions may be said to have been based at all upon the Findings. It is true (Gov. Brief, p. 72) that there were a substantial number of Findings not based upon any language in the Government's brief. With few exceptions, however, these were the Findings relating to Columbia, Universal and United Artists. To the extent that they related at all to defendant exhibitors, they did so indirectly and not by design. Some of these Findings were inconsistent with the Findings which directly related to defendant exhibitors and were adopted from the Government's brief.[13]

Not only were the Findings as a whole, to the extent that they were against the defendant exhibitors, adopted from plaintiff's brief, but the findings of discrimination were clearly intended by both plaintiff and the District Court to be based mainly upon inter-office or inter-company memoranda and correspondence of the distributors.[14] If Assignments of Error Nos. 17, 18 and 19 are sustained, the whole decree goes out. We think those assignments must necessarily be sustained for the reasons set forth herein and in our main brief.

"The Evidence in Support of Findings to Which Specific Error Has Been Assigned."

This subject is relegated in the Government's brief to Appendix A. We shall not undertake to repeat the discussion of these assignments of error contained in our main brief. The comments made in the Government's brief afford no basis for a holding that the Findings of the District Court are supported by competent evidence.

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[12] R. 1522.

[13] Compare the third paragraph in Finding 39 (R. 1373) which was taken from the Government's brief, with Finding 154 (R. 1462) and Finding 173 (R. 1470). Also compare Finding 99 (R. 1424) which was not taken from the Government's brief, with the next to last paragraph in Finding 100 (R. 1425).

[14] In this Court the Government argues that even if this evidence was incompetent, the findings are supported by inferences from other evidence.

It will be noted that the Government undertakes to uphold these Findings on the theory that the Findings made the basis of specific assignments of error are "permissible inferences" either from other Findings as to which specific error was not assigned, or from letters quoted in the Findings. However, these other Findings were, in every instance, included in Assignments of Error Nos. 17, 18 and 19. Furthermore, this piling of inference on inference violates fundamental principles as to burden of proof and the presumption of innocence.[1] Take, for example, the portion of Assignment of Error 11 relating to the finding that "pressure" by Sudekum was responsible for the fact that prints were made available to Crescent's Alabama City theatre, the Ritz, before they were made available to the independent suburban theatre in East Gadsden, known as the Dixie. The Government still insists (p. 76) on a so-called "obvious inference," which is directly contrary to undisputed testimony.[2]

CONCLUSION.

In our main brief we emphasized the variance between the theory of the complaint and the theory of the decision. In one respect, however, the complaint and the decision were consistent,—the gravamen of the case was still the alleged injury to so-called independent exhibitors. Nowhere either in the complaint or in the Findings is there any suggestion of injury to the theatre-going public. On the contrary, the evidence was that defendants operate comfortable and modern theatres in many very small towns where, if the field were left to the so-called independents,

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[1] Main brief, pp. 67-68.

[2] Main brief, pp. 95-96. The *absence* of clearance provisions in favor of Alabama City are regarded in the same light as the absence of the Knave's signature on the document introduced in evidence in Chapter XII of Alice in Wonderland:

> "Please, your Majesty," said the Knave, "I didn't write it, and they can't prove that I did: there's no name signed at the end."
>
> "If you didn't sign it," said the King, "that only makes the matter worse. You *must* have meant some mischief, or else you'd have signed your name like an honest man."

there would probably be no theatres at all or exceedingly poor ones.

In a case reported since our main brief was filed, *Hunt v. Crumboch* (C. C. A. 3, 1944) 143 F. (2d) 902 (Advance Sheets of Sept. 25, 1944), plaintiffs sought treble damages on the theory that an unlawful combination of defendants had caused them to go out of business, which was that of transporting produce and food stuffs. In affirming the judgment of the District Court dismissing the complaint the Circuit Court of Appeals said (p. 904):

> "We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services."

In the case at bar it seems equally clear that, from the standpoint of the public, it is immaterial whether defendants exhibit particular motion pictures or whether they are exhibited by so-called independents. The public concern is with the cost and character of service rendered and there was no charge against defendants in this case in these respects.

It is therefore somewhat surprising that in its brief in this Court the Government undertakes to make an argument based on the public interest (e.g. Footnote 34, p. 41). In making this argument the Government is forced to ignore the complaint, the evidence and the Findings and predicate the argument on unproven assumptions. We think that the case should be decided on the theory on which it was originally brought and on the record in the case.

It is respectfully submitted that plaintiff's assignments of error should be overruled, the assignments of error of defendants sustained, and the case reversed and dismissed.

Respectfully submitted,

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October 4, 1944.

Nos. 17, 18 and 19.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

CRESCENT AMUSEMENT COMPANY ET AL.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA.

MEMORANDUM OF CRESCENT AMUSEMENT COMPANY ET AL. IN OPPOSITION TO MOTION OF MORRIS L. ERNST, ESQ. AS ATTORNEY FOR THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 17, 18.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

CRESCENT AMUSEMENT COMPANY ET AL.

No. 19.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA.

MEMORANDUM OF CRESCENT AMUSEMENT COMPANY ET AL. IN OPPOSITION TO MOTION OF MORRIS L. ERNST, ESQ., AS ATTORNEY FOR THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please the Court:

We have declined to give consent to the filing of the proposed brief* and we oppose the motion for leave to file same on the following grounds:

* Defendants' counsel definitely declined this consent on the same day that they received and read the page proofs referred to in paragraph 2 of the Motion. No prior draft of the brief was submitted in any form whatever. This statement is made to clarify the statements contained in paragraph 2 of the Motion.

1. It is said at the top of page 3 of the brief that the "vital stake" of so-called independent producers of motion pictures and the movie-going public "is implicit in the record", although the actual issue in the case was the alleged suppression of the competition of independent exhibitors.

If and when the Government, or a private litigant, brings a suit in which the interests of producers and the theatre-going public are *actually* rather than *implicitly* involved, it will be time to develop the relevant facts in a judicial proceeding with appropriate pleadings and evidence, and argue the questions which are raised. In the present case there was no attempt to develop such facts and it seems clear that the Court cannot base a judicial opinion on matters which are thought to be "implicit" in a record prepared on entirely different issues. The opinion of Circuit Judge Frank in *United States* v. *Forness* (C. C. A. 2, 1942), 125 F. (2d) 928, at pages 942-943 (some of which is quoted at pages 79-80 of our main brief) is pertinent as to the grave importance of basing decisions on the right facts.

2. The brief writer makes numerous assertions, in general phrases, as to what the record shows. For example, at the bottom of page 4 it is said that defendants' arguments "are flatly refuted by the facts of record in this case", although no citation to the record is made. Even where citations to the record are made, particularly on pages 20 and 23-24 of the brief, a reference to the pages of the record which are cited will reveal that the brief writer has engaged in a rather reckless form of wishful thinking as to the facts in the case at bar. He has assumed facts to fit the legal theories which are propounded and then has sought to read these assumed facts into the record. The Government is at least content to rely upon the Findings made by the District Court. The present brief writer is not content even with these Findings.

3. An order in the present case permitting the filing of this brief would make it incumbent upon defendants to file

a reply brief. The issues which would be discussed are so far afield from the actual issues in this case that, in our view, it would be of no help to the Court to debate them. On the other hand, if the so-called independent producers,—who actually distribute their pictures through one or more of the major distributors, such as United Artists,—have a cause of action for treble damages against the defendants in this case (as suggested at pages 20-22), they should bring such a suit and test out their legal theories in a proper forum.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 19.

THE CRESCENT AMUSEMENT COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF ON BEHALF OF THE CRESCENT AMUSEMENT COMPANY, ET AL., APPELLANTS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 19.

THE CRESCENT AMUSEMENT COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF ON BEHALF OF APPELLANTS, THE CRESCENT AMUSEMENT COMPANY, ET AL.

REFERENCE TO OPINIONS BELOW.

No opinion was filed in the Court below with the exception of an opinion on preliminary motions to strike a portion of the complaint and for bills of particulars. The official reference to this opinion is *United States* v. *Crescent Amusement Co., Inc., et al.*, (D. C., M. D., Tenn., Feb. 21, 1940), 31 F. Supp. 730.

GROUNDS OF JURISDICTION.

This was an equity case filed by United States of America involving the Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2). The jurisdiction of this Court to review by direct appeal the judgment entered below is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The final decree[1] was entered May 17, 1943, and within ten days thereafter motions were filed by appellants (defendants below) to amend the Findings of Fact in substantial and material ways.[2] These motions were in part granted and in part overruled on August 30, 1943[3], and this appeal duly prayed and granted on October 29, 1943, within the sixty-day period.[4]

Consideration of the question of the jurisdiction of this court was postponed to the hearing on the merits.[5] This brief on the merits assumes that the Court will take jurisdiction. The Government has not questioned the jurisdiction of the Court in this case, although appellees in case No. 18 (the second appeal by the Government) pointed out what we regard as a serious jurisdictional question. That is to say, the Government was allowed a premature appeal which was never abandoned or dismissed but was deliberately kept alive by orders entered in the District Court; and the District Court proceeded to take steps in the case, by filing amended findings and conclusions and allowing the Government's second appeal, after it had lost jurisdiction by allowing the first appeal.

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[1] R. 1480
[2] R. 108-139, 1485
[3] R. 1489-1495
[4] R. 1505-1521
[5] R. 1537

STATEMENT OF THE CASE.

I. Proceedings Below.

Plaintiff, United States of America, filed this suit in equity on August 11, 1939, against: (1) The Crescent Amusement Company and four corporations in which it owned half the stock, Lyric Amusement Company, Inc., Cumberland Amusement Company, Strand Enterprises, Inc. and Nu-Strand Corporation; (2) Rockwood Amusements, Inc., and two corporations in which it owned half the stock, Cherokee Amusements, Inc., and Kentucky Amusement Co., Inc.; (3) three individuals who are officers of one or more of the above corporations, Messrs. Sudekum, Stengel and Baulch; (4) Muscle Shoals Theatres, Inc., a partnership composed of Louis Rosenbaum and Mrs. Tony Sudekum; and (5) eight distributors (who for convenience will be referred to by abbreviations of their corporate names) as follows: Paramount, Fox, Warner, Loew's, RKO, United Artists, Columbia and Universal. The defendants other than the distributors were referred to as "defendant exhibitors". (These corporations will be referred to as Crescent, Cumberland, etc., rather than by their full corporate names.)

It was alleged that defendant exhibitors, by combinations with distributors, had obtained control of the film market and had exercised this control so as unreasonably to restrain, suppress or eliminate the competition of "independent exhibitors".[1] (It should be pointed out that defendant exhibitors themselves were and are independent of affiliation with any distributor.)

Plaintiff voluntarily dismissed the case prior to the trial as to Paramount, Fox, Warner, Loew's and RKO and eliminated all allegations that any of the distributors had combined among themselves.[2] There were left in the case the allegations as to combinations among the defendant ex-

[1] R. 7

[2] R. 19

hibitors and between defendant exhibitors and individual distributors. The occasion for the dismissal of the case as to the five distributors was a consent decree entered in a case brought against the distributors in the United States District Court for the Southern District of New York, referred to in the record as the Paramount case. These five distributors owned in whole or in part various chains of theatres and the Government sought to divorce the operation of theatres from the distribution of motion pictures. By the consent decree these distributors were permitted to retain their theatres but there was put into effect something in the nature of a Code of Fair Practices.[3] United Artists, Columbia and Universal owned no theatres and were not parties to the consent decree. These last three distributors are pleased to refer to themselves as the "Little Three", and the others as the "Big Five", and for convenience these designations will sometimes be used in this brief.

Prior to the trial the District Court entered an order, on motion of defendant exhibitors, requiring plaintiff to furnish a bill of particulars and to specify the independent exhibitors whose competition had been restrained, suppressed or eliminated and the particular manner or manners in which the competition of each of them was restrained, suppressed or eliminated.[4] By a subsequent order, plaintiff was permitted to file additional bills of particulars and give additional information in these respects as and when plaintiff obtained knowledge thereof, but in no event later than thirty days preceding the trial.[5] This order was never modified and hence the issues in this respect were confined to the particulars furnished by plaintiff in accordance with these orders. Plaintiff included in its bills of particulars at least one situation alleged to have occurred after the filing of the complaint;[6] and after the

[3] R. 198-227
[4] R. 151
[5] R. 159
[6] Dixie Theatre, Gadsden, Ala.; R. 171

trial had proceeded for about two weeks, plaintiff filed a supplement to the complaint in which it was alleged that the unlawful acts complained of had continued down to the time of the filing of said supplement.[7]

The District Court filed no opinion but filed "Findings and Conclusions" in which it was held that Columbia and Universal were not guilty of any violation of the Sherman Act; that Strand Enterprises, Inc., and Nu-Strand Corporation were not guilty of any violation of the Sherman Act; and that Baulch was not guilty of any violation of the Sherman Act. It was held, however, that the proof established violations by the remaining defendant exhibitors and by United Artists. The gravamen of the decision was that in a few isolated instances an individual distributor had "discriminated" against an independent exhibitor in the licensing of pictures; e. g. that the particular distributor had licensed the first run of its product in a particular town to Crescent, instead of to Crescent's competitor, without giving the latter an opportunity to bid. The Court did not find that the defendant exhibitors had "conspired" with any distributor to discriminate against the independent, but held that the defendant exhibitors enjoyed "circuit buying power" which induced the distributors to "discriminate." The Court concluded that there were illegal combinations between the particular defendant exhibitor and the particular distributor involved in these different situations.

There was no finding that any independent exhibitor's competition had been unreasonably restrained, suppressed or eliminated as averred in the complaint and as set forth in the bills of particulars.[8] Nor was there any finding that the interests of the theatre-going public had been adversely affected. There was no evidence (and no contention by the Government) that the defendant exhibitors charged excessive admission prices or failed to provide good theatres and

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[7] R. 20.

[8] R. 1352-1479

good service, or failed to exhibit the best pictures which were produced by each distributor. The decree was predicated on the theory that there should be competition between exhibitors in any town large enough to support two theatres, and that the Sherman Act was violated *by defendant exhibitors* if the independent exhibitors were not given the opportunity *by each distributor* to bid for the latter's product. In other words, the question which concerned the Anti-Trust Division was not whether the theatre-going public in a small town in Tennessee was allowed to see "Gone With the Wind" for a reasonable admission price, but whether that picture was exhibited by Crescent or by Crescent's competitor.

It would appear that, in the application of the Government's theory, an injunction should have been sought against the distributors to prevent them from licensing pictures in competitive situations without giving each of the competing exhibitors an opportunity to negotiate for the pictures. This was the relief prayed in the complaint as filed. Later on, however, the Government dismissed as defendants the five principal distributors, and without amending the prayer of the complaint obtained an injunction against the defendant exhibitors which not merely placed the burden upon the latter to see that the distributors follow non-discriminatory licensing methods, but severely punished the defendant exhibitors for violating the Sherman Act.

For the convenience of the Court the final decree of May 17, 1943,[2] is copied in full in an appendix to this brief.

Appellants are the defendant exhibitors found guilty, with the exception of Muscle Shoals Theatres who did not appeal. Appellants have been assigned error as to paragraphs (1), (8), (12), (13), (15), (16), (18) and (21) of said decree. As to the remainder of the decree, appellants have not assigned error for the reason that they regard it as harmless error and prefer to present to this Court the

[2] R. 1480-1484

portions of the decree which materially and vitally affect them.

II. Nature of the Business.

We believe it appropriate to give a preliminary outline of certain axiomatic facts and principles involved in the business of licensing and exhibiting motion pictures.[1] Inasmuch as the alleged violations of the Sherman Act relate to the operation of theatres in small towns in Tennessee and adjoining states, this outline will refer in particular to the licensing practices in vogue in such small towns, rather than in large cities. It will also refer to the licensing practices in vogue during the period covered by this suit rather than the practices put into effect by the consent decree in the Paramount case.

1. A motion picture film is a copyrighted article which has no standard market price, and film rentals are fixed by "horse trading." The exhibitor hopes to get a deal in which he is required to play and pay for a minimum number of pictures out of the season's product so that he can select the best box-office attractions and reject the others. The exhibitor also hopes to get a contract which will permit him to play the pictures soon after release date and to pay as low film rentals as possible. Frequently, however, he prefers to negotiate a late film deal because he can then, generally speaking, procure the pictures for lower film rentals. Generally speaking, the same picture will procure for the distributor a high or low film rental depending upon whether it is played soon or late after release date and depending upon whether it is played first run or second run

[1] See discussions in *Westway Theatre* v. *Twentieth Century Fox Film Corp.* (D.Md.1940) 30 F. Supp. 830; aff'd (C.C.A. 4, 1940), 113 F. (2d) 932; *Gary Theatre Co.* v. *Columbia Pictures Corp.* (C.C.A. 7, 1941), 120 F. (2d) 891; *Midwest Theatres Co.* v. *Cooperative Theatres* (D.C.E.D.Mich.1941), 43 F. Supp. 216, 222; *William Goldman Theatres, Inc.* v. *Loew's, Inc. et al* (D.C.E.D. Pa.1944) 54 F. Supp. 1011. The consent decree in the Paramount case, to which reference will be made, is copied at pages 198-227 of the record.

in the town, and as to whether or not clearance is given over neighboring towns.[2]

2. In addition to the eight distributors referred to as co-conspirators in the case, there were other so-called independent distributors who distributed motion pictures. So far as was concerned the number of pictures produced over any particular period of time, there were always more than enough pictures available for exhibition both by the defendant exhibitors and by their competitors.[3] Necessarily, each distributor had some pictures which were better than others from the standpoint of box-office attraction. There is no definite standard for determining whether one picture is more choice or less choice than another, and box-office appeal of different types of pictures varies in different sections of the country and in different localities in the same section of the country. In the section of the country where defendant exhibitors do business, the so-called "Western" pictures are particularly choice pictures,[4] although in some other sections of the country this type of picture is rarely shown. These Western pictures are distributed, in the main, by companies other than the eight distributors named as co-conspirators. No one distributor's entire product consists of "choice pictures," but each distributor produces some choice pictures and some less desirable pictures.

3. It is the general aim and purpose of the distributor to obtain the maximum revenue for its pictures over a period of years in any given territory. It may be to the interest of a distributor to refuse, for a period of one or more years, to make any deal at all with an exhibitor on terms which are unsatisfactory,—one reason being that the starting point of negotiations for a film deal is generally the deal for the prior season, so that a distributor would prefer to start such negotiations without any precedent at all, rather

[2] See R. 899-902, 1208-1209, as to film negotiations from the viewpoint of the exhibitor.

[3] R. 231, 233, 1204

[4] R. 908, 1198-1201, 1350-1351. See also Amending Finding 113, R. 1492-1493.

than with a poor precedent from its standpoint, even if the result is to lose revenue for the particular season.[5] Similarly, it may be to the interest of an exhibitor to leave out the pictures of one or more distributors during a particular season where the terms offered by the distributor are unsatisfactory to the exhibitor. Where a distributor's product is left out for one season, the exhibitor is frequently able to make a deal the next season which will cover both seasons' products and permit the exhibitor to select a given number of pictures from the two seasons' products rather than from any one season's product.[6] Since competition among exhibitors generally enables a distributor to be assured of licensing its pictures in the town, and to obtain higher film rentals and dispose of its inferior pictures as well as its good ones, it is to the decided financial advantage of the distributor to have competition among exhibitors, provided the competition is of a substantial character.[7]

4. In negotiations for film deals, the staying power of each party to the deal is necessarily an important factor. The distributors have far greater resources, and hence greater staying power, than exhibitors who are not actually affiliated with a distributor. Similarly, where there is competition among the exhibitors in a particular town, the exhibitor with the greater resources necessarily has the greater staying power, whether those resources consist of theatres in other towns or money in the bank.

5. Prior to the consent decree in the Paramount case, it was a general policy of most of the distributors not to license a second run of its product in a small town to a competitor of the first run exhibitor. This policy was based on the well-known fact that theatre-goers will wait to see a second run of a picture if it is known with reasonable

[5] R. 1024-1025. Another reason is that, with product open in the town, there is the possibility that a competing theatre will open and give the distributor another potential outlet for its product.

[6] R. 901-902

[7] R. 1114-1115, 1324

certainty that the picture will be shown again at a lower admission price. Where the second run exhibitor is a competitor of the first run exhibitor, he will be sure to let the public know that the pictures are coming back, and the first run revenue from the pictures will thus be impaired. Film rentals must ultimately depend upon the gross receipts obtained by the exhibitors. The first run revenue from a picture in a small town is, generally speaking, so much greater than the second run revenue that it is against the interest of a distributor to jeopardize the first run revenue by competing with itself. Of course, these principles are not applicable to the same extent in a situation where the two theatres are owned by the same exhibitor, because such an exhibitor will try in his own interest to follow a policy which will protect the first run revenue.[8]

6. Where a distributor is negotiating with an exhibitor who has several theatres, the distributor's aim is to license the pictures for all of the theatres and not merely for the one or more theatres located in towns where there is competition. It would naturally be to the exhibitor's advantage to license the pictures in the towns where there is competition before negotiating for a deal in the towns where there is no competition. But the distributor has the advantage of "leverage" under these circumstances, and can refuse to make any deal other than a circuit deal.[9] Conversely, the exhibitor need not agree on terms for the non-competitive situations unless and until the distributor has agreed on terms for the competitive situations.[10]

7. Competition between exhibitors in a particular town not only enables the distributor to play one exhibitor off against the other, and obtain higher film rentals, but such competition also tends to reduce the income of the competing exhibitors because patronage is divided. The mere

[8] R. 1015, 1326
[9] R. 752, 828-829, 856-857
[10] R. 264

fact that one exhibitor plays pictures ahead of the other exhibitor does not mean that the latter cannot survive. A theatre which plays pictures late in the season, with low admission prices and low film rentals, may have a better margin of profit than a theatre which plays pictures early but with high admission prices and high film rentals. Similarly as to the class of pictures played: a theatre which plays action pictures and Western pictures in a small Tennessee town may make more money than a theatre which pays high film rentals in order to play pictures which the film critics approve.[11] In a small town, competition will naturally enter if the existing theatre is inadequate or furnishes inadequate entertainment. Otherwise competition will not normally enter except for the purpose of creating and cashing in on a nuisance value.

8. A motion picture exhibitor must have pictures to show in his theatre every business day in the year. He is dependent upon the regular flow of a product over which he has no control except by bargaining with the distributors. In a rising market such as the country experienced during the period covered by this suit, the demands of the distributors were constantly increasing as to film rentals and terms. The gross receipts of a theatre must be divided between distributor and exhibitor. The distributors have each year sought an increase in their part of each dollar of gross receipts. These increasing demands naturally led to disputes with exhibitors and these disputes led to delays in the licensing of pictures. In the bargaining between distributors and exhibitors, efforts were made by both parties to arrive at methods which would furnish the exhibitor the regular flow of product which he desired, and at the same time furnish the distributor the constantly increasing revenue demanded by it. Out of this situation the so-called "franchise" was developed,—a film deal covering a period of years as contrasted with the usual film deal which

[11] R. 908, 1198

covered the product of only one season. Quite naturally the distributors were inclined to execute these franchise agreements only with exhibitors who had a record of financial stability.

III. Theory of the Decision.

The theory of the decree (except the portion of the decree relating to "franchises") is apparent from Findings 52[1] and 75[2] and Conclusion 17[3] relating to United Artists Corporation, the only defendant distributor found guilty of violating the Sherman Act. Conclusion 17 is in *pari materia* with Conclusion 13[4] relating also to the five distributors who were voluntarily dismissed as defendants.

In Finding 52 the Court found that in Rogersville, Tennessee, where an independent exhibitor named Miller was doing business, United Artists preferred to deal with Cumberland Amusement Company so that it could make a deal with Cumberland in the ten other towns in which that circuit operated.

In Finding 75 the Court found that in Athens, Alabama, an independent exhibitor named Buchanan applied for United Artists products but that United Artists licensed the product to Muscle Shoals Theatres (Rosenbaum). The Court found that United Artists Corporation preferred to deal with Muscle Shoals Theatres because it could get more revenue by selling Muscle Shoals Theatres for its four towns than by selling Buchanan for Athens alone.

In Conclusion 17 the Court held that United Artists Corporation had violated the Sherman Act by making deals with Muscle Shoals Theatres and Cumberland Amusement Company instead of with Buchanan and Miller. In explaining this conclusion, the Court said:

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[1] R. 1383-1386
[2] R. 1399-1401
[3] R. 1477-1478
[4] R. 1477

"This phase of the case has caused the Court more concern than any other question involved. The Court recognizes the rule that a distributor of motion picture film is perfectly free to do business with the exhibitor of its choice, and to negotiate with a circuit and an independent one at one and the same time, and to sell either one it prefers to do business with, yet such conduct must be free from discrimination against independent enterprises as a result of pressure or coercion on the part of a monopoly or combination.

"There is no evidence that United Artists entered into a conspiracy with either Crescent, Rockwood, Cumberland, Sudekum, Stengel or Rosenbaum, in any of these matters, yet to hold there was no discrimination in either of the above instances, would be ignoring the plain facts. Under all the circumstances, United Artists could hardly be blamed for preferring to do business with the circuit and its affiliates, but it should not have allowed such desire to influence its conduct to the extent it apparently did, in its dealings with Miller and Buchanan. The principal criticism for this situation, however, lies at the doorstep of the monopoly built up by Crescent and its affiliates, and United Artists hardly did more than cooperate with what it knew to be the policy of the monopoly in order to make an attractive business deal."

Paramount, Fox, Warner, Loew's and RKO were voluntarily dismissed as defendants before the trial of the case, and for that reason there was no Conclusion that any of these distributors had violated the Sherman Act. However, in Conclusion 13, the Court held that the defendant exhibitors violated the Sherman Act by combining with these distributors as well as with United Artists "in licensing films for the purpose and with the effect of maintaining theatre monopolies and preventing independent theatres from competing with them". If Conclusion 13 be examined in conjunction with Conclusion 17, it is apparent that the Court held, in effect, that none of the defendant exhibitors had "conspired" with any of the distributors but had "combined" with each of the distributors in licensing films.

Following this theory, the Court entered a decree in which it was provided: "That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation."[5] United Artists Corporation, the only defendant distributor found guilty, was not enjoined from conditioning the licensing of films in competitive situations upon the licensing of films in other situations; and, of course, none of the other distributors were enjoined because Columbia and Universal were held not guilty, and the Big Five had been voluntarily dismissed as defendants.

As we understand it, the Government construes this provision of the decree as imposing upon defendant exhibitors the burden of ascertaining, before licensing films in any competitive situation, that the distributor has given the competing exhibitor the opportunity of bidding for these films. Not only is this confusing standard of *future conduct* laid down for the exhibitors by the decree, but their failure to observe this standard of conduct in the *past* is made a predicate for the most drastic character of punitive relief. While ignorance of the law is no excuse, the District Court has not regarded as even a moderating circumstance the fact that these defendants did not anticipate the novel theory of the Sherman Act which has been adopted. The decree of the Court goes on to provide that, because of these violations of the Sherman Act, Crescent must divest itself of stock ownership in Cumberland and Lyric; that Rockwood must divest itself of stock ownership in Cherokee, Ruffin and Kentucky; that Cherokee must divest itself of stock ownership in Newport, and that neither Sudekum nor Stengel can be an officer of more than one corporation.[6]

[5] R. 1482-1483.
[6] R. 1483

The attention of this Court is invited to the sweeping character of the charges in the complaint and bills of particulars as compared with the violations of the Sherman Act which were actually found by the District Court to have occurred. The Conclusions of the District Court are based on Findings of a relatively few "discriminations" by distributors against competitors of defendant exhibitors. It is to be assumed that the District Court had in mind "unreasonable discriminations" because the very nature of the business is such that to license a particular run to one exhibitor is to discriminate against his competitor. It is difficult, however, to gather from the Findings the feature or features which made the discriminations unreasonable. The distributors had valid business reasons, in each instance, for preferring to make these film deals with appellants rather than with the independents. The District Court in Findings 111 and 112[7] expressly recognized this fact but seemingly regarded it as immaterial to the decision.

Each discrimination involved one distributor and one season's product. The District Court refused to find there had been *any* conspiracy—much less that these discriminations were the "symptoms or incidents of an enveloping conspiracy with its own illegal ends" (297 U. S. 515). The drastic "relief" granted the Government, particularly in the divestiture provisions of the decree, is out of all proportion to the minor violations of law which were found to have been committed. No period of probation was given the defendant exhibitors such as is frequently given an ordinary criminal on his first conviction.

The findings as to discrimination by distributors against independent exhibitors are based almost entirely upon letters and memoranda, written by employees of the distributors to each other, which appellants knew nothing about until the trial, or shortly prior thereto. These findings are adopted almost *verbatim* from a printed brief

[7] R. 1428-1429; *infra* pp. 51-52.

filed by plaintiff after the conclusion of the evidence in the case.[8]

In the complaint, plaintiff did not contend that mere discrimination by one or more distributors against an independent exhibitor was *per se* a violation of the Sherman Act. The decision of the District Court as to the legal effect of these isolated instances of alleged discrimination thus goes beyond the theory of the complaint.

An examination of the bills of particulars[9] disclosed that plaintiff proposed to prove that the competition of specified independent exhibitors was unreasonably restrained, suppressed or eliminated because they were unable to obtain sufficient product. Plaintiff alleged in the complaint (paragraphs 40-42)[10] that an exhibitor should have the product of three of the eight distributors each season in order to operate successfully. There was no finding to the effect that any of these independent exhibitors were ever unable to obtain the product of three of the eight distributors in any season, and the evidence did not support any of the charges as to restraint, suppression or elimination of competition as the result of a shortage of product.

The District Court based the decree upon the theory that if particular distributors discriminated against particular independent exhibitors, the operators of the circuits were guilty even if the independent exhibitors had available to them a sufficient number of choice pictures of other distributors. The effect of the discriminations on the business of the independents was an essential element of the complaint but was seemingly regarded as immaterial by the District Court.

In paragraph (10)[11] of the decree the Court declared invalid certain franchises to which certain of the appellants were parties. Cumberland Amusement Company was

[8] Stipulation, R. 1521-1522
[9] R. 153-173
[10] R. 7
[11] R. 1482

included in paragraph (10), although the proof was undisputed that Cumberland Amusement Company was not a party to any of these franchises. There was no allegation in the complaint to support this provision of the decree. No reason was given by the Court for declaring these franchises invalid. Since all of these franchises have now expired, no error is assigned to this action of the Court.

However, in paragraph (1) of the decree,[12] appellants are enjoined and restrained "from continuing in combination with each other and with each of the distributors, Paramount, Fox, and Warner in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them". Again, there was no allegation in the complaint to support this provision of the decree.

Much of the evidence as to franchises related to Clause 8-e of the Paramount franchise[13] whereby appellants were given the right to "repeat" pictures at specified film rentals. Plaintiff contended that Clause 8-e had the effect of tying up second-run product so that independents were precluded from licensing it even though appellants had not contracted for it. Appellants vigorously disputed this contention. The District Court's Findings are in accord with plaintiff's contention,[14] but appellants insist that they are not supported by competent evidence. The decree, however, is to the effect that the Paramount franchise was invalid *in toto*,—not merely Clause 8-e,—and that the Fox and Warner franchises were also invalid *in toto* although the repeat run clauses were quite different. Comments of the Court during the argument as to the form of the decree indicated that the Court did not intend to hold a two-year franchise illegal, but only franchises for longer periods than two years.[15] The decree, however, contains no such qualifying language.

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[12] R. 1480

[13] Exhibits P-24, P-29 and P-30, sent up in original form.

[14] R. 1432, 1435-1438

[15] R. 52

SPECIFICATION OF ERRORS.

The errors assigned by appellants are twenty-six in number and cover fourteen pages of the record.[1] Appellants intend to urge all of these errors, and they are discussed in the sequence set forth in the following summary. This summary follows the "statement of points on which appellants intend to rely" which was filed in connection with the appeal.[2]

SUMMARY OF ARGUMENT.

1. Plaintiff contended in the District Court that defendant exhibitors (appellants here) exercised "control" over the licensing of films by the eight major distributors, Paramount, Fox, Warner, Loew's RKO, United Artists, Columbia and Universal, and that by the exercise of said control defendant exhibitors were able to and did unreasonably restrain, suppress and eliminate the competition of competitors referred to as independent exhibitors. The District Court did not find or conclude that plaintiff's contentions in these respects were supported by the evidence. Appellants here contend that there was a fatal variance between the allegations and the Findings (as well as the proof) and that the decree cannot stand for that reason.

2. The District Court found that in several instances a distributor discriminated against an independent exhibitor in the licensing of films. It was found, in effect, that in making deals with a defendant exhibitor rather than with an independent, the distributor was influenced by its desire for the business of the defendant exhibitor in other towns in the circuit. The District Court concluded that the discrimination was the result of "coercion" exercised by defendant exhibitors. It is the contention of appellants that such discrimination by the distributors would not warrant the conclusion that defendant exhibitors violated

[1] R. 1506-1520

[2] R. 1533-1535

the Sherman Act and would not justify paragraphs (8), (12), (13), (15), (16), (18) and (21) of the decree, even if the complaint had been filed on that theory.

3. It is the contention of appellants that the findings of discrimination should be disregarded in this Court as entitled to no weight whatever for these additional reasons: (1) because they are based almost entirely on incompetent evidence consisting of inter-office memoranda and communications from one employee of a distributor to another employee of the same distributor, and appellants had nothing to do with said communications and were not parties to them; (2) because the Findings are copied from plaintiff's brief and hence are entitled to no greater weight than their source, which was an admittedly partisan document.

4. It is the contention of appellants that the findings of discrimination are contrary to the weight of the competent evidence in the record, and that in these cases of alleged discrimination, the distributor in every instance had a good and valid reason for preferring to do business with the defendant exhibitor rather than the independent, wholly aside from the desire of the distributor to get additional revenue by making a circuit deal.

5. All other questions aside, appellants contend that paragraphs (8) and (12) of the decree are not adapted to carrying out the purposes of the Sherman Act and should be eliminated from the decree. The effect of these paragraphs is to permit distributors to exercise "leverage" on appellants in negotiating film deals, in that distributors are left free to condition the licensing of films in competitive situations upon the agreement of appellants to license pictures in other situations at film rentals and on terms dictated by the distributors. Appellants are deprived of the right to insist that film rentals and terms for competitive situations be agreed upon at the same time that film rentals and terms for other situations are agreed upon. The

effect is to aggrandize the distributors at the expense of appellants. In this connection it should be stated that plaintiff evidently had the same view of the matter when the complaint was filed. There was a prayer asking for an injunction against the *distributors* but not against the exhibitor defendants. After five of the distributors had been dismissed as defendants, and without any amendment of the prayer, plaintiff at the conclusion of the trial asked for the injunction against the exhibitor defendants which is now found in the decree.

6. All other questions aside, appellants contend that paragraphs (13), (15), (16), (18) and (21) of the decree are harsh and punitive rather than equitable and remedial, and should be eliminated. By these paragraphs of the decree each corporate appellant is required to divest itself of any stock ownership in any other appellant corporation, and also in certain corporations which were not parties to the cause; and Sudekum and Stengel are each permitted to be connected with only one appellant corporation. It is the contention of appellants that these divestiture provisions of the decree have no tendency whatever to correct any of the evils or supposed evils alleged to exist in the business of exhibiting motion pictures, and would entail a substantial financial sacrifice without corresponding benefit to the public.

7. The District Court held that so-called "franchise" agreements between certain of defendant exhibitors and certain distributors (who were indispensable parties to a suit to invalidate such agreements but were voluntarily dismissed from the case by plaintiff) were illegal and void. In paragraph (1) of the decree, the District Court enjoined appellants from entering into further franchise agreements with said distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them". Appellants contend that franchises are not illegal *per se*;

that it is not a violation of the Sherman Act to have franchise agreements with three distributors at the same time (there being the eight major distributors as well as other so-called independent distributors whose product is available to the independent exhibitors); and that the language of paragraph (4) of the decree does not afford an ascertainable standard of conduct. Appellants further contend that there was no allegation in the complaint to the effect that a franchise was in any different category from a one-year deal, and that the decree in this respect is outside the issues in the case and is *coram non judice* and void. Appellants finally contend that the Findings on which paragraph (1) of the decree is based are not supported by competent evidence and are not entitled to consideration because they were copied from plaintiff's brief; and assignments of error based on certain of these Findings are discussed to illustrate and support that contention.

ARGUMENT.

I. Failure of Plaintiff to Prove the Allegations of the Complaint as Amplified by the Bills of Particulars.

Although this was a suit in equity, the ultimate issue involved was whether defendant exhibitors had violated a criminal statute. One criterion for a fair trial under our system of jurisprudence is that the defendants be given timely notice of the charges and that no conviction (or its equivalent) be predicated on charges at variance with the charges on which they are given such notice.

In *Morgan* v. *United States* (1937) 304 U. S. 1, this Court nullified an administrative decision in a case where no specific complaint had been formulated. Certainly it is worse, after giving defendants notice of specific charges in a complaint and bills of particulars, for the Government in an actual court proceeding to disregard the charges, introduce "thousands of pages of testimony" and "numerous complicated exhibits" (304 U. S. 19) and then obtain a de-

cision on a new theory formulated after it became apparent that the charges contained in the complaint and bills of particulars could not be proven.

The charges on which defendants went to trial in this case were *narrow and specific*. By paragraphs 40, 41 and 42 of the complaint,[1] plaintiff told defendants that independent exhibitors, in order successfully to operate their theatres, must be able to exhibit each year a substantial number of the feature pictures released by three or more of the eight distributors. In paragraph 43[2] it was alleged that defendant exhibitors, by virtue of the control exercised by them over the licensing of feature pictures, had been able to take over the operation of numerous theatres and keep other theatres closed. In paragraph 49[3] it was alleged that certain "exclusive privileges" specified in paragraphs 47 and 48, had enabled the defendant exhibitors unreasonably to restrain, suppress and eliminate the competition offered by other theatre operators. These allegations were repeated in paragraph 54. Other allegations of paragraph 54 were eliminated from the case by action of the court on defendants' motion to strike.[4]

On motion of defendant exhibitors plaintiff was required to specify the theatres referred to in paragraph 43 and as to each threatre, "the manner in which control over the licensing of feature pictures was exercised by the defendant exhibitors to enable them to take over the theatre or keep the theatre closed." Plaintiff was further required, in respect of paragraph 49, to specify the theatre operators whose competition was restrained, suppressed or eliminated "and the particular manner or manners in which the competition in each of them was restrained, suppressed or eliminated, and the time when each restraint, suppression or elimination was

[1] R. 7
[2] R. 7
[3] R. 8-9
[4] R. 9-10

effected".[5] In response to the order of the Court, plaintiff specified the theatre operators and gave these particulars as to the situations where it was contended that competition had been restrained, suppressed or eliminated, as the result of any of the four types of practices enumerated in paragraph 49.

Paragraph 49 of the complaint was as follows:[6]

> "49. The foregoing exclusive privileges have enabled the defendant exhibitors unreasonably to restrain, suppress, and eliminate the competition offered by other theatre operators in said Crescent towns by—
>
> (a) Preventing them from obtaining enough first-class pictures for exhibition to operate their theatres successfully.
>
> (b) Forcing them to exhibit feature pictures previously exhibited or rejected by the defendant exhibitors and to maintain admission prices for such pictures higher than those warranted by the quality of the entertainment they were thus able to offer.
>
> (c) Preventing them from showing any feature pictures released by the defendant distributors with first-run clearance in any of said towns.
>
> (d) Preventing them from exhibiting any feature pictures released by the defendant distributors with second-run clearance in any of said towns where any of the defendant exhibitors operate one or more second-run theatres."

[5] Particulars as to theatres "taken over" or "kept closed" were furnished in paragraph 1, and particulars as to other theatre operators whose competition was restrained, etc., were furnished in paragraph 6 of the successive bills of particulars which were filed. R. 153-173. Paragraphs 1 and 6 of the bills of particulars correspond with items 1 and 6 of Section III of defendant's motion, R. 142, 144, and of the court's order, R. 152.

[6] R. 8-9

In the bills of particulars[7] plaintiff abandoned (b), (c), and (d) and relied only upon: "(a) Preventing them from obtaining enough first-class pictures for exhibition to operate their theatres successfully". When the bills of particulars were filed, there were variations in this particular language, but sub-paragraph (a) of paragraph 49 was evidently intended. The situations thus specified and the particulars given included the following:

CRESCENT AMUSEMENT COMPANY

Time: (R. 172) 1935 and 1936
Place: Brownsville, Tennessee.
Theatre: Southland
Independent Exhibitor: C. G. Lawing
Distress Methods Employed: Kept independent from obtaining sufficient product to continue in business and independent was forced to close.

Time: (R. 160-161) June, 1936.
Place: Greenville, Tennessee
Theatre: Princess
Independent Exhibitors: Ausmus and Parrott Amusement Company, Inc., and Parrott and Hendren Amusement Co., Inc.
Distress Methods and Manner Employed: Threat of opening competing theatres in town and running independent exhibitors out of business. Independent exhibitors had trouble getting pictures and were forced to sell.

Time: (R. 155) August 1939
Place: Earlington, Kentucky
Theatre: Roxy
Independent Exhibitor: E. W. Dozier
Distress Methods and Manner Employed: Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell.

Time: (R. 155) December 1938
Place: Hopkinsville, Kentucky
Theatre: Kentucky
Independent Exhibitor: V. R. Anderson
Distress Methods and Manner Employed: Defendant exhibitor engaged in price cutting, had bank nights and family nights, stage shows and the like. Independent exhibitor had trouble getting pictures and was forced to sell.

[7] R. 153-173

Time: (R. 154-155) June 1939
Place: Union City, Tennessee
Theatre: Roxy
Independent Exhibitor: John. D. Henry
Distress Methods and Manner Employed: Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell.

Peerless Enterprises, Inc. (No time specified). Theatres at Morristown, Tennessee and Harriman, Tennessee. Was unable to get sufficient product to operate successfully and was forced to close down. (R. 158)

Dixie Theatre, H. T. Bailey, Jr., Manager, Gadsden, Alabama. (No time specified). Independent exhibitor unable to obtain satisfactory product and is having difficult time continuing in business. (R. 171)

ROCKWOOD AMUSEMENTS, INC.
Time: (R. 155) December 1937
Place: Central City, Kentucky
Theatre: Empress
Independent Exhibitor: F. M. Pittman
Distress Methods and Manner Employed: Defendant Exhibitor opened competing theatre. Independent exhibitor was unable to compete with the purchasing and booking power of defendant exhibitor chain.

CUMBERLAND AMUSEMENT COMPANY AND ROCKWOOD AMUSEMENTS, INC.
Time: (R. 154) September 1938
Place: Rogersville, Tennessee
Theatre: Palace
Independent Exhibitor: William P. Miller
Distress Methods and Manner Employed: Defendant exhibitor built a new theatre, cut prices and began to show double features. Independent exhibitor had difficulty getting desirable pictures and was forced to sell.

CHEROKEE AMUSEMENTS, INC. None
KENTUCKY AMUSEMENT CO., INC. None
LYRIC AMUSEMENT CO., INC. None

It will be noted that the particulars as to the situations above tabulated were all furnished under paragraph 1 of the respective bills of particulars, except the particulars as

to Peerless Enterprises, Inc. and the Dixie Theatre, Gadsden, Alabama, which were furnished under paragraph 6.

In the foregoing tabulation we have, of course, omitted situations which were included in the bills of particulars but as to which plaintiff abandoned its contentions or there were no Findings. We have also omitted situations where the only particulars furnished were along the lines of that part of paragraph 54 of the complaint which was stricken by the Court on motion of defendants.[8] These allegations as to lowering of admission prices, giving away prizes, etc., were eliminated from the case by order of the Court, and there was no subsequent order for their reinstatement.

It should also be noted that the Findings of the Court include references to a number of other situations which are not included in the foregoing tabulation. Some of these situations were not properly in the case for the reason that no particulars were furnished, and for the further reason that the independent exhibitors were still in business at the time of the trial. There was no allegation as to unsuccessful "threats" but only as to successful "threats"; and there was no Finding as to any restraint, suppression or elimination of their competition. There are also Findings relating to situations where the only particulars furnished were as to "implied threats" that the independent exhibitor would be prevented from procuring desirable pictures, and sold his theatre on account of these implied threats. This allegation was made in paragraph 54 of the complaint. The implied threat consisted merely of the opening or professed intention of a defendant exhibitor to open a competing theatre, and the independent offered to sell his theatre because he preferred to sell out rather than have competition. There are also Findings which are not properly in the case because the circuit involved in the situation was not a defendant in the case but was merely affiliated with a defendant exhibitor.

[8] R. 152.

In order that the Court may readily see that we have included in the foregoing tabulations all situations which are properly in the case, we list below the three classes of Findings which are not included in the tabulation:

1. Findings as to situations where no particulars were given and where the independent exhibitor was still in business at the time of the trial:

Town	Independent Exhibitor	Findings
Gallatin, Tenn.	Roth	87, 88, 89
Mt. Pleasant, Tenn.	Page	92, 93
Scottsville, Ky.	Caldwell	104
Russellville, Ky.	Mitchell	105
Jefferson City, Tenn.	Hutton	106
Lexington, Tenn.	Amis	107
Livingston, Tenn.	Brown	108

The Findings as to these situations, if relevant at all, are relevant only to show that the monopolistic power of the exhibitor defendants was not sufficient to enable them to eliminate the competition of these independents. To the extent that a few of these Findings refer to alleged discriminations by distributors against the independents, they are not entitled to consideration because no particulars as to these alleged discriminations were furnished.

2. Situations where the only particulars given were as to "implied threats":

Town	Independent Exhibitor	Findings
McKenzie, Tenn.	Moore	59
Spruce Pine, N. C.	Taylor	60, 61
Greenville, Ky.	Head	102
Decatur, Ala.	Hine & Mitchell	110

It was apparently assumed by the Court that competition *per se*, or a mere threat of such competition by a circuit, amounted to a predatory practice and was unlawful, although in the reverse situation, where the independent offered the competition, there was no illegality. In these situations there was no proof or Finding of any threat

made by any defendant exhibitor that the independent would not be able to procure sufficient product. References in a few of these Findings to alleged discriminations by distributors against the independents are not properly in the case because plaintiff furnished no particulars as to such alleged discriminations.

3. Situations where no defendant exhibitor was involved:

Town	Independent Exhibitor	Findings
Newport, Tenn.	Peerless Enterprises, Inc.	70, 71, 72, 73
Dresden, Tenn.	Taylor	90, 91
Hickman, Ky.	Wiley	109

The circuit involved in the Hickman, Kentucky and Dresden, Tennessee situations was Ruffin Amusements, Inc. and the circuit involved in the Newport, Tennessee situation was Newport Amusements, Inc., and neither of these corporations was a defendant in the case and could not possibly be classified as a "defendant exhibitor" within the meaning of the complaint.

Finding 80, involving a theatre opened by G. W. Haynes in Union City, Tennessee, in 1934 is also irrelevant because the situation was not specified in any of the four bills of particulars filed by plaintiff. Indeed, most of the alleged facts referred to in this Finding were prior to the date fixed in the complaint as the commencement of the conspiracy, to-wit, August 11, 1934.

This leaves for consideration the nine situations included in the tabulation. As to Brownsville, Tennessee, however, it should be pointed out that no particulars were furnished until less than thirty days prior to the trial. A time limit of thirty days had been imposed upon plaintiff by an order of the Court,[9] and appellants insist that the Brownsville situation is not properly in the case for that reason. Our discussion of the Brownsville situation is not intended as a waiver of that contention.

[9] R. 159.

In discussing the nine situations included in the tabulation we think it necessary only to refer to the Findings of the Court to demonstrate that in no instance was there a Finding that the independent exhibitor's competition was restrained, suppressed or eliminated as the result of a shortage of product. It will be recalled that according to paragraphs 40, 41 and 42 of the complaint,[10] it was plaintiff's theory that an exhibitor should be able to exhibit each year a substantial number of the feature pictures released by three or more of the eight distributors.

BROWNSVILLE, TENNESSEE[11]

In Finding 38 it is stated that in the summer of 1935 Crescent opened the Capitol Theatre in Brownsville, Tennessee in opposition to Lawing, who had been operating the Southland Theatre in that town since 1932. In Finding 46 it is stated that Crescent acquired Lawing's theatre in April, 1936. The issue was whether or not Lawing had sufficient product for the 1935-1936 season.

It appears from Findings 40, 41 and 43 that Crescent obtained Paramount, Warner and Loew's pictures for the 1935-1936 season. This left five of the eight distributors unaccounted for.

It appears from Finding 42 that Lawing obtained the Fox product for that season.

There is no Finding as to RKO product.

It appears from Finding 139[12] that Columbia "invariably leased its product" to Crescent's competitors and "refused to sell its product to defendant exhibitors."

It is stated in Finding 154[13] that there is no evidence that Universal sold either Lawing or Crescent at Brownsville.

It appears from Finding 172[14] that Lawing contracted

[10] R. 7.
[11] R. 1372-1378.
[12] R. 1459.
[13] R. 1462.
[14] R. 1470.

for 1934-1935 United Artists product but did not play any of the pictures because he considered the price too high and the express charges on the films too high and that he made no effort to procure the 1935-1936 product.

There is no Finding that any one kept Lawing "from obtaining sufficient product to continue in business", as alleged in the bill of particulars,[15] or that he sold his theatre for any reason other than the obvious reason that he was unwilling to operate his theatre in a competitive situation. Indeed, plaintiff's counsel made no attempt to prove the allegations of the bill of particulars; and it is clear that product was no problem to Lawing because he did not even play pictures he had contracted to play.

GREENEVILLE, TENNESSEE.

In Finding 25[16] it is stated that in 1936 Crescent and Parrott & Hendren were competing in Greeneville and Maryville, Tennessee, after having erected opposition theatres in each other's towns. Parrott & Hendren subsequently sold the Greeneville and Maryville theatres to Crescent at the same time Cherokee Amusements, Inc. was formed to take over the other theatres operated by Parrott & Hendren. In Finding 21[17] it is stated that Cherokee Amusements, Inc. was organized in August, 1936.

In Finding 127[18] it is stated that Parrott & Hendren licensed Fox 1935-1936 feature product in Greeneville and paid $2,589.00, whereas Crescent licensed its product for 1937-1938 and paid $1,095.00. There is no Finding as to Fox 1936-1937 product (but Parrott & Hendren evidently licensed it before selling the theatre to Crescent).

There is no Finding as to Loew's, Paramount, Warner or RKO.

[15] R. 172.
[16] R. 1363.
[17] R. 1362.
[18] R. 1447.

In Finding 139[19] it is stated that Columbia invariably licensed its product to independent exhibitors and refused to sell its product to defendant exhibitors.

In Finding 155,[20] it is stated that there is no evidence that Universal discriminated against the independent operators in Greeneville at any time.

In Finding 173[21] it is stated that there is no evidence of any discrimination by United Artists in the licensing of its pictures at Greeneville as between Crescent and the independent exhibitors.

There is no Finding that "independent exhibitors had trouble getting pictures and were forced to sell", as alleged in the bill of particulars.[22]

EARLINGTON, KENTUCKY.[23]

In Finding 47 it is stated that in 1932 Dozier opened a theatre in Earlington, Kentucky (population 2858) distant three or four miles from Madisonville, Kentucky (population 8209), where Crescent operated a theatre. In April, 1937, Crescent opened a new theatre in Earlington. It appears from Finding 50 that Dozier sold his theatre to Crescent in August, 1939.

In Finding 48 it appears that Dozier had Paramount product in Earlington during every season.

In Finding 49 it appears that Dozier had Fox 1935-1936 product, but that Crescent had the Fox product in the succeeding seasons.

There is no Finding as to Loew's, Warner, or RKO.

In Finding 139[24] it is stated that Columbia licensed its product to Dozier.

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[19] R. 1459.
[20] R. 1462.
[21] R. 1470.
[22] R. 161.
[23] R. 1378-1383.
[24] R. 1459.

In Finding 153[25] it is stated that Universal contracted with Dozier for each of the seasons 1934-1935 to 1938-1939, inclusive.

In Finding 171[26] it is stated that United Artists sold Dozier its product for the years 1937-1938 and 1938-1939.

There is no Finding that Dozier "had trouble procuring pictures and was forced to sell", as alleged in the bill of particulars.[27] On the contrary, it is stated in Finding 50 that Dozier sold his theatre to Crescent because "he was unable to secure a sufficient number of good pictures *on a run ahead of Madisonville* to make his operation profitable". Since plaintiff made no such contention in its bill of particulars, this Finding is irrelevant.

HOPKINSVILLE, KENTUCKY.[28]

It appears from Finding 62 that in June, 1937, Anderson and partners opened a theatre in Hopkinsville, Kentucky where Crescent already operated both a first-run and second-run theatre. Anderson had been the manager of one of Crescent's Hopkinsville theatres, and had quit to open the opposition second-run theatre. It appears from Finding 66 that in November, 1938 Anderson sold this theatre to Crescent.

In Finding 63 it is stated that Crescent played Paramount pictures both first-run and second-run in Hopkinsville.

In Finding 64 it is stated that Loew's refused to sell Anderson its 1937-1938 product, second-run, but made a deal with him for those 1936-1937 Loew's pictures which had not already played a second run in Hopkinsville.

In Finding 65 it is stated that Anderson played Warner's 1937-1938 product second run in Hopkinsville.

[25] R. 1462.
[26] R. 1469.
[27] R. 155.
[28] R. 1391-1394.

In Finding 66 it is stated that Crescent played RKO pictures both first-run and second-run in Hopkinsville, although it only played nine RKO 1937-1938 features for a second run showing.

There is no Finding as to Fox.

In Finding 139[29] it is stated that Columbia licensed its product to Anderson in Hopkinsville.

In Finding 161[30] it is stated that there is no proof of any dealings between Universal and either Anderson or Crescent at Hopkinsville during the period when Anderson was in competition with Crescent.

In Finding 179[31] it is stated that United Artists sold its 1937-1938 product to Anderson, although Crescent had previously been its customer at Hopkinsville.

There is no Finding that Anderson "had trouble in getting pictures and was forced to sell", as alleged in the bill of particulars.[32]

UNION CITY, TENNESSEE.[33]

It appears from Finding 81 that John D. Henry opened the Roxy Theatre in Union City in March, 1939, and it appears from Finding 86 that he sold this theatre to Crescent in June, 1939.

It appears from Findings 82, 83 and 84 that Universal, RKO and Paramount licensed their 1938-1939 product to Crescent.

There is no Finding as to Loew's.

It appears from Finding 84 that Fox negotiated with Henry but there is no Finding as to whether Henry did or did not make a deal.

In Finding 139[34] it appears that Columbia sold its product to Henry.

[29] R. 1459.
[30] R. 1463.
[31] R. 1471.
[32] R. 155.
[33] R. 1403-1412.
[34] R. 1459.

Finding 180,[35] relating to United Artists, is as follows:

> "180. John D. Henry, operating a theatre at Union City, Tennessee, made an application for United Artists Corporation product at Union City on October 13, 1938, for twenty-seven pictures, 1938-1939 product, and ten pictures, 1937-1938 product. At the time he made his application and several times subsequent thereto, Henry detailed his plans for opening opposition theatres to the Crescent Amusement Company not only at Union City but at several other West Tennessee towns.
>
> "As soon as Henry obtained his lease on January 3rd, 1939, he advised United Artists at Atlanta to this effect, and his applications were accepted and approved by United Artists. At the same time United Artists Corporation expressed a willingness to contract with Henry at such other opposition points as he should be able to open theatres, and made every effort to cooperate with him in his opposition to Crescent Amusement Company.
>
> "He played only a small part of his contract with United Artists Corporation at Union City, and at the time of his sale to the Crescent Amusement Company owed United Artists about one thousand dollars for unplayed pictures, none of which he ever paid."

There is no Finding that Henry "had trouble procuring pictures and was forced to sell" as alleged in the bill of particulars.[36]

MORRISTOWN AND HARRIMAN, TENNESSEE.[37]

Tim Smith (Peerless Enterprises, Inc.) opened theatres in Morristown and Harriman in opposition to Crescent on March 26, 1927 and June 17, 1938, respectively, as appears from Findings 67 and 68. He subsequently closed both theatres and sold his equipment in the Harriman theatre to Crescent on February 8, 1940, as appears from Findings 68 and 73.

[35] R. 1471.
[36] R. 155.
[37] R. 1394-1399.

In Finding 70 it is stated that Smith was unable to license Paramount product second-run in Morristown where Crescent operated both a first-run and second-run theatre.

In Finding 71 it is stated that Smith was unable to license Warner product at either Morristown or Harriman.

In Finding 72 it is stated that Smith was able to license Fox product for second-run exhibition at Morristown but that Fox refused to sell him second-run pictures in Harriman.

There is no Finding as to Loew's or RKO.

In Finding 141[38] it is stated that Columbia was justified in asking for a deposit from Tim Smith before licensing him product for Harriman or Morristown, for the reason that Smith had broken a previous contract with Columbia and that his financial condition in 1938 was bad.

In Finding 156[39] it is stated that there is no evidence that Peerless Enterprises applied for Universal product at either Morristown or Harriman.

In Finding 174[40] it is stated that United Artists sold none of its product to Crescent either at Morristown or Harriman during the period in which Peerless was in competition with Crescent, but on the other hand made all of its product available to Peerless Enterprises, Inc. and made contracts with it for the exhibition of its product in those towns during the entire period of its operation there.

There is no Finding that Peerless Enterprises, Inc. "was unable to get sufficient product to operate successfully and was forced to close down", as alleged in the bill of particulars.[41] On the other hand, it appears from Finding 68 that the building where Smith undertook to operate a theatre in Harriman was being operated as a theatre at the time of the trial by the owner of the building "who did not testify in the case and is presumably able to obtain

[38] R. 1459.
[39] R. 1462-1463.
[40] R. 1470.
[41] R. 158.

a satisfactory product". If Smith was short of product, he could have obtained Columbia pictures by making a deposit, and he would have applied to Universal for pictures.

GADSDEN, ALABAMA.[42]

This situation is referred to in Findings 94 to 100 inclusive. It appears that on September 2, 1939, after the institution of this suit, a suburban or neighborhood theatre was opened in East Gadsden, Alabama, about four or five miles distant from the Alabama City section of Gadsden, where Crescent operated a neighborhood theatre. There was no evidence and no Finding that the Dixie Theatre in East Gadsden was "unable to obtain satisfactory product and is having a difficult time continuing in business", as alleged in the bill of particulars.[43] On the contrary, the only contention now made by the plaintiff as to this situation is that the distributors made product available for use at the Ritz (Crescent's neighborhood theatre in Alabama City) before making it available to the Dixie Theatre. The managers of the Dixie Theatre who testified contended that they should have been allowed to play pictures at the same time the Ritz Theatre played them, although there was no real competition between the two theatres. There were no particulars furnished as to the contention of plaintiff embodied in these Findings, and the Findings in this respect are accordingly irrelevant.

CENTRAL CITY, KENTUCKY.[44]

It appears from Finding 103 that in 1937 there were two competing theatres in Central City, the Selba and the Empress. The latter was operated by F. M. Pittman. Rockwood acquired the Selba Theatre in the latter part of 1937,

[42] R. 1420-1425.

[43] R. 171. (See R. 512-514 as to the complaint actually aired at the trial).

[44] R. 1426.

and about a month later Pittman sold the Empress to Rockwood "because he realized that he could not compete with Sudekum". There are no Findings whatever as to film deals and no suggestions in the Findings that Pittman was "unable to compete with the purchasing and booking power of defendant exhibitor chain", as alleged in the bill of particulars.[45]

ROGERSVILLE, TENNESSEE.[46]

It appears from Finding 51 that Cumberland opened the Rogersville Theatre in October, 1936, in opposition to the Palace Theatre operated by Miller. It appears from Finding 53 that Cumberland sold the Rogersville theatre to Rockwood about April 1, 1938, and from Finding 57 that Miller sold out to Rockwood in August, 1938.

In Finding 52 it is stated that United Artists licensed its 1936-1937 and 1937-1938 product to Cumberland.

In Finding 53 it is stated that Fox licensed its 1936-1937 product to Cumberland and its 1937-1938 product to Miller.

In Finding 54 it is stated that Warner licensed its 1936-1937 product to Miller and its 1937-1938 product to Cumberland.

In Finding 55 it is stated that RKO split its 1937-1938 product between Cumberland and Miller.

In Finding 56 it is stated that Universal licensed its 1936-1937 product to Miller and its 1937-1938 product to Cumberland.

There is no Finding as to Loew's or Paramount.

In Finding 139[47] it is stated that Columbia licensed its product to Miller, apparently for every season.

In Finding 57 it is stated: "One of the principal reasons for Miller's willingness to sell his theatre was the difficulty he encountered, as well as the difficulty he anticipated, in securing suitable pictures for exhibition in his theatre."

[45] R. 155.
[46] R. 1383-1388.
[47] R. 1459.

This Finding was amended by the Court so as to add to the quoted sentence: "at prices he was accustomed to pay for such pictures".[48] Thus, there is no Finding that Miller "had difficulty getting desirable pictures and was forced to sell", as alleged in the bill of particulars.[49] On the contrary, Miller's complaint was that the distributors raised their prices after competition entered the town.[50]

To Summarize: Plaintiff went to trial on the theory that these independent exhibitors were forced to sell their theatres because of a shortage of product. In two of the nine situations examined it affirmatively appeared that the independent exhibitor did not even apply to certain distributors for product and failed to play the pictures of other distributors after contracting for them (Brownsville, Tennessee, and Union City, Tennessee). In two other situations (Earlington, Kentucky and East Gadsden, Alabama), the only complaint was as to the time of playing pictures; and of course film rentals are, generally speaking, lower when pictures are played late than when played early after release date. In one situation (Rogersville, Tennessee) it was expressly found by the Court, after proper motion had been made to amend the Findings, that the independent's complaint was only as to the prices of pictures. In no instance did the evidence or the Findings of the Court support plaintiff's theory as stated in the complaint and in the bills of particulars. The burden of proof was on plaintiff. Where the Court failed to make a Finding as to some particular distributor, it will usually be found, upon an examination of the evidence, that the independent had actually licensed that product. *In no such instance was there evidence to the contrary.*

While there are Findings to the effect that various distributors "discriminated" against independent exhibitors, it must be remembered that these Findings were copied

[48] R. 1489-1490.
[49] R. 154.
[50] R. 437-442.

from plaintiff's brief and were largely based on incompetent evidence consisting of inter-office communications of the distributors. These questions will be discussed in a later portion of this brief.

It necessarily follows, we believe, that the Findings of the Court do not support the theory of the complaint and that plaintiff has utterly failed to prove the allegations of the complaint. This being true, the portions of the final decree as to which error has been assigned by appellants were necessarily and automatically erroneous. There was a fatal variance between the allegations and the proof.

We wish to stress before this Court that we are relying not merely upon the factual and legal questions involved in the case as actually determined by the District Court, but upon this fundamental defense of failure of proof of the allegations of the complaint as amplified by the bills of particulars. We think that this suit was brought by plaintiff as a result of inadequate information as to the facts,—probably as the result of complaints which had been made to the Department of Justice by such persons as Tim Smith of Peerless Enterprises, Inc.[31] The failure of plaintiff even to introduce evidence as to the great majority of the situations specified in the bills of particulars suggests a misapprehension prior to the trial as to what the facts were. The ultimate decision violates the fundamental principle that a defendant cannot fairly be convicted of violating a criminal statute, even in an equity case, where the charges on which the trial is predicated are not proved.

Even in litigation of a strictly civil nature, there has always been applied in our jurisprudence the principle that a verdict is bad if it varies from the issue in a substantial matter, and that the judgment or decree must conform to the pleadings. The principle is so well established that it may seem superfluous to cite authorities. Nevertheless it is a principle on which we think this case is to be decided,—without ever reaching for consideration the other questions

[31] R. 595-597.

discussed in the briefs,—and we ask the indulgence of the Court in citing and referring to some of the decisions of this Court:

In *Patterson* v. *United States*, 2 Wheaton, 221, this Court said:

> "The rule of law is precise upon this point. A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, no judgment can be rendered upon the verdict."

In *Boone* v. *Chiles*, 10 Pet. 177, at page 209, this Court said:

> "A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree; the latter must support the former." (citing authorities.)

In *United States* v. *Seminole Nation* (1937), 299 U. S. 417, 81 L. ed. 316, this Court said (299 U. S. 422):

> "The judgment may not be sustained as to any item that is not included in a cause of action set up in the original petition or that was by the findings of the lower court or otherwise put upon a ground not there alleged. *Harrison* v. *Nixon*, 9 Pet. 483, 503. *Boone* v. *Chiles*, 10 Pet. 177, 209. *Garland* v. *Davis*, 4 How. 131, 148. It may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or opinion, are clearly sufficient to entitle plaintiff to recover. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205."

Under any rule of procedure different from that laid down by this Court in the cases above referred to, it would be impossible for defendant's attorney to know how to cross-examine plaintiff's witnesses or introduce evidence on behalf of his clients. Take, for example, the statement in the bill of particulars with respect to Dozier, an independent exhibitor in Earlington, Kentucky: "Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell".[52] Crescent's theatre in Earlington was known as the Earl Theatre. Crescent also had a theatre in the neighboring and larger town of Madisonville, Kentucky. In the bill of particulars nothing was said as to clearance between Madisonville and Earlington, and according to well-established trade practices there was no question but that Madisonville would have clearance over Earlington, all other things being equal.

Dozier testified on cross-examination: "The main thing was to play ahead of Madisonville, and the Earl Theatre there, as far as that is concerned, didn't amount to anything to me on my feature pictures."[53] In other words, Dozier, as a witness for plaintiff, repudiated plaintiff's theory and announced a new theory. Was it then incumbent on defendants' counsel to continue the cross-examination in an effort to explode the new theory, after Dozier had repudiated the theory set forth in the bill of particulars? We think the answer is clearly in the negative. Nevertheless the District Court adopted Dozier's theory in the Findings which were the basis of the decree.[54]

Of course the Dozier situation is merely illustrative. We have heretofore pointed out that the Findings as a whole are at variance with the charges. Wholly aside, moreover,

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[52] R. 155.

[53] R. 404. When Dozier used the expression "the Earl Theatre there", he referred to Crescent's Earlington Theatre.

[54] Findings 47-50, R. 1378-1383.

from the point that plaintiff failed to prove the charges contained in the bills of particulars, attention is called to an equally fundamental proposition, viz., that where one large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain a conviction or decree.[55] The complaint in the case at bar was predicated on nine large conspiracies or combinations: between the defendant exhibitors as a group and each of the eight distributors, and a ninth conspiracy or combination between the defendant exhibitors to coerce the distributors to discriminate against independent exhibitors. No one of these large conspiracies or combinations was proved. The decree is predicated on a few isolated instances of supposed discrimination by a distributor against an independent exhibitor in favor of a defendant exhibitor. The District Court treated these instances of discrimination as "combinations" (but not as conspiracies) between the particular distributor involved and the particular defendant exhibitor involved.

In Conclusion 17[56] the Court found that United Artists had combined with Cumberland, Rockwood and Stengel to eliminate the independent theatre competition at Rogersville, Tennessee. Doubtless the Court included both Cumberland and Rockwood because Cumberland built the Rogersville theatre and sold it to Rockwood after operating it for two or three years. It is to be noted, however, that the Court did not find that Crescent, Lyric, Cherokee or the other defendant exhibitors were parties to the "combination". The Court did not go into equal detail with reference to any of the distributors other than United Artists, but it must necessarily be assumed that the District Court had the same view as to the "combinations" to which the other distributors were parties, viz., that the combination in each instance was between the distributor and the

[55] For a recent criminal case applying this doctrine, see *Ob[illegible]r v. U. S.* (C. C. A. 10, 1941), 121 F. (2d) 245.

[56] R. 1477.

particular defendant exhibitor who operated the theatre which was the beneficiary of the discrimination.

These minor combinations on which the Court predicated the decree were outside the scope of the complaint. There was no Finding or Conclusion by the Court that these minor combinations were acts in furtherance of any one of the nine large conspiracies or combinations alleged in the complaint. The situation is directly analogous to that in *U. S. v. Reading Co.* (1912) 226 U. S. 324, where this Court said at page 373:

> "As to the legality of the minor combinations, we therefore express no opinion. We affirm the action of the court below in declining to enjoin them, because to construe the bill as directed against them as independent combinations, between some but not all of the principal defendants, would make the pleading objectionably multifarious. We therefore direct that the bill be dismissed, without prejudice, in so far as it seeks relief against the three alleged minor combinations."

Without further elaboration, it is respectfully submitted that defendant exhibitors in the case at bar were clearly entitled to a decree in their favor with respect to the issues made in the pleadings, as amplified by the bills of particulars. Appellants are accordingly entitled, for that reason, to have the case reversed and dismissed in its entirety without the necessity of further consideration by this Court of the other questions raised in the appeal.

II. THEORY OF COERCION AND DISCRIMINATION.

1. The Legal Aspects.

The essential element in plaintiff's case as embodied in the complaint was the "control" of the film supply by defendant exhibitors. We think this is simply a misuse of the English language. Defendant exhibitors did not control the film supply in any sense of the word. They merely played pictures for which they had contracted pursuant

to license agreements. There was no contention that defendant exhibitors ever bought pictures and "put them on the shelf" (i.e., pay for them and not use them), or bought and played more pictures than was normal for the purpose of preventing competitors from playing them.[1] It is true that some of the film deals were "selective". That is to say, the exhibitor was permitted to reject a greater percentage of the season's product than provided in the normal printed form of contract. When these pictures were rejected, within the time limits specified, they were available to their competitors.

When plaintiff got into the trial of this case it abandoned any attempt to prove that any independent exhibitor had a shortage of product in the same sense outlined in paragraphs 40, 41 and 42 of the complaint. In most instances the witness was either not asked or was unable to testify as to exactly what product he had licensed in a particular season. Having been forced to abandon the theory of the complaint, plaintiff proceeded to prove or attempt to prove isolated cases of alleged discrimination by particular distributors.

Although the complaint as originally drafted contained allegations that the eight distributors had combined among themselves or acted in concert to assist defendant exhibitors in running their competitors out of business by depriving them of films; the complaint was amended so as to eliminate these allegations. The case thus went to trial on the assumption (which was a correct one) that the distributors were in competition with each other for the business of defendant exhibitors and their competitors. In other words, plaintiff abandoned the theory on which it originally relied in an attempt to bring the case within the scope of *United States* v. *Interstate Circuit* (1939), 306 U.

[1] The case is thus distinguishable from *White Bear Theatre Corp.* v. *State Theatre Corp.* (C. C. A. 8. 1942, 129 F. (2d) 600, and *Mid-West Theatres Co.* v. *Co-Operative Theatres* (D. C. E. D. Mich. 1941), 43 F. Supp. 216.

S. 208, where the violation was a conspiracy among the eight distributors and the defendant exhibitor.

No one of the eight distributors controlled more than a small fraction of the film supply. There were "independent" distributors in business in addition to the eight distributors named in the complaint, and more than 700 feature pictures were released in the United States market during each of the years 1935-1939, inclusive, of which approximately half were released by the eight distributors and approximately half by "independent" companies.[2] It follows that individual "combinations", even if alleged and proved, between defendant exhibitors and any three or four distributors would not unreasonably restrain competition or amount to a violation of the Sherman Act as interpreted by this court in *Apex Hosiery Company* v. *Leader* (1940), 310 U. S. 469.

The theory which plaintiff finally adopted was that any discrimination by a distributor against an independent exhibitor amounted to a violation of the Sherman Act not only on the part of the distributor but upon the part of the defendant exhibitor who was the beneficiary of the discrimination. If not a violation on the part of the distributor, it could scarcely be a violation on the part of the defendant exhibitors, unless the distributors were unwilling and helpless victims. Hence, let us first look at the situation from the standpoint of the distributor.

The contention that discrimination of this character violates the Sherman Act runs afoul of the well-settled

[2] R. 231-233. The theatres involved in this case usually made four changes of program each week. The program shown on Saturday usually consisted of a Western picture, or in some cases, a double bill including a Western picture and a low-priced feature. This adds up to an annual requirement of not more than 250 photoplays, including Westerns, the vast majority of which were distributed by independent distributors. R. 1198. The double bills on Saturday were sometimes necessary because of the short running time of the Western picture. R. 1207. The territory where appellants operate theatres is "single feature territory", so that more feature pictures are available for competing theatres than in territory where double feature programs are generally shown. R. 1204.

principle which was tersely stated by this Court in a unanimous opinion in the case of *Moore* v. *New York Cotton Exchange* (1926), 270 U. S. 593. The New York Cotton Exchange had a contract with the Western Union Telegraph Company for furnishing quotations to customers of the Exchange through a ticker service. The New York Cotton Exchange was used to furnish this ticker service to plaintiff, and plaintiff brought suit and sought an adjudication that the contract between the New York Cotton Exchange and the Western Union Telegraph Company was in violation of the Sherman Act because of the alleged discrimination against plaintiff. The Court said, at page 605:

> "In furnishing the quotations to one and refusing to furnish them to another, the Exchange is but exercising the ordinary right of a private vendor of news or other property."

A similar theory was pressed in the case of *Terminal Warehouse Co. v. Pennsylvania R. R. Co.* (1936), 297 U. S. 500, and was rejected by this Court in an opinion in which Mr. Justice Cardoza said (297 U. S. p. 511):

> "First. Discriminatory privileges and payments given by a carrier to a consignor or consignee are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-Trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends . . . "

After elaborating upon the foregoing proposition, this Court said (p. 515):

> "In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages."

The illustration was given that discrimination by a carrier in favor of a particular shipper would be in violation

of the Sherman Act if the carrier knowingly confederated with that shipper to preserve or foster a monopoly of manufacturing (an interstate business). In the case at bar the District Court expressly held that there was no "conspiracy" between any defendant exhibitor and United Artists; and the holding as to United Artists was necessarily applicable in the same way to the distributors who were voluntarily dismissed as defendants. Why in the name of common sense would any distributor knowingly attempt to foster a monopoly of exhibition? The self-interest of a distributor is to have competition among exhibitors.[3] The competitive situations which plaintiff's proof undertook to expose were almost uniformly situations where the independent was operating on a shoe-string in a small and inferior theatre.

It seems axiomatic that the monopolization of exhibition can come within the scope of Section 2 of the Sherman Act only on the assumption that it is co-extensive with and based upon a monopolization of the supply of films. Necessarily there could have been no monopolization of films by appellants except pursuant to a conspiracy or federation in which at least majority of the distributors knowingly collaborated. The mere statement of such a proposition is its own refutation, even aside from the fact that all allegations as to concert of action among the distributors were voluntarily eliminated from the complaint. The District Court's theory of a "combination" which is not a "conspiracy" in violation of Section 1 of the Sherman Act is a novel theory which, so far as we know, has never before been adopted by any Court. The complaint did not allege that there were any contracts between any defendant exhibitor and any distributor which were, in and of themselves, contracts in restrain of trade or commerce. Equally

[3] Provided, of course, that the competition is of a substantial and *bona fide* character. It would not ordinarily be to the permanent interest of a distributor to foster competition with a good customer by a shoe string operator in a shot-gun theatre.

novel is the theory that a monopoly of a local business (such as retail stores, barber shops or motion picture theatres) amounts to a violation of Section 2 of the Sherman Act merely because there has been a violation of Section 1 in connection with the obtaining of merchandise or supplies. It is unnecessary, however, for this Court to pass upon these propositions because there is no factual basis whatever for the theory of the District Court.

2. The Factual Aspects.

Since the gravamen of the District Court's decision is the supposed coercion of distributors by appellants, as the result of which distributors were forced to discriminate in favor of appellants and against independent exhibitors who were in competition with them, we next propose to demonstrate the lack of factual basis for this theory.

Let us assume a circuit having a number of theatres in different towns and no competition in any of them. Loew's and Fox have been distributing good pictures and have been spending large sums on national advertising. The circuit has licensed their pictures over a period of years at high prices in order to satisfy the public demand created by this advertising. The circuit has exploited these pictures and has played a substantial part in creating public demand for their exhibition. On the other hand, the circuit has left out Paramount and United Artists pictures for the reason that it has been unable to get together on terms with these distributors and has felt that the pictures of the other distributors have suited the tastes of the theatre-goers in their particular towns as well as the pictures of Paramount and United Artists. The circuit decides to enter an additional town where there is an existing theatre operated by an independent exhibitor who has been using Loew's and Fox pictures for several seasons. The circuit wishes to use Loew's and Fox pictures, as in its other towns, or if it cannot get them, it wishes to procure Paramount and United Artists pictures for exhibition in the competitive theatre.

The question confronting the sales managers of the four distributors is whether or not to attempt to make a deal with the circuit for its competitive theatre. In the language used by plaintiff's counsel on the trial of the case, the making of a deal with the circuit would be a "sell-away" if the independent was in the town first and had been a regular customer of the particular distributor.

It is apparent that neither Loew's nor Fox would be getting additional outlets for product by licensing pictures to the circuit rather than to the independent. They know that the circuit wants their pictures in its other towns where it has helped to build up the reputation of their pictures. They know that the circuit would be "cutting off its nose to spite its face" if it discontinued these pictures in its other towns because of its failure to procure them for its competitive theatre. Quite naturally they will consider the size and appointments of each of the competing theatres; they will consider the record of the circuit and of the independent exhibitor as to punctuality in meeting contractual obligations; and they will consider other factors which might have a bearing on the matter, including the revenue they think they can get from the circuit theatre as compared with the revenue they can get from the independent. Presumably they will desire to get higher prices and better terms in general than they have been getting in the past. In other words, they will hope to take advantage of the competitive situation.

Assuming that there is no threat, express or implied, from the circuit that it will boycott Loew's and Fox in its other towns, there is certainly no basis for a Finding of coercion if Loew's and Fox negotiate with the circuit for pictures in the entire circuit, including the competitive situation. Indeed, the "leverage" is the other way. Loew's and Fox have the opportunity of bettering their deals in the other towns in the circuit by including or continuing to include the competitive theatre in the deal.

Now let us look at the matter from the standpoint of Paramount and United Artists. They would like to have all the circuit theatres as outlets for their pictures. They say to the circuit: "Of course we aren't going to furnish you pictures for your competitive theatre, where we know you need them, unless you also include in the deal your other theatres where you have not been using them." The result is that Paramount and United Artists make deals with the circuit instead of with the independent. Again, in this situation, the coercion is the other way. The distributors have forced the circuit to take their pictures for the other towns in order to get them for the competitive theatre.[1]

The "coercion" found by the District Court was simply the desire of the distributors to get appellants' business,—a natural desire in the business world. We submit that the effort of the distributors to procure the greatest possible return for their pictures is not the fair legal equivalent of "coercion" of the distributors by the defendant exhibitors.[2]

Plaintiff did not contend in the District Court that there was any discrimination by "sell-aways" unless the distributor, looking at the two exhibitors in the particular town and disregarding the ownership or operation of other theatres by either exhibitor, *would otherwise have preferred to deal with the independent*. The District Court made no Findings as to actual preference in such cases, but did find that in practically every instance the circuit theatre was superior to the independent theatre; and that, as a general proposition, the independent exhibitors had been poor accounts in that they had not been punctual in complying with contractual obligations and had frequently insisted upon adjustments on the previous deal as a condition to making a deal for the ensuing season. Under

[1] See R. 752, 828-829, 856-857.

[2] As to the resources and economic power of the distributors, see R. 178-195. The revenue which a distributor could obtain from defendant exhibitors was relatively too small to cause the distributors to depart substantially from their own ideas of film rentals and terms. See R. 832, 1014-1015, 1024-1025.

these circumstances, the distributor naturally preferred to do business with the circuit rather than the independent, wholly aside from the other theatres involved.

For the convenience of the Court these Findings are here copied:[3]

"111. The theatres maintained by the defendant exhibitors and their affiliates in the towns in which they operate are modern and up-to-date in their appointments; are attractive in appearance, for the most part have been originaly built as motion picture theatres, have adequate seating capacity, and the equipment and buildings are well maintained. They have large sums invested in buildings and equipment. The management is competent and experienced. The exhibitor defendants and their affiliates are adequately financed, are financially responsible, have stablizied the operation of motion picture theatres in the small towns in the area in which they operate, and have the reputation of playing out their contracts as agreed.

"112. For the most part theatres operated by independents in competition with the defendant exhibitors and their affiliates have been greatly inferior to those operated by the defendant exhibitors or their affiliates in the several competitive situations.[4] Usually the theatre building was a converted store building, not built for the purposes of a theatre, unattractive in appearance, inadequate in modern conveniences. In many instances the equipment has been second hand. Some operations have been inadequately financed, and in a number of cases there was no stability of operation in these independent situations.

"The distributors have found it necessary by reason of this instability of operation and inadequate financing in some instances, to make large concessions from the contract terms originally agreed upon, or to

[3] R. 1428-1429.

[4] This Finding was amended (R. 1491) to specify the only two exceptions: Henry's theatre in Union City, Tennessee, as compared with Crescent's second-run theatre in that town (Finding 81, R. 1403) and the Dixie Theatre in East Gadsden, Alabama, as compared with Crescent's theatres other than its first-run theatre (Finding 94, R. 1421).

accept cancellations of obligations to exhibit pictures as originally called for under the contract."

The evidence shows, moreover, that distributors did not uniformly "sell away" from the independent but either continued to do business with the independent (e. g., Fox at Brownsville, Gallatin and Greeneville)[5] or split the product between the two competitors (e. g. RKO at Rogersville).[6] There is not a shred of evidence that appellants or any of them ever discontinued or threatened to discontinue the product of any distributor because of the failure or refusal of the distributor to sell away from an independent competitor. The theory of coercion which is the basis of the decree was, we submit, wholly without support in the evidence.

We next propose to examine the actual cases of supposed coercion and discrimination reflected in the Findings. Since plaintiff took the position that a distributor *preferred or should have preferred* to deal with its "old customer" in a particular town, our inquiry here may properly be confined to the situations where there was a "sell-away" from the old customer. The Findings include four such situations, Brownsville, Rogersville, Greeneville and Gallatin. As to Gallatin, however, no particulars were furnished (the situation was specified as a town where there was competition, but without any particulars whatever as to discrimination)[7] and the Findings as to Gallatin are accordingly irrelevant under any aspect of the case.

In these three situations, Brownsville, Greeneville, and Rogersville, the independent theatres were small and inferior. There is no suggestion in the Findings that these theatres and their independent operators were exceptions to Findings 111 and 112.

Lawing's theatre at Brownsville was a converted store building. His original investment was about $200.00 in cash

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[5] R. 311, 847.

[6] R. 430, 442.

[7] R. 158.

and some second-hand equipment contributed by Lawing and $50.00 contributed by his partner. The screen was in the front end of the building and his projection machine on the outside of the building extended out over a vacant lot. His theatre had no rest-room. The seating capacity was originaly 180 but was later increased to 200 downstairs and 25 or 30 in the balcony. Crescent's theatre was modern and up-to-date and much larger than Lawing's theatre.[8]

Parrott & Hendren's theatre in Greeneville was poorly equipped. The citizens of Greeneville requested Mr. Sudekum to come to Greeneville and open up another theatre. For some time Sudekum endeavored to find a location and finally obtained a building which he remodeled into a modern, up-to-date theatre with a seating capacity of 721 at a cost of $35,000.[9]

Miller's theatre in Rogersville was operated in an old warehouse. It had no sewerage connection and its heating system was improvised by Miller who rigged up a twenty-horsepower threshing machine boiler in an outhouse. Cumberland built a modern theatre in the town.[10]

Quite obviously the citizens of those three towns deserved better theatres than they had and quite obviously each distributor would have preferred to deal with the new theatre operated by the circuit, wholly aside from other theatres of the circuit in other towns. Findings 111 and 112 give ample reasons and justification for such a preference. There is no Finding and no suggestion by the District Court that, had it not been for the other theatres of Crescent in the case of Brownsville and Greeneville, or Cumberland in the case of Rogersville, the distributors would have preferred to deal with the independents.

We shall now refer to the Findings of discrimination: *Brownsville:* Finding 40[11] is to the effect that Paramount

[8] R. 322, 748-749.
[9] R. 952-953.
[10] R. 436, 444.
[11] R. 1373.

licensed its 1934-1935 product to Lawing but licensed its 1935-1936 product to Crescent as part of a 19-town deal without even negotiating with Lawing. There is no suggestion that Lawing had been a consistent user of Paramount product, and the evidence was that he had not been a consistent user and had not been a satisfactory account.[12] Lawing himself testified that he would have had to secure reduced film rentals from Paramount before he could have licensed the product for 1935-1936,[13] and there is no evidence that he made any effort to negotiate for it. In Finding 115[14] it is stated, in effect, that the 19-town deal referred to in Finding 40 was made by Crescent at the suggestion of Paramount's District Manager, Mr. Morgan, in an effort to help along Crescent's negotiations regarding the Paramount Theatre in Nashville. This Finding,—that Paramount's Nashville theatre was the motivating factor,—necessarily excludes the theory that Crescent made the 19-town deal in order to get Paramount pictures for its Brownsville theatre as distinguished from its theatres in the other eighteen towns, or that Paramount was coerced to include Brownsville in the deal.

Finding 44[15] is to the effect that Warner licensed its 1934-1935 product to Lawing, but licensed its 1935-1936 product to Crescent after refusing to discuss a deal with Lawing. Again, there is no suggestion that Lawing had been a consistent user of Warner product and there was affirmative evidence that he had been a troublesome account.[16] Warner received substantially more from Crescent for its 1935-1936 product than it had received from Lawing for the prior season's product.[16] In this Finding 44, it is

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[12]R. 669-672.

[13]R. 325. See also R. 720 and defendant's Exhibit 235, R. 1352, as to film rentals paid by Crescent as compared with prior film rentals paid by Lawing.

[14]R. 1430.

[15]R. 1374.

[16]R. 1100-1108.

also stated that either Ochs, Warner's Memphis Exchange Manager, or Byron Adams, a Warner salesman, told Lawing "that their hands were tied in any situation Crescent had gone into". Although neither Ochs nor Adams testified in the case, and neither of them was charged with being a co-conspirator, it is significant that the District Court quoted Lawing's wholly incompetent testimony as a part of a finding of fact. Actually there was no evidence and not even a contention by the plaintiff that Warner's deal with Crescent for Brownsville was part of a circuit deal or that it was in any way conditioned by either party upon the making of a deal for any other town.

Finding 42[17] is to the effect that Fox licensed both its 1934-1935 and its 1935-1936 product to Lawing, and that the 1935-1936 product was licensed to Lawing prior to February 1f, 1935. This Finding demonstrates that Fox made the deal with Lawing at a very early date and without even waiting to see whether Crescent wanted to negotiate for the product,—exactly the reverse of the allegations of paragraph 47[18] of the complaint.

Findings 43-45[19] are in regard to negotiations by Loew's with Lawing and Crescent, finally resulting in a deal for 1935-1936 product with Crescent in December, 1935. The Findings contain excerpts from letters or memoranda from Willingham, a Loew's salesman, to Loew's New York Office. In view of the inclusion in the Findings of these excerpts from Willingham's communications, and the emphasis placed on them by plaintiff and the District Court, it will be necessary to examine the evidence in some detail.

Willingham was introduced as a witness by plaintiff and was asked to identify these communications. He testified that he wrote them on or about the dates they bore. He was not asked to testify as to the truth of any of the statements in these communications or as to whether they had

[17] R. 1374.

[18] R. 8.

[19] R. 1374-1378.

any basis in fact.[20] On cross-examination, Willingham was asked to identify other letters which he had written both to Loew's New York Office and to Lawing himself. These communications were in many respects contradictory and inconsistent with the ones introduced by plaintiff, and Willingham was forced to admit that the statements contained in these latter communications were true.[21] The sum and substance of the evidence was that Willingham was a prolific writer and had little regard for consistency.

The principal letter relied upon by plaintiff was dated January 22, 1936, written to the New York office with reference to a deal with Lawing for the latter's theatre in Whiteville, Tennessee. Willingham said:

> "As you know, this exhibitor operates the Southland Theatre, Brownsville, Tennessee. He has been using our product in Brownsville ever since he has been in business and paid excellent rentals. However, we refused to sell him the 1935-36 product in Brownsville this season because Mr. Tony Sudekum has opened a theatre in Brownsville and we had to sell our product to Mr. Sudekum." (Ex. 167).[22]

We think this letter was obviously incompetent. It was written about six weeks after the deal between Crescent and Loew's had been made. It was not alleged or contended that Willingham was a co-conspirator or that this letter was written in furtherance of any conspiracy between Loew's and Crescent. There was no *other* evidence that Loew *had* to sell its product to Mr. Sudekum.

On cross-examination Willingham testified that Loew's had trouble with Lawing about getting him to date and play newsreels and other short subjects which he had contracted to play, as well as feature pictures, and that letters written by him to Lawing on this subject correctly stated

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[20] R. 733-742, 746-747.

[21] R. 757-764.

[22] R. 742.

the facts.[23] On October 25, 1935, about six weeks before Loew's closed with Crescent on the 1935-36 product, Willingham wrote to Lawing in regard to the latter's theatre in Brownsville as follows (Def. Ex. 56):

> "The writer has just reviewed your account and finds it to be in a most deplorable condition. I never realized until now that you are absolutely ignoring our product and not giving us any dates whatever.
>
> "Attached is notice of availability for features and short product and if there is another account in the United States in a worse condition, we would like to know just who it might be.
>
> "We are going to insist that you give us dates in abundance, playing two pictures per week in Brownsville, starting immediately, in order to catch up as you are so far behind this will be the only possible way you can catch up on your playing arrangement."[24]

In Findings 44 and 45,[25] it is stated that Lawing's offer for Loew's 1935-1936 product was "as good as, if not better than" the deal Loew's accepted from Crescent. These statements are not supported by the record. The Lawing application called for fifty feature pictures with the privilege of eliminating five of the pictures. Crescent actually played 46 of these pictures, at a film rental, including score charges, aggregating $1,021.95.[26] The Lawing application on a flat rental basis, assuming the playing of these same 46 pictures, would have resulted in film rentals of $911.50, including score charge. It is true that the Lawing application called for the playing of 12 pictures at a guaranteed price against percentage, but there is no reason to suppose that Loew's would have received an "overage". Further-

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[23] R. 759-764.

[24] R. 760.

[25] R. 1375-1378.

[26] R. 807, 1345-1346; (Lawing's rejected application was part of Gov't. Ex. L-18, which was not sent up with the record to this court). Even Mr. Willingham regarded the Crescent deal as "commensurate with" Lawing's offer, which was rejected. R. 308.

more; it appears that Crescent's 1935-1936 contract provided Loew's additional revenue of $575.00 from trailers, shorts and newsreels.[27]

The evidence showed that Lawing told Willingham, and Willingham in turn advised the New York Office, that Lawing could not pay as much for the 1935-1936 product as he had previously been paying.[28] In 1934-1935, Lawing had played 41 feature pictures at a total film rental of $765.69, and had paid an additional $321.00 for trailers, shorts and newsreels, or a total film rental of $1,086.69. Loew's obtained from Crescent a total of $1,569.95 for the 1935-1936 product.[29]

The testimony of Lawing and Willingham on cross-examination conclusively demonstrates that Loew's natural preference in Brownsville would have been to deal with Crescent rather than Lawing, wholly aside from any other theatres owned and operated by Crescent. (At that time Crescent had theatres in only nineteen other towns, exclusive of Nashville, where Loew's operated its own theatre; Sudekum was not making film deals for Lyric, because Crute was still living; and Rockwood and affiliates had not yet been organized). Indeed we think the amount of consideration given by Loew's executives to the question of whether or not to license the product to its old customer, Lawing, is remarkable in view of the character of Lawing's theatre and his past record. It was perhaps induced by Willingham's express desire to deal with Lawing rather than Crescent. There is no evidence that any weight whatever was given by Loew's to the fact that Lawing's opposition was a circuit theatre. The principal consideration on one side appears to have been the fact that Lawing was an old customer, and the principal consideration the other way appears to have been the fact that Lawing was unable to

[27] R. 811-812, 1345-1346.
[28] R. 324-325; 751, 757.
[29] R. 811-812; 1345-1346.

pay as much film rental as was to be expected from his competitor, and had been a poor account in the past.

There is no suggestion that Crescent threatened Loew's with a boycott if it did not obtain Loew's product for Brownsville and there is no suggestion that Loew's made the deal for Brownsville in order to make a deal for other Crescent theatres. The undisputed evidence was to the contrary.[30] Crescent had previously used Loew's product in its other theatres and there is no reason to assume that it would not have continued to use it regardless of the Brownsville situation.

To sum up the Brownsville situation, it appears that Crescent was able to license the product of three distributors, Paramount, Warner and Loew's, who had previously had one or more deals with Lawing. There is no Finding or evidence that any of these three distributors would have preferred to deal with Lawing, rather than with Crescent, had it not been for Crescent's business in other towns. There is no Finding or evidence that Crescent attempted to coerce any of the three distributors or would have been able to coerce them if it had so desired.

A careful comparison by the Court of Findings 43-45 with Lawing's testimony, Willingham's testimony and letters, and the testimony of Kirk, the office manager in Willingham's office,[31] will give the Court a fair indication of the character of the Findings as a whole, and demonstrate that they are inconsistent with the competent evidence in the record.

We have previously stated that no particulars as to the Brownsville situation were given until less than thirty days prior to the trial of the case;[32] and the foregoing discussion is not to be construed as a waiver of that point.

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[30] R. 1009-1026.

[31] Lawing, R. 324-325; Willingham, R. 733-753 and R. 755-778; Kirk, R. 805-825, and Defendants' Exhibit 58, R. 1345-1346, which was at first stricken but later admitted, R. 810-812.

[32] R. 172.

Greeneville: There are only two references in the Findings which might be construed as Findings of discrimination against Parrott & Hendren at Greeneville,—both in the discussion of "Franchises".

In Finding 120 it is said: "Crescent also took the 1935-1936 Warner product away from Parrott & Hendren at Greeneville".[33] There is no Finding or evidence, however, either that Parrott & Hendren had used Warner product of the 1934-1935 season, or that they wanted it for the 1935-1936 season. The Finding that Crescent "took the 1935-1936 product away" is wholly unsupported by the evidence.

In Finding 127 it is said: "Hendren's letter of February 7, 1936 (Ex. 258) indicates that if he could have gotten the Fox 1936-1937 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greeneville. . . . For the 1935-36 product in Greeneville he paid $2,589.00 against $1,095.00 paid by Crescent for 1937-38 (Ex. 328)."[34] There was no sell-away. The undisputed evidence was that Parrott & Hendren had Fox product at Greeneville as long as they operated a theatre there.[35] There was not the slightest evidence that Parrott & Hendren failed to make a deal for Fox 1936-1937 product before selling the theatre to Crescent in August, 1936, and plaintiff made no such contention on the trial when the letter was introduced.[36] The contention made in the brief and copied in the Findings was an afterthought based on a deduction from Hendren's letter. Since the burden of proof on all issues was on plaintiff and no attempt was made on the trial to prove a sell-away by Fox at Greeneville, there was no occasion for defendants to introduce the contract

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[33] R. 1439.
[34] R. 1450.
[35] R. 847, 855.
[36] R. 927-928.

for the 1936-1937 product made by Fox with Parrott & Hendren.[37]

The Finding suggests that Parrott & Hendren paid too much for the Fox 1935-1936 product, as evidenced by the fact that Crescent licensed the 1937-1938 product at considerably smaller film rentals. There is no suggestion or Finding, however, that Fox charged Parrott & Hendren exorbitant rentals as a part of a conspiracy with Crescent, or for any reason than Fox's desire to get as much revenue as possible and Parrott & Hendren's poor judgment in making a deal with such high film rentals. When Parrott & Hendren licensed the 1935-1936 product, there was competition in Greenville, of which Fox perhaps took advantage.

To sum up the Greenville situation, there is no Finding and not the slightest evidence of discrimination by any distributor against Parrott & Hendren, and no evidence of any attempt by Crescent to coerce any distributor, or any evidence that Crescent could have coerced any distributor if it had so desired.

Rogersville: The theatre involved in the Rogersville situation was built by Cumberland Amusement Company, which operated thirteen theatres in ten towns whose 1940 populations varied from 1,500 to 5,300.[38] Cumberland never combined or collaborated with any other defendant exhibitor in negotiating film deals. There are Findings as to such collaboration by other defendant exhibitors (Findings 32, 33, and 34),[39] but Cumberland is conspicuous by its absence.

[37]In view of the above quoted statement from Finding 127, however, we think it fair to refer to statement of plaintiff's counsel at page 3209 of the original transcript of evidence (not designated as a part of the record on the appeal): "In Greenville, Crescent didn't buy the Fox pictures and only two were played which had been previously bought by Hendren from the 1936-1937 season".

[38]R. 1360. The consent decree in the Paramount case recognizes that there must be at least fifteen theatres in the circuit before "circuit buying power" becomes significant. R. 208.

[39]R. 1368-1371.

from these Findings. The evidence was that prior to his death Mr. Hill did the film buying for Cumberland. Mr. Hill was succeeded by Mr. Oldham.[40] The local manager at Rogersville, Mr. Davis, attempted to negotiate some, if not all, film deals for the Rogersville theatre, without regard to the deals for the other Cumberland towns.[41] For reasons hereinafter appearing, however, certain of the distributors insisted upon deals which included all the Cumberland towns.

Finding 52[42] is to the effect that Miller, the independent, used United Artists product of the 1934-1935 season and the 1935-1936 season, but that United Artists sold away from Miller and licensed both the 1936-1937 and the 1937-1938 product to Cumberland. It appeared that Cumberland had not been using United Artists pictures prior to the 1936-1937 season, but needed them in Rogersville where it had opened its new theatre, and United Artists negotiated a deal with Cumberland for all the latter's theatres. Finding 52 includes a quotation from a report dated September 16, 1936, made by a United Artists representative who was not introduced as a witness (Ex. 221) as follows:

> "In Rogersville, Hill has opened a new theatre and we will have to play with Hill because this is the only spot in all of the fifteen towns where there is any competition and Hill has demanded that we approve all contracts or none."

Pretermitting the competency of this salesman's statement, and treating it as evidence, it would appear that after Cumberland had negotiated a deal for all its theatres, some question arose as to whether United Artists would approve the Rogersville deal, and Hill insisted that United Artists approve all contracts or none. Since Cumberland had not previously been using United Artists product, it is

[40] R. 968.
[41] R. 425, 856-857.
[42] R. 1383-1386.

obvious that by making a deal with Miller rather than Cumberland, United Artists would not have lost any business it previously had. United Artists was actually getting new business by using Rogersville as the lever. If this situation involved coercion, we insist that United Artists coerced Cumberland rather than the reverse. It appears from Conclusion 17,[43] however, that, in the view of the District Court, Cumberland coerced United Artists when, *after* Hill agreed to buy United Artists product for his nine other towns so that he could get it for Rogersville, Hill demanded that United Artists approve the deal for Rogersville as well as the other towns.

Finding 52 further indicates that United Artists attempted to follow the same policy with respect to the 1937-1938 season.

Finding 53[44] is to the effect that Miller played Fox pictures in the 1934-1935 and the 1935-1936 seasons, but that Fox sold away from Miller to Cumberland for the 1936-1937 season. Thereafter, Fox sold Miller its 1937-1938 product, as it did not make a deal with Cumberland for that season.

The evidence indicates that Fox followed much the same policy as United Artists. Miller also operated a theatre at Sneedville, and Miller testified that the Fox salesman told him that he would not sell for Rogersville unless Miller also bought for Sneedville.[45] A Fox representative who testified in the case, Paul Wilson, also testified that Fox refused to sell the 1937-1938 product to Cumberland at Rogersville because it had not been able to make a deal with Cumberland for its theatres in its other towns.[46] In other words, Fox used Rogersville as a lever in attempting to force Cumberland to make a deal satisfactory to Fox for its other towns, and when Cumberland failed to make the

[43] R. 1477-1478.
[44] R. 1386.
[45] R. 440.
[46] R. 856-857.

proposed deal, Fox declined to license its 1937-1938 product to Cumberland for Rogersville and "sold away" to Miller.

Wilson also testified that Miller had not been a regular Fox customer; that he had been hard to get along with; that he had "complained about the pictures, the bookings, and everything".[47]

Finding 54[48] is to the effect that Miller played the Warner 1936-1937 product and made an application for the 1937-1938 product but that Warner licensed the latter product to Cumberland as a part of a circuit deal. It also appears from Finding 54 that the Cumberland deal called for a total guaranteed rental on feature pictures of $35 more than the total specified in Miller's offer, but that Miller's offer called for eighteen pictures at a percentage against a guarantee, and that Warner might possibly have received more money by making a deal with Miller because of this percentage feature. This is pure speculation. Nothing is said in Finding 54 as to short subjects; and, of course, a distributor considers a deal not merely on the basis of feature pictures but on the basis of the entire deal.

Miller had not been an old customer of Warner. On the contrary, he had not used Warner product prior to the 1936-1937 season and licensed it for that season to take the place of Fox pictures after Fox had made a deal with Cumberland.[49]

Finding 55[50] is to the effect that RKO made a split deal for its 1937-1938 product between Miller and Cumberland, and that its excuse for not offering Miller the entire product was that it might thereby be knocked out of a deal for the remainder of Cumberland's theatres. There is no evidence, however, that Cumberland made any threat that it would refuse to make a deal for its other towns if RKO licensed its entire product to Miller in Rogersville. It is

[47] R. 848.
[48] R. 1386.
[49] R. 430, 440.
[50] R. 1387.

stated in Finding 55 that Miller had licensed the entire RKO product in previous seasons[51] (although Cumberland had the opposition theatre) and there was no evidence that during these previous seasons Cumberland had refused to deal with RKO on that account.

To sum up the Rogersville situation, there was no Finding or evidence that, leaving out of consideration Cumberland's other theatres, any distributor would have preferred to deal with Miller rather than Cumberland in Rogersville. There was no evidence of any attempt by Cumberland to coerce any distributor, and no evidence that Cumberland could have coerced any distributor if it had so desired. While the Court was of the opinion that Cumberland had coerced United Artists, we think the evidence was to the contrary and that the Court's conclusion was unwarranted.

In none of the three situations,—Brownsville, Greeneville and Rogersville,—was there any evidence that any distributor lost business which it enjoyed in a prior season, or was threatened with loss of business which it had enjoyed in a prior season, as the result of making a deal or negotiating for a deal with the independent. In other words, there was no evidence of a boycott or threatened boycott. Each of the independents,—Lawing at Brownsville, Parrott & Hendren at Greeneville, and Miller at Rogersville,—had or had available the product of three or more of the eight distributors (as well as independent product) during each season, and none of these eight distributors lost any business as the result of doing business with the independents. The only leverage exercised was that exercised by the distributors themselves.[52] When a particular distributor did not make a deal for non-competitive situations with the defendant exhibitor in any season, the only reason was the failure of the parties to get together on film rentals and terms.

In the consent decree in the Paramount case, there is a

[51]But see Miller's testimony, R. 441.

[52]R. 752, 828-829, 856-857.

paragraph outlining the factors to be considered in arbitration cases where two competing exhibitors desired to license the same product. In every case of supposed discrimination involved in the case at bar, we believe the so-called independent would have lost an arbitration proceeding under the consent decree. The paragraph in question, contained in Section X, is as follows:

> "C. In determining whether the exhibitor's complaint is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:
>
> the terms, if any, offered in respect of each of the two competing theatres;
>
> the seating capacity of each of said theatres;
>
> the capacity of each for producing revenue for the distributors;
>
> the character, appearance and condition of each, including its furnishings, equipment and conveniences;
>
> the location of each of said theatres;
>
> the character and extent of the area and population each serves;
>
> the competitive conditions in the area in which they are located;
>
> their comparative suitability for exhibition of the distributor's features on the run requested;
>
> the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty, and fair dealing;
>
> the policy under which each of the theatres has been operated and the policy under which the com-

plainant proposes to operate his said theatre if he obtains the run requested;

the financial responsibility of the exhibitor operating each of said theatres; and

the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom."[53]

As we understand the last clause, above quoted, it is proper to take into consideration not only the two theatres involved, but also the distributor's prior relations with their owners and operators. Where one of the theatres is a new theatre, the distributor's prior relations with the owner and operator of that theatre would necessarily have been with respect to other theatres, if any, owned and operated by the same exhibitor. For example, when Crescent opened its new theatre in Brownsville, Tennessee, Loew's had had prior relations with Crescent in other towns. By reason of these prior relations with Crescent in other towns, Loew's knew the character and ability of Mr. Sudekum, his reputation for showmanship, honesty and fair-dealing, and the financial responsibility of Crescent Amusement Company. If the consent decree had been in effect at that time, these matters would have been considered by the arbitrator as well as the seating capacity of the two theatres, the capacity of each for producing revenue for the distributors, etc.

The *most* that can be said of plaintiff's case on the theory of coercion and discrimination is that the evidence was *consistent* with this theory as well as with the theory that there was no coercion and no discrimination. Where circumstantial evidence is equally consistent with two theories, it is well settled that judgment must go against the party having the burden of proof.[54] It is equally well settled

[53] R. 209-210 (paragraphing supplied). Cf. Findings 111 and 112, R. 1428-1429, copied *supra*, pp. 51-52.

[54] *Pennsylvania Railroad Co.* v. *Chamberlain* (1933), 288 U. S. 333, 339.

that the defendant in a case of this character is entitled to the presumption of innocence.[55] These principles have been uniformly applied in cases under the Sherman Act.[56]

III. FINDINGS AGAINST APPELLANTS NOT ENTITLED TO PRESUMPTION OF CORRECTNESS.

All other questions aside, there are two reasons why, as we insist, the Findings of the District Court, to the extent that they are against appellants, are not entitled to a presumption of correctness in this Court.

1. Findings Based on Incompetent Evidence. (Assignments of Error 18 and 19).[1]

The Findings of the District Court, to the extent that they are against appellants, are in very large measure based upon letters and other communications written by employees of distributors either to other employees or to persons other than appellants. Frequently these letters and communications were written by a superior to a subordinate, or vice versa, to justify or excuse some line of action in connection with a deal or proposed deal, and the facts were obviously colored or switched to fit the argument. It was proved or stipulated that these letters and communications were written on or about the dates they bore by the persons whose signatures they bore and were sent to the persons to whom they were addressed. In some cases the authors of the documents were introduced as witnesses but were not asked to testify and did not testify as to the truth of the statements contained in the documents. Where the documents were introduced by stipulation, there was necessarily no testimony by the au-

[55] *Interstate Commerce Commission* v. *Chicago G. W. Ry.* (1908), 209 U. S. 108, 119-120.

[56] *U. S.* v. *United Shoe Machinery Co.* (1918), 247 U. S. 32; *U. S.* v. *New York Coffee & Sugar Exchange, Inc.* (1924), 263 U. S. 611; *U. S.* v. *International Harvester Co.* (1927), 274 U. S. 683.

[1] R. 139, 1515-1517.

thors as to the truth of the statements. The defendants objected to the introduction of these documents and at the conclusion of plaintiff's proof in chief made a formal motion to exclude them, which was overruled by the District Court.[2]

In order that the Court may readily see the nature of these communications and the prejudicial effect resulting from their introduction, we shall refer specifically to several of the documents which are actually quoted from in the Findings.

In Finding 44 there are quotations from two reports or letters written by Willingham (Loew's Memphis Manager) to Loew's New York office. In one of them, dated July 30, 1935, Willingham said: "We might add Mr. Kessnich, on his last visit to Memphis, told us to go ahead and sell this contract as Mr. Lawing was entitled to our product."[3] In another one, dated January 22, 1936, Mr. Willingham said: "However, we refused to sell him the 1935-36 product in Brownsville this season because Mr. Tony Sudekum has opened a theatre in Brownsville and we had to sell our product to Mr. Sudekum."[4]

Willingham testified as a witness in the case but did not testify that either of these statements was true.[5]

In *Dwyer* v. *Dunbar* (1886), 5 Wall. 318, one Smyth gave a deposition in which he testified that he wrote a letter to one Charles Russell, and this letter was attached to the

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[2] R. 366-369, 382, 653, 732, 930-932, 941-942. While the District Court at first ruled that such documents were admitted only provisionally, R. 368, he later came to the conclusion that they might be offered "for the purpose of also proving the conspiracy", R. 652, and was "inclined to agree" with plaintiff's counsel that such letters were "better evidence than any oral statements elicited four years later as to what happened." R. 843.

[3] R. 1376.

[4] R. 1376-1377.

[5] R. 734-735. The letters themselves are found, respectively, at pages 739 and 742. The untrustworthiness of such letters becomes evident when comparison is made with Willingham's other letters, R. 758-764.

deposition. All that Smyth said about the letter in the deposition was as follows:

> "The letter of this affiant to Charles Russell was written in reply to a letter of said Russell wishing to know the circumstances respecting the settlement made in the Dunbar claim by me."

The defendant, who had offered Smyth's deposition, undertook to rely upon statements contained in the letter as evidence. The District Court excluded the letter on the ground that Smyth had nowhere stated in his deposition that what he said in his letter was true. This action of the District Court was assigned as error and this Court said:

> ". . . The letter, of itself, was clearly not evidence. There being no proof of the truth of its contents, it was within the definition of *res inter alios acta*. It was simply a narrative to a third person of a past transaction, in relation to which the writer was a competent witness, and gave his deposition. . . ."

These communications were apparently introduced, however, on the assumption that they amounted to declarations by co-conspirators in the furtherance of a conspiracy and hence were admissible against all co-conspirators. Analyzing the complaint, it appears that nine separate conspiracies were charged, viz., a separate conspiracy between the defendant exhibitors as a group and each of the eight distributors, and then a ninth conspiracy among the defendant exhibitors to coerce the distributors. The District Court expressly held as to United Artists, the only distributor found guilty, that there was no conspiracy between United Artists and any defendant exhibitor.[8] The holding was, in substance, that Cumberland had coerced United Artists and that this amounted to a "combination" but not a "conspiracy" between Cumberland and United Artists. Pre-

[8] R. 1478.

sumably the Court had in mind the same theory with respect to the five distributors who were dismissed as defendants. There was no Finding or Conclusion as to any conspiracy whatever.

The principle involved is stated in *Richards v. United States* (C. C. A. 8, 1909) 175 Fed. 911, at page 948. In that case the District Court had charged the jury to the effect that, once a conspiracy or combination is established, and the defendant's connection therewith is shown by independent evidence, the defendant is bound by the acts and declarations of his co-conspirators. The Circuit Court of Appeals said:

> "The fatal objection to this charge was the failure to recognize and declare the established rule that, while whatever is said or done by either one of the parties may bind the others, it must be said or done in furtherance of the common design; . . ."

In *Dowdy v. United States* (C. C. A. 4, 1931), 46 F. (2d) 417, at page 425, it is said:

> ". . . It is well settled that before such a statement or declaration is admissible, it must not only be made during the continuance of the conspiracy, but it must be made in furtherance of it. These statements were nothing more than a confession by Martin implicating Funk, and all the authorities hold that they are inadmissible, except as against the party making them . . ."

Assuming that there had been established by independent evidence a conspiracy or combination between Crescent and Loew's, a declaration by Willingham was nevertheless incompetent unless Willingham was also a co-conspirator and made the declaration in furtherance of the conspiracy. A corporate conspirator must act through agents; but if Loew's was a conspirator, it does not follow that every employee of Loew's was a conspirator. Certainly Willingham was not a party to the conspiracy, because Willingham wanted Loew's to license the product to Lawing rather than

to Crescent. By no stretch of the imagination could these letters written by Willingham be said to have been written in furtherance of a conspiracy which had been established by independent evidence.

Indeed these letters written by Willingham would not have been admissible even against Loew's, if Loew's had been a party to the case. In *Winchester & Partridge Mfg. Co. v. Clegry et al* (1885) 116 U. S. 161, the vendee of personal property brought a suit for the recovery of the property against an officer who had seized it on a writ of attachment against the vendor. The defense was that the sale was collusive and was made pursuant to a conspiracy between the vendor and vendee to defraud the vendor's creditors. To prove this conspiracy the defendants offered declarations of plaintiff's agent, one Spaulding, whom plaintiff had put in possession of the property after he had purchased it. This Court said at page 167:

> "Spaulding was plaintiff's agent to control and manage the property. It was not within the scope of his agency to make admissions or declarations as to the circumstances under which, and the purpose for which, the plaintiff bought the property. Such admissions or declarations are only recitals of the details or circumstances of a past occurrence, and are not proof of the existence of the occurrence. They constitute, in their essence, hearsay evidence."

In the case at bar Loew's was not a party defendant and it is unnecessary to decide whether Willingham's declarations would have been admissible against Loew's. Without further elaboration, however, it seems entirely clear that they were not admissible against the defendant exhibitors: (1) because there was no proof of a conspiracy by independent evidence; (2) because, assuming such a conspiracy, Willingham was not a party to the conspiracy even though he was an employee of Loew's; and (3) assuming a conspiracy to which Willingham was a party, these letters were not written in furtherance thereof.

In Finding 48 there is copied a letter from Reagan of Paramount to Howard of Paramount.[7] Reagan was in Paramount's New York office and Howard was the Exchange Manager in Indianapolis, Indiana. Dozier, an independent exhibitor at Earlington, Ky., had been licensing Paramount product through the Indianapolis Exchange at a time when Crescent was not playing Paramount pictures in Madisonville, Ky. Madisonville had a population two or three times as great as that of Earlington, and when Paramount pictures were not played in Madisonville, it was easy for residents of Madisonville to go three or four miles to Earlington and see these pictures in Dozier's theatre. However, Paramount made a contract for the 1935-36 product with Crescent through the Atlanta Exchange and gave Madisonville clearance over Earlington, which meant that the Indianapolis Exchange had to accept much lower rentals from Dozier in Earlington.[8] Howard complained to Reagan, and Reagan wrote Howard on September 24, 1935, as follows:

> "Dear Mr. Howard:
>
> This will acknowledge receipt of your letter of September 20th, regarding Madisonville and Earlington, Kentucky.
>
> If Madisonville were the only town involved in the Sudekum deal I agree with you that they would not be entitled to any protection over Earlington. However, that is not the case. We have finally been successful in closing a deal with the Sudekum Circuit, which we have been unable to sell for a number of years because of an old argument the Theatre Department had with Mr. Sudekum; but since there is much more involved than just Madisonville, the Company is desirous of securing the film rental we have not had for several years from the Sudekum towns, and it was necessary to include in the Madisonville deal the Earlington protection."

[7] R. 1381.

[8] R. 674-675. See Defendants' Exhibit 223, R. 1351.

Reagan did not testify in the case. If he had testified it would have been difficult for him to explain why Madisonville, with its finer and larger theatre, was not entitled to clearance over Dozier's theatre in the much smaller town of Earlington.[9] Certainly Reagan's letter was not competent evidence to that effect. Not only did Reagan not testify as to the truth of his statement, but the letter was obviously not written in furtherance of a conspiracy between Paramount, Reagan and Crescent, established by independent evidence, to restrain, suppress or eliminate Dozier's competition, but rather to appease a subordinate employee.[10]

In Big Business as well as in Government there are officials who, when forced to make decisions, are prone to give reasons which relieve them from responsibility. Reagan's letter to Howard is a good illustration. Howard was evidently irritated that the Indianapolis Exchange had lost revenue when the Atlanta Exchange made a deal with Crescent, and Reagan was evidently desirous of soothing Howard. Letters of this character from one employee of a distributor to another must necessarily be viewed with skepticism, and there is no reason that they should be entitled to greater consideration as evidence of the truth of their contents than other forms of written hearsay.

In Finding 52, there is quoted a report dated September 16, 1936, from a United Artists salesman concerning his negotiations with Cumberland. This quotation is as follows:

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[9]Cf. Agnew's testimony, R. 1320-1322.

[10]Correspondence of this nature was introduced under a stipulation that the letters were written pursuant to their duties by the persons signing them and that they were received by the persons to whom addressed. R. 723-724. There was no stipulation that the facts stated were true or that the opinions stated were justified. See R. 732-733. Clearly these letters did not constitute memoranda or records of "any act, transaction, occurrence or event" made at the time thereof in the regular course of business so as to be admissible under Act of June 20, 1936, c. 640, Sec. 1, (49 Stat. 1561; 28 U. S. C. A., Sec. 695).

"In Rogersville Hill has opened a new theatre and we will have to play with Hill because this is the only spot of his entire fifteen towns where there is any opposition at all, and Hill has demanded that we approve all contracts or none."[11]

The salesman who wrote the letter did not testify. If he had testified he could not possibly have justified the statement that Cumberland (or Hill) operated theatres in fifteen towns. Cumberland never operated theatres in that many towns. Possibly he might have testified as to the truth of the statement that Hill demanded that United Artists approve all contracts or none. The fact remains, however, that Hill himself died before the trial and that the salesman who wrote the letter was not introduced as a witness. Indeed there is no evidence that the salesman himself had ever spoken to Hill. He may have been referring to what someone else told him. Yet this letter is the basis for the conclusion that Cumberland "coerced" United Artists.

One further illustration will suffice. In Findings 81-85[12] it appears that John D. Henry opened a second-run theatre in Union City, Tennessee, where Crescent was operating a first-run theatre. Crescent also had a second-run theatre in the town but the Court House had burned and Crescent's building, known as the Opera House, was being used as a temporary court building. When Henry (who had just sold out to Ruffin Amusements, Inc., a theatre in Hickman, Kentucky, to devote himself entirely to the insurance business)[13] commenced work on his new theatre in Union City, Tennessee (under circumstances which indicated that he was more interested in selling than operating it)[14] Crescent also commenced to remodel a building to use as a second-run theatre.

[11] R. 1384.
[12] R. 1403-1412.
[13] R. 894.
[14] R. 895.

In Findings 81 and 85 reference is made to a letter from a Fox salesman to his Sales Manager stating that Henry's theatre was "one of the most beautiful little theatres I have ever seen in any town". Of course, any statement in this letter as to the character of the theatre was pure hearsay evidence on that subject. What we mainly desire to call attention to, however, is Finding 83 in which it is said that RKO's Memphis Exchange Manager, one Avery, told Henry that he had sold Crescent fifteen pictures of the 1938-1939 product "but that he couldn't sell any of the other pictures to him because he had been advised by Mr. Sudekum's office not to sell those pictures to Henry as Crescent was going to open a theatre in Union City, and would likely want all of them". The District Court in Finding 82 had held that Henry himself was not a credible witness. This statement in Finding 83 must, therefore, have been based on the letter quoted in said Finding dated January 28, 1939, and written by Avery to RKO's Sales Manager. In this letter Avery said, referring to Henry:

> "I would not sell him any of the 1938-39 product as Mr. Sudekum's booker advised that they were putting in a second theatre themselves over there, and would no doubt use our entire 1938-39 product." (Ex. 179).

Avery was introduced as a witness by the plaintiff and testified that he wrote this letter.[15] He was not asked to testify as to the truth of its contents. On cross-examination, however, he testified that if was RKO's practice and custom, where an exhibitor had made a selective deal for a limited number of pictures, to offer that same exhibitor the remaining pictures before offering them to the opposition. Avery further testified that Crescent had contracted definitely for twenty-one pictures (not fifteen) but played not only the twenty-one pictures but an additional eighteen pictures. Avery further testified that although RKO had

[15] R. 801-802.

licensed eighteen pictures to Henry, from the prior season's product, Henry failed to comply with his contract and played only three of the eighteen pictures.[16]

Finding 83 thus appears to be an inaccurate summary of the evidence, leaving the erroneous impression that RKO had conspired with Crescent to withhold product from Henry. This is merely another instance where the District Court relied on the mere fact that a letter had been written instead of relying on the testimony of the person who wrote the letter.

Not all of the Findings contain quotations from these letters and communications, but practically all of the Findings, to the extent that they are against appellants, refer to such documents as the basis for the Findings. There would be very little left in these Findings if the incompetent evidence were eliminated. Hence we think we are entitled to a reversal and dismissal.

2. Method by Which the Findings Against Appellants Were Formulated.

(Assignment of Error 17).[1]

It is well settled that in an equity case, especially where the witnesses testified in open Court, the Findings of the District Court are entitled to a presumption of correctness. The basis of the rule is that the Trial Judge has seen the witnesses testify, observed their manner and demeanor on the witness stand, compared their testimony on direct examination with that on cross-examination, weighed the conflicting testimony where witnesses contradicted each other, and undertaken through the exercise of the judicial process to arrive at the truth. In the case at bar the Findings were filed approximately eighteen months after the conclusion of the trial. The Findings against appellants are, almost without exception, copied *verbatim* from plain-

[16] R. 802-805.

[1] R. 139, 1514-1515.

tiff's brief.[2] In many respects they conflict with Findings in favor of the three distributors, who remained in the case as defendants, with respect to the same situations.[3] Under these circumstances it is respectfully submitted that these Findings are not entitled to a presumption of correctness.

Undoubtedly it is a difficult matter for a District Judge who presides over a Court with a crowded docket to find the time to make an independent analysis of the evidence in a case of this character, where approximately two months were consumed in the trial. No criticism of the District Judge is intended. It is nevertheless submitted that the procedure adopted was seriously prejudicial to appellants. Plaintiff's brief was naturally a partisan document in which plaintiff's able counsel made the most of every point and undertook to draw every possible inference in favor of plaintiff and gainst defendants. It was necessarily argumentative in its discussion of the facts.

There have been many recent reforms in procedure as exemplified in the new Federal Rules of Civil Procedure. We think, however, that the streamlining of judicial procedure has gone too far if Findings of a District Court copied from the brief of one of the parties are to be accorded any verity whatever on appeal. Our views in this connection are supported by *Process Engineers, Inc.* v. *Container Corporation of America*, (C. C. A. 7, 1934) 70 F. (2d), 487, where Circuit Judge Evans, in delivering the opinion of the Court, said (p. 489):

> "It is urged that the court's findings should be sustained because supported by some evidence. The weakness of this argument lies in the fact that the findings were not made by the court, but are the work of industrious counsel who combined his argument and a partisan and unfair statement of facts into one and

[2] R. 1521-1522.

[3] Illustrations will be pointed out in the next succeeding portion of this brief.

called it, 'Findings of Fact'. It is difficult to distinguish these findings from the brief of counsel for appellee.

"Such so-called findings do not help an appellate court. They reflect the views of counsel who submitted them and detract from the force and effect which are ordinarily given to findings made by the trial judge. When the abuse is aggravated (and the objectionable practice is growing), the assistance to the appellate court, which findings when carefully made by the trial court afford, is lost, and it becomes necessary for us to study the evidence as though no findings had been made by the District Court."

We think the language of Circuit Judge Frank in *United States* v. *Forness* (C. C. A. 2, 1942), 125 F. (2d) 928, at pages 942-943, may also be appropriately considered in this connection. The discussion is lengthy and we quote only the following paragraph:

"We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principles.' " That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds admin-

istrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards."

IV. ASSIGNMENTS OF ERROR 1-11, INCLUSIVE.

Under this heading we proposed very briefly to discuss certain of the Findings as to which we have specifically assigned error. In each instance, these Findings were copied from plaintiff's brief. The principal purpose of these assignments is to annotate and support the general propositions stated under the preceding subdivision of this brief and to illustrate the prejudicial effect of the consideration by the District Court of incompetent evidence and of the adoption from the Government's brief of the Findings on which the Government now relies to support the decree. No one of these assignments, in and of itself, is determinative of any of the main issues raised on the appeal, viz., the question of the elimination of portions of the decree. Their cumulative effect is, we believe, to demonstrate the utter lack of factual basis for those portions of the decree as to which error has been specifically assigned.[1]

Finding 39—Paris, Tenn.
(Assignment of Error 1).[1]

Promptly after Crescent opened its new theatre in Brownsville, Tennessee, in the summer of 1935, in opposition to Lawing, the latter opened a theatre in Paris, Tennessee, in opposition to Crescent.[2] In Finding 39 it is stated that for his Paris theatre Lawing obtained 1934-35 Paramount product and 1935-36 Fox product and was able to spotbook a few RKO pictures. The Finding then proceeds:

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[1]These assignments of error seeking a revision of the decree are discussed in the next succeeding subdivisions of this brief, commencing at page 96.

[1]R. 1506.

[2]R. 1373.

"He was unable to secure any other major product nor would any of the distributors sell him a second run; the ostensible ground of refusal was that the town was too small for a second run. But the Crescent was allowed to repeat pictures which had played Lawing's theatre in Brownsville, a much smaller town."

While Mr. Lawing did testify on direct examination, in very general terms, that he was unable to secure any other major product for Paris and that none of the distributors would sell him a second run,[3] it is elementary that the cross-examination of a witness must be considered in connection with his direct examination and, if the two are in conflict, no weight can be given to either. On cross-examination Mr. Lawing testified as follows:[4]

"Q. What did the Columbia representative tell you when you made application for second run pictures?

A. They sold me some first run pictures that Mr. Sudekum didn't have under contract up there.

Q. Did they refuse to sell you any second run pictures?

A. I have a very vague memory about that. As a matter of fact, I don't know that I recall definitely about asking for second run Columbia.

Q. Now, which companies did you definitely ask for second run pictures?

A. I believe that would be impossible for me to answer except that I possibly went into all of them and asked them if it would be possible to get second run pictures for Paris and they had all about the same answer; that they either wouldn't care to take a contract or that Paris was too small for second run operation.

Q. You say you possibly did that. Do you mean from your recollection at this time it is possible that back in 1935 you did those things?

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[3] R. 302-303.

[4] R. 328-329.

A. Well, it is customary to call on all the companies and make every reasonable effort to get product for the towns, yes sir.

Q. I say, you are basing your testimony about that on what is possible or what was customary and not on any actual or definite recollection?

A. Well, it would be very vague as far as the definite part of it is concerned."

Finding 39 is, we think, in irreconcilable conflict with the portion of Finding 154[5] relating to Paris, Tennessee, as follows:

"At Paris, Tennessee, Lawing made no application for Universal product and it does not appear that the Crescent Amusement Company contracted for Universal product during the period that it operated in competition with Lawing."

We think it is also in irreconcilable conflict with the statement in Finding 172[6], with respect to United Artists, that:

"He (Lawing) made no effort to procure the 1935-1936 product either at Paris or Brownsville."

Finding 39 illustrates the prejudicial effect to appellants of the District Court's method of formulating the Findings against appellants. Finding 39 was copied from plaintiff's brief.[7] Finding 154 and Finding 172, which were not taken from plaintiff's brief, reflect a different state of facts.

Attention is further called to the fact that while Lawing's Paris theatre was specified by plaintiff in paragraph 1 of one bill of particulars, no particulars as to alleged "distress methods" were ever furnished.[8]

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[5] R. 1462.
[6] R. 1470.
[7] R. 1522.
[8] R. 164.

Findings 44 and 45—Brownsville, Tenn.

(Assignments of Error 2, 3, and 4).[1]

These Findings are in regard to the alleged discrimination by Loew's against Lawing. In Finding 44[2] reference is made to testimony of Loew's New York Sales Manager, Mr. Connors, who testified that one reason for overruling Willingham's recommendation that Lawing's offer be accepted was "that Willingham had advised him that Lawing claimed he could not pay as much for the 1935-1936 product as he had previously been paying" (referring to Willingham's letter of May 28, 1935, which was introduced as Def. Ex. 51),[3] and that Lawing's application called for less money than he felt Loew's product was worth in Brownsville."

Finding 44 then proceeds as follows:

> "... This could not possibly have been Connor's reason for rejecting Lawing's application; however, because, first, there is nothing to show that Connors ever told anyone Lawing's offer was inadequate, and second, Lawing's offer, as a matter of fact, was as good as, if not better than, the deal Loew's accepted from Crescent. Connors further explained, in justification for his decision overruling Willingham's recommendation, that he knew that Lawing's theatre was not as modern as the new Crescent Theatre, and he felt that Metro could get more money from the new theatre. This was also an afterthought, as there is no suggestion in the voluminous correspondence regarding this situation introduced in evidence by both sides that the relative merits of the theatres entered into his decision, nor was there any necessity for Connors to speculate about what he could get from the two theatres because he had both offers before him, and by the simple process of comparing the two offers, he would have ascertained that from the standpoint of Loew's, the Lawing deal was as good as, if not better than, the Crescent offer."

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[1] R. 1507-1508.

[2] R. 1375-1377.

[3] R. 751.

In Finding 45 it is stated:

> "Thus, as far as the disposition of Loew's 1935-36 product in Brownsville, Tennessee, is concerned, the record shows that it was licensed to Crescent although Lawing offered Loew's at least as good a deal as the Crescent deal and was Loew's old customer in Brownsville."

This situation has been discussed heretofore in an earlier portion of this brief and reference is made to said discussion so as to avoid repetition. There is absolutely no basis for the Finding that Connors testified falsely or that his reasons for overruling Willingham's recommendations were not as stated by him. Plaintiff's counsel did not question Connors on cross-examination as to the source of his information regarding the character of Lawing's theater in Brownsville as compared with Crescent's theatre.[4] The evidence as to the revenue obtained by Loew's from Crescent, as compared with the revenue previously obtained from Lawing, and as to the revenue which Loew's might have expected to obtain from Lawing, was in direct conflict with the Findings.[5]

Finding 48—Earlington, Ky.
(Assignment of Error 5).[1]

As explained in an earlier portion of this brief, Crescent did not play Paramount pictures in Madisonville, Kentucky, during the 1933-34 and the 1934-35 seasons. When Dozier played Paramount pictures of these two seasons in Earlington, Kentucky, three or four miles distant, no question of clearance was involved. Crescent licensed the 1935-36 product for Madisonville on August 22, 1935, after Dozier had licensed this product for Earlington in April,

[4] R. 1019-1020.
[5] *Supra*, pp. 57-58.
[1] R. 1508.

1935.[2] At the time Dozier made his contract, Paramount was negotiating with Crescent and necessarily had to consider whether Madisonville would have clearance over Earlington, or Earlington would have clearance over Madisonville. Hence, when Dozier made his contract in April, 1935, there was inserted a provision as follows:

> "Clearance: Subject to final decision of Indianapolis Clearance Board".

This was a Board that had been set up under the authority of the National Industrial Recovery Act, which was declared unconstitutional about thirty days later, and, as stated by plaintiff's counsel at the trial of the case, the Board broke up immediately after the decision.[3]

The plain meaning of this provision of the contract was that the Board would determine whether Earlington was to have clearance over Madisonville, or Madisonville was to have clearance over Earlington, and the length of the clearance. Dozier was permitted to testify, however, that he had an oral agreement with a Paramount salesman, one Newman, that Earlington would have clearance over Madisonville, and that only the length of the clearance would be fixed by the Board.[4] It was undisputed that film salesmen had no authority to make contracts. Dozier's testimony as to his conversation with Newman was plainly incompetent not only for that reason but for the reason that it varied the terms of the written contract.

Crescent's contract with Paramount, executed in August, 1935, (after the Board had broken up) gave Madisonville clearance over Earlington. Paramount then entered into a "superseding contract" with Dozier, reducing the film rentals called for in his agreement of April 3, 1935, by approximately seventy-five per cent. This was fair because when Dozier had to play the pictures after Madison-

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[2] R. 674-675. See Defendants' Exhibit 223, R. 1351.

[3] R. 342-346.

[4] R. 364.

ville, he was catering only to the residents of Earlington and the pictures were less valuable than when he was catering to the residents of both towns.[5]

In Finding 48[6] it is stated:

> "In April 1935, Dozier entered into a contract for Paramount's 1935-36 product which provided that Dozier was to have clearance over Madisonville, but the the length of the clearance was to be decided by the N. R. A. Clearance Board at Indianapolis."

Again, in Finding 48 it is stated that Paramount's contract with Crescent giving Madisonville clearance over Earlington "was in direct conflict with his (Dozier's) agreement with Paramount."

It is submitted that these statements are wholly without support in the record, unless plainly incompetent evidence is to be considered.

Assuming, however, that Paramount violated its contract with Dozier: there was no evidence that Crescent knew of the provision in the contract regarding clearance or in any way induced Paramount to breach the contract. The Finding as to a breach of contract is therefore immaterial and irrelevant. It is nevertheless prejudicial to appellants for the reason that there is no express Finding as to Crescent's lack of complicity.

Attention is further called to the fact that plaintiff's specification of Earlington in its bill of particulars related solely to competition between the theatres at Earlington and not to competition between Dozier's Earlington theatre and Crescent's Madisonville theatre.[7]

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[5] See statement of plaintiff's counsel, R. 345-346. Dozier had advertised the pictures in Madisonville to attract residents of that town to his Earlington theatre. R. 1272.

[6] R. 1379.

[7] R. 155.

Finding 54—Rogersville, Tennessee.

(Assignment of Error 6).[1]

In Finding 54[2] the following language appears:

> "An examination of Miller's application for the Warner 1937-38 product shows that it called for a total guaranteed rental on feature pictures which was $35.00 less than the rental called for by the Cumberland contract. However, it called for 18 pictures at a percentage against a guarantee, and if these pictures had paid anything above the guarantee, the contract would have equaled or exceeded the Cumberland deal."

As heretofore pointed out, this Finding disregards entirely the question of short subjects. A comparison of the film rentals received by Warner Bros. from Miller in 1936-1937 and Cumberland in 1937-1938 was as follows:[3]

	Features	Scores	Shorts	Total
1936-37 Miller	$858.84	$145.00	$184.50	$1188.34
1937-38 Cumberland	975.00	135.00	440.50	1550.50

Finding 59—Huntingdon and McKenzie, Tennessee.

(Assignment of Error 7).[1]

The theatre at McKenzie, Tennessee, in Carroll County, was operated by Moore. Rockwood acquired a theatre in Huntingdon, Tennessee, a neighboring town of slightly less population within the actual corporate limits than McKenzie, but Huntingdon was the County Seat and the McKenzie theatre was very inferior.[2]

The following language appears in Finding 59:[3]

> "The Huntingdon deal for the 1938-39 season was only $37.00 higher than the 1937-38 deal when it did

[1] R. 1508.
[2] R. 1386.
[3] R. 1108.
[1] R. 1509. See requested amendment to the Finding, R. 112.
[2] R. 1226-1228, 1250-1252.
[3] R. 1388-1389.

not have clearance over McKenzie, and this increase was not in payment for the switch in runs because it represented the identical season-to-season increase called for by the franchise in other Rockwood situations where no change in clearance was involved. Insofar as Huntingdon and McKenzie are concerned, Paramount lost money by switching the runs.[4] Why then did the change occur? This is answered by Morgan's letter to Unger, Paramount's southern division sales manager, on August 6, 1938, in which he said:

> 'With further reference to your letter of July 28, regarding the letter that Mr. Y. D. Moore, of McKenzie, Tennessee, wrote to Mr. Agnew. I have discussed the matter several times with Mr. Sudekum, and he insists that Huntingdon have protection over McKenzie.'[5][6]

This is another illustration of the manner in which Findings were based on incompetent evidence rather than on competent evidence.[6] It is to be assumed that Rockwood insisted that Huntingdon have protection over McKenzie. It is likewise to be assumed that Moore insisted that McKenzie have protection over Huntingdon. The question for Paramount to decide was how to get the greatest aggregate revenue from the two towns over the five year period covered by the franchise,—whether by giving McKenzie clearance over Huntingdon or vice versa.[7] Rockwood agreed to play the four top Paramount pictures on a percentage of gross receipts and undoubtedly the gross re-

[4] This is pure speculation. Rockwood may have paid too much for the 1937-1938 product, treating that season separately, and may have agreed to the franchise terms for Huntingdon for the full five year period only on condition that Huntingdon was to have clearance over McKenzie commencing with the 1938-1939 season.

[5] R. 655.

[6] Plaintiff's counsel merely asked Morgan if he wrote the letter in the course of his duties as Southern District Manager of Paramount. R. 650. Morgan was not asked and Sudekum was not asked about the *facts* of the matter.

[7] R. 1319, 1330.

ceipts would have been substantially decreased by giving McKenzie clearance over Huntingdon.[8]

Attention is further called to the fact that plaintiff's specification of McKenzie in its bill of particulars related solely to an alleged threat of competition in McKenzie and not to competition between Moore's theatre in McKenzie and Rockwood's theatre in Huntingdon.[9]

Finding 63—Hopkinsville, Ky.

(Assignment of Error 8).[1]

In Hopkinsville, Kentucky, a theatre in opposition to Crescent's theatres was opened by Anderson, former manager of one of Crescent's Hopkinsville theatres. On October 12, 1937, Anderson wired Paramount asking whether its second-run product was available and Paramount's Atlanta Manager replied on October 14, 1937, that they were unable to offer second-run service to him. Previously on October 11, 1937, a Paramount salesman, one Lowe, had advised Anderson that Paramount had made a deal with Crescent for its circuit.[2] After stating these facts, Finding 63[3] proceeds as follows:

> "The deal with Sudekum referred to by Lowe, was the franchise dated July 28, 1938, as of November 1, 1937. Clause 8(e) of that franchise gave Crescent the option of playing an additional or repeat-run on any picture it played first-run in Hopkinsville and all of the other towns outside Nashville where a first run was licensed. By this option Crescent was able to prevent Anderson from obtaining any second-run feature although it made no commitment to use them itself."

Lowe was not introduced as a witness, and there was no evidence whatever to support the above statements. It is

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[8]Exhibit P-29.

[9]R. 157.

[1]R. 1509.

[2]R. 621.

[3]R. 1392.

true that Crescent and Paramount had agreed in principle on a five-year franchise, but the details had not been worked out and the agreement was not actually executed until July 28, 1938 "as of November 1, 1937".[4] Lowe's communication to Anderson was on October 11, 1937. Certainly Lowe, a salesman, did not know then that the franchise as ultimately drafted would contain clause 8(e).[5] This clause will be more fully discussed in a later portion of this brief. Suffice it to say here that there was no evidence that Paramount's unwillingness to negotiate with Anderson for second-run product in Hopkinsville was dependent upon clause 8(e) of the franchise;[6] and the language "Crescent was able to prevent Anderson from obtaining any second-run feature" is wholly unwarranted because there was no evidence that Crescent even knew that Anderson wanted to negotiate for it.

Finding 70—Morristown, Tenn.
(Assignment of Error 9).[1]

Tim Smith of Peerless Enterprises, Inc., opened a theatre on March 26, 1937, in Morristown, Tennessee, where Crescent was operating a theatre. In February, 1938, Smith asked Paramount to permit him to play in his Morristown theatre six pictures which he had contracted to play in a theatre which Smith operated at Fountain City, Tennessee. He received a reply signed by A. H. Duren, booking agent of Paramount, saying: "we will be unable to do this, since our service has been sold to another exhibitor in Morristown for both first and subsequent runs".[2] Duren was not in-

[4]Exhibit P-29.

[5]The negotiations as to the franchise were not closed until December 21, 1937. R. 679.

[6]See Defendants' Exhibit 224, R. 1351, as to revenue received by Paramount from Crescent in 1937-1938 as compared with revenue received from Anderson in 1936-1937.

[1]R. 1509.

[2]R. 531.

troduced as a witness and the introduction of this letter by Smith proved nothing except the fact that Smith received the letter and that Paramount refused to permit him to transfer the pictures.

In Finding 70[3] it is said (referring to the five-year franchise):

> "... One reason Smith was advised that Paramount pictures were not available to him second-run was because of the repeat-run option in the same franchise. This is clearly indicated by the following portion of Morgan's letter to Unger of November 11, 1938, which was in response to a letter from Unger to Morgan, written after Smith had complained to the Department of Justice, directing Morgan to make some pictures available for Smith (Ex. 152):[4]
>
> Now as regards the last paragraph of your letter about second runs, following shows the population of each town:
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> | | |
> |---|---|
> | Morristown | 5,875 |
> | Harriman | 5,000 |
> | Newport | 2,753 |
>
> In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8, of the Crescent Amusement Company franchise, provides he can repeat any feature at a certain given price."

As we see it, Morgan's letter indicates that he was undertaking to give a reason which had not previously entered into the matter at all. Morgan's letter was written nine months after Paramount's booking agent had refused to permit Smith to transfer the pictures from Fountain City to Morristown. This letter from Morgan, a Paramount employee, to his immediate superior was certainly not written in furtherance of a conspiracy between Paramount

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[3] R. 1397.

[4] R. 651-656.

and Crescent to eliminate Tim Smith's competition at Morristown, Tennessee. Not only was Morgan's letter written about a past event, but Morgan was not the man who had refused to permit Smith to transfer the pictures. In his letter Morgan erroneously assumed that Smith had tried to license these pictures for Morristown, while as a matter of fact he had already licensed them for Fountain City and was trying to get out of his agreement. In his testimony Morgan went into the hypothetical situation which would have existed if Smith had attempted actually to license these pictures for Morristown.[5]

Morgan also mentioned Harriman, Tenn., and Newport, Tenn., in his letter of November 11, 1938. Crescent had both a first-run theatre and a second-run theatre in Harriman, Tennessee, when Smith opened up his opposition theatre. The Court makes no Finding of discrimination as to Harriman or Newport (the theatre at Newport was operated by Newport Amusements, Inc. which was not made a defendant) and it is unnecessary to discuss these situations.

Finding 81—Union City, Tennessee.

(Assignment of Error 10).[1]

When John D. Henry opened his theatre in Union City in opposition to Crescent (under circumstances which clearly indicated that Henry was simply trying to create and cash in on a nuisance value),[2] Crescent's second-run theatre in

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[5]R. 694-696, 1038-1039.

[1]R. 1510.

[2]R. 893-895. Henry had operated the only theatre at Hickman, Kentucky, and had solicited the interest of Ruffin Amusements, Inc., toward its purchase for the purpose (as he represented) of getting out of the threatre business. Ruffin Amusements, Inc. bought the theatre, and immediately after he made the sale Henry began to make arrangements to open a theatre at Union City to compete with Crescent. Henry was engaged in the loan and insurance business and had found a way of picking up some extra money.

the town, known as the Opera House, was being used for a temporary court house while a new court house was under construction. About a week before Henry opened his second-run theatre, Crescent opened a new second-run theatre known as the "Ritz". There was no evidence that Crescent intended to operate both the Ritz and the Opera House at the same time, but Crescent necessarily had the option to operate its second-run theatre in the Opera House instead of the Ritz when the new court house was finished. Paramount amended the franchise by providing that the pictures contracted to be played in Union City might be played at either the Capitol (the first-run house), Ritz or Opera House.

In Finding 81[3] it is said:

> "... The negotiation and execution of the rider at this time showed that Crescent intended if necessary to eliminate Henry, to operate all three theatres, and Paramount was willing to cooperate."

This is merely an inference improperly drawn from the admitted fact that the rider was executed. Under well settled principles as to burden of proof, defendants were entitled to the presumption that the rider was executed in the ordinary course of business and for a bona fide purpose, because this inference was at least equally permissible. There was no other evidence that Crescent or Paramount had any understanding such as that suggested in Finding 81 which was, as in the case of the other Findings referred to in these assignments of error, copied from plaintiff's brief.[4]

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[3]R. 1403.
[4]R. 1522.

Finding 100—Gadsden, Ala.
(Assignment of Error 11).[1]

Crescent operated three theatres in Gadsden, Alabama, all located in the down-town business district, and one theatre in Alabama City, which was formerly a separate municipality but had been annexed to Gadsden. Crescent and the distributors, however, had continued to treat Alabama City as a separate town, for the purpose of film deals, instead of as a part of Gadsden. In other words, film deals made by Crescent specified Alabama City and Gadsden as separate towns.[2] After the present suit was filed, a suburban or "neighborhood" theatre was built in East Gadsden, a suburb on the opposite side of downtown Gadsden from Alabama City, and opened in September, 1939.[3] This theatre, known as the Dixie, had several successive managers. Two of them, Currey and Bailey, testified in the case.

In Finding 100[4] it is said:

> "Curry didn't attempt to negotiate with Paramount 'because it was well understood that the Crescent Amusement Company had a first-run franchise and second run option'. The franchise provides both a first run in Gadsden and a first run in Alabama City with a repeat-run option."

It is true that Curry, who was manager for about seven weeks in July and August, 1940,[5] testified on direct examination that he didn't try to negotiate with Paramount for second-run product "because it was well understood that the Crescent Amusement Company had a first run franchise and a second run option, so I didn't even have the heart to go to see them".[6] Actually the Dixie Theatre, in July and

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[1] R. 1510.
[2] R. 1421, second paragraph of Finding 94; see also R. 850-852.
[3] R. 454-456.
[4] R. 1424-1425.
[5] R. 462.
[6] R. 472.

August, 1940, when Curry was its manager, already had a contract with Paramount, made by one of Curry's predecessors, covering specified pictures of the 1938-39 product and designated "second run Gadsden";[7] and at this same time Crescent had a definite second-run contract (not an option) containing a definite commitment for twenty photoplays of the 1939-40 product, with only thirty days after first-run playdate to notify Paramount of its intention to use any picture for second-run in one of its three down-town Gadsden theatres.[8] The Dixie Theatre thus had full opportunity to license the rejected second-run pictures of the current product, (in addition to making an ordinary third-run deal), and could always know, within thirty days after first-run exhibition in Gadsden, whether a particular picture was available for second-run exhibition. The pictures selected by Crescent had to be played at the rate of two per month, as available,[9] so that the Dixie Theatre was not prejudiced if it desired to play these pictures on third-run. It must always be kept in mind that the Dixie Theatre was a suburban or "neighborhood" house of the type which normally plays pictures after the down-town theatres have played them.

In Finding 100[10] it is further stated:

> "Fox, Loew, Paramount, United Artists, and Warner all held the Dixie back of the Ritz, although there was no clearance provision in their contracts with the Ritz which would require them to do so. Their uniformily in holding a superior theatre behind an inferior one may only be explained by the pressure which Sudekum was able to exert on each of these distributors."

The Ritz was Crescent's Alabama City theatre, which had been in operation for many years. The availability of prod-

[7] Defendants' Exhibit 227; see also R. 1080-1081.
[8] Defendants' Exhibit 228.
[9] Defendants' Exhibit 228.
[10] R. 1425.

uct for exhibition in the Ritz had been long established, and was not changed when the Dixie Theatre was opened. The two theatres were on opposite sides of down-town Gadsden, —about five miles apart,—and were not competitive in any substantial way.[11] It is to be assumed that the film rentals paid by the Dixie Theatre were substantially lower than the film rentals paid by Crescent for the Ritz, in view of the fact that the Ritz played the pictures earlier. However, there was not the slightest evidence that Crescent had any agreement with any of the distributors as to play dates for the Dixie Theatre. There was positive testimony to the contrary.[12] Crescent had no control whatever over the distributors as to how they made their product available. So far as United Artists is concerned, the above quoted language from Finding 100 is at variance with Finding 99,[13] which is to the effect that after the Dixie Theatre was opened, United Artists merely continued its established custom of setting up the Ritz Theatre at Alabama City as a first-run situation for the Alabama City area. There was not the slightest evidence of any "pressure" exerted by Sudekum on the distributors with reference to their deals with the Dixie Theatre; and the language in Finding 100 is another illustration of unwarranted deductions from the evidence.[14]

V. PARAGRAPHS (8) AND (12) OF THE DECREE. (Assignment of Error 21).

For the convenience of the Court paragraphs (8) and (12) of the decree are copied below:

"(8) That each of the defendants, the Crescent Amusement Company, Muscle Shoals Theatres, Rock-

[11] R. 456-457.

[12] R. 1209-1210.

[13] R. 1424.

[14] That the Dixie Theatre suffered from no shortage of films is evidenced by the fact that it didn't play Fox pictures which it contracted to play. R. 1138, 1157.

wood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations, and to discriminate against its independent competitors in licensing films.

"(12) That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation."

Certain similarities and certain differences will appear from a comparison of these two paragraphs in the decree, both designed to prevent appellants from exercising leverage against the distributors.

We have heretofore discussed the theory of "coercion" on which these paragraphs and other paragraphs of the decree are based. We now propose to discuss briefly the effect which these provisions of the decree will necessarily have.

Let us assume that the circuit has been doing business for many years with RKO, making circuit deals each season. Let us assume that when this decree becomes effective independent opposition opens in one of the towns in the circuit,—perhaps a Tim Smith or John D. Henry. RKO then says to the circuit: "We will not negotiate with you for pictures in your new competitive situation unless you agree to such and such prices and terms for the remainder of the circuit." The circuit must accede to these prices and terms for the rest of the circuit before it can even negotiate with RKO in the competitive situation. RKO has already had the business of the circuit and will not get additional business by these means but would get better terms and greater revenue.

It must be borne in mind that in non-competitive or "closed" situations the exhibitor can ordinarily take ad-

vantage of competition among the distributors for the exhibitor's business. In competitive situations, on the other hand, the distributors can take advantage of the competition between the exhibitors for pictures, playing position, etc. Paragraphs (8) and (12) of the decree take away from the exhibitors the former advantages they enjoyed and give the distributors advantages which they did not enjoy. If it were not for the decree, the circuit could say to RKO in the hypothetical case above described: "We will accede to your prices and terms for the remainder of the circuit only if you agree to corresponding prices and terms in the town where we have competition."

Plaintiff's theory in the case at bar disregards entirely the question of film rentals and terms in film deals. It assumes that prices and terms are standardized and that the only question is whether the distributor will furnish the pictures to the circuit or the independent. This is a wholly unrealistic and fallacious viewpoint which, we think, underlies the entire decree.

It is difficult to see how these paragraphs of the decree will be of much help to independent exhibitors. Certainly the price of pictures will not be reduced. If the theory of the Government is that an independent exhibitor should have the opportunity of bidding against the circuit for pictures, playing position, etc., the distributors should have remained in the case as defendants. If they had been found guilty, it would have been possible for an injunction to issue which would restrain them from licensing films in a competitive situation except upon a strictly competitive basis. The present decree, which operates upon the circuit rather than upon the distributors, is ineffective to reach the desired result and can have no possible effect except to aggrandize the distributors at the expense of the exhibitors.

Aside from the economic aspects, and viewing the question as one of ordinary equity practice, the injunction against the defendant exhibitors was improper because the distributors were necessary or indispensable parties. The

Big Five were deliberately and voluntarily dismissed as defendants after having originally been made parties, and no injunction was issued against United Artists, the only defendant distributor found guilty.

In Pomeroy's Equity Jurisprudence, Fifth Edition, Sec. 114, it is said that a fundamental principle concerning parties is that "all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit: . . . The primary object is, that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed, and all may be bound in respect thereto by the single decree."

In support of the text the author cites cases decided by this Court, including *Niles-Bement-Pond Company* v. *Iron Moulders Union* (1920), 254 U. S. 77, in which the Court said:

> "There is no prescribed formula for determining in every case where a person or corporation is an indispensable party or not, but a rule early announced and often applied by this court is sharply applicable to the case at bar. In *Shields* v. *Barrow*, 17 How. 130, 139, this language,—quoted with approval in *Barney* v. *Baltimore City*, 6 Wall. 280, 284, and again in *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 48,—was used to describe parties so indispensable that a court of equity will not proceed to final decision without them, viz:
>
> "'Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'"

In the later case of *Commonwealth Trust Company of Pittsburgh v. Smith et al*, (1924), 266 U. S. 152, suit had been brought by a trustee for bondholders to foreclose the lien on the land and water rights of two settlers under a reclamation project. The defendants urged that the bill should be dismissed because all the settlers under the particular project had not been made defendants. The District Court dismissed the bill because of the refusal to bring in the additional parties and this Court affirmed, quoting with approval the language of the District Judge as follows:

> "In a very substantial sense all the settlers are parties to one general contract, in the subject matter of which all are interested and by virtue of which all have rights so interdependent, whether they be regarded as joint or several, that the interest of one cannot be defined and adjudicated without affecting the interests of all others."

Our best authority in the case at bar for the theory that the distributors were necessary parties is the Anti-Trust Division itself. When the complaint was filed there were eight defendant distributors and paragraph 4 of the prayer for relief read as follows:

> "4. That the defendant *distributors* herein, and each and all of their respective officers and directors, and each and all of their respective servants, agents, and employees, and all persons acting or claiming to act on behalf of said defendants or any of them, be perpetually enjoined and restrained from licensing feature pictures for exhibition on any run at any theatre in any of the Crescent towns, except upon a local competitive basis whereby all theatres operating in each of said towns will have an equal opportunity to license pictures for that area without regard to whether these theatres or any of them form or constitute a part of a circuit of theatres." (Italics ours).

There was not in the original complaint, and there was never added by amendment, a prayer that the defendant

exhibitors be enjoined as now provided in paragraphs (8) and (12) of the decree. The draftsman of the complaint recognized that any injunction of this character should operate against the distributors,—not against the exhibitors. This is simply another illustration of the manner in which the theory of the suit was changed in midstream and of the manner in which the decree was based on a theory not embodied in the complaint. We repeat that United Artists was found guilty but *was not included* in the injunctive relief contained in these two paragraphs of the decree.

Passing now from questions of economics and questions of practice, it is next submitted that these paragraphs of the decree cannot be sustained under the interpretation given the Sherman Act by this Court in *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 84 L. ed. 1311. Discriminations by sellers as between different purchasers were not regarded as "restraints of trade" at common law. That Congress did not intend the Sherman Act to prohibit such discriminations is indicated by the fact that it enacted the Clayton Act and the Robinson-Patman Act (Title 15, U. S. C. A. Sections 12, et seq.) Except in the case of public utilities, there has never been a legislative rule which undertakes to put every purchaser on exactly the same footing with respect to any service or commodity. The liberty of trade would be greatly impaired if, for example, a milliner could not save an especially attractive hat for a good customer, or even a prospective customer, and decline to sell it to someone else in her own absolute discretion.

In *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, decided April 10, 1944, this Court said:

> "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District

Court apparently was loath to deny to Soft-Lite this privilege of selection."

As previously suggested, it is the theory of the portion of the decree now under discussion that, in localities where there are competing theatres, motion picture films should be licensed on the basis of competitive bidding. Certainly the distributors could have no objections because competitive bidding raises prices. But it is a novel view of the Sherman Act whereby it becomes the medium to enforce, by judicial decree, a trade practice which raises prices instead of lowering them. In *Apex Hosiery Co.* v. *Leader*, *supra*, this Court interpreted the Sherman Act as designed to prevent practices which "deprive purchasers or consumers of the advantages which they derive from free competition." Here the attempt is made to establish free competition among purchasers for the advantage of the sellers. The interests of the theatre-going public are not considered.

We do not contend, and it is unnecessary in this case for the Court to consider the question, that the Sherman Act may not under some circumstances be invoked by sellers against combinations of purchasers. Indeed the Government has in recent years invoked the Sherman Act for such purposes, but always in favor of sellers of perishable goods, such as livestock, which must be sold promptly and through local markets.[1] This is the first time that the Sherman Act has been invoked, so far as we know, to protect sellers of the products of industry from an alleged "combination" of purchasers on the ground that the combination is able to procure lower prices and more favorable terms than can be procured by individual purchasers. The fact that the emphasis is on the supposed discrimination against the

[1] *United States* v. *St. Joseph Stock Yards* (D. C. W. D. Mo. 1942), 44 F. Supp. 31; *United States* v. *Swift & Co. et al* (D. C. Colo. 1942) 46 F. Supp. 848 (appeal dismissed 318 U. S. 442); *United States* v. *Swift & Co. et al* (D. C. Colo. 1943), 52 F. Supp. 476.

individual purchaser who is in competition with the combination cannot conceal the actual economic philosophy behind this portion of the decree. An individual exhibitor, of course, is always free to join one of the cooperative associations of theatre operators which bargain for pictures through a common purchasing agent.

It is to the pecuniary interest of any distributor to have two competitive theatres bidding for its product in any town rather than a local monopoly, provided the two theatres are comparable in size, equipment, appointments, etc., for the reason that film rentals rise with competition. In the case of *Interstate Circuit* v. *U. S.*, 306 U. S., 208, it was to the pecuniary interest of the distributors to be coerced. In the case at bar, however, we have just the opposite in that it is not to the pecuniary interest of the distributors to suppress individually operated theatres. The proof shows that the distributors always desire competition among exhibitors, provided that it is of a substantial and bona fide character.

There is no proof in this case that any of the eight distributors is so weak as not to be able to resist coercion from the defendant exhibitors. The evidence is to the contrary. The undisputed evidence is that the distributors prefer to lose the business of the defendant exhibitors for one or more seasons rather than to establish precedents which would be hard to overcome in succeeding years. They prefer to take a temporary loss in revenue rather than to depart from their established business practices in order to obtain this revenue.[2] The uncontradicted proof is that the distributors each year call for higher film rentals than in the preceding year. The exhibitors always endeavor to buy the product at the lowest possible price, and rather than establish a low basis the distributors have oftentimes refused to sell the product to the defendant exhibitors for one or more seasons.

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[2]R. 1024-1025.

No instance was shown in the proof in which any distributor "sold away" from an established independent account except where the immediate or potential revenue from the new account was substantially greater. Where the established account has been unsatisfactory or where the new theatre is substantially larger and better, the potential revenue is likewise substantially greater. It is to the interest of a producer to have its pictures shown in the best theatre in the town. The plaintiff did not prove a single instance in which any distributor has "sold away" from an established account in favor of a theatre which was not substantially larger and better. The proof revealed several instances, however, in which the distributor remained with an established account whose theatre was substantially smaller and inferior to the new competing chain theatre.

We do not dispute the proposition that competition among exhibitors for the patronage of the public is in the public interest; but we think it is even more in the public interest to have motion pictures exhibited by exhibitors who are independent of affiliation with the producers and distributors of the pictures and who have the power to bargain with the distributors, on a fairly equal footing, with respect to the film rentals and terms on which the pictures are to be exhibited. It is this power to bargain,—referred to in the complaint as "circuit buying power",—which the Government seeks to destroy. To have a bargaining position that is worth anything, an exhibitor (or association of exhibitors) must have a sufficient number of theatres so that the revenue to the distributor is worthwhile; otherwise, the distributor,—backed by great resources and indifferent to the fate of the exhibitor,—may name a film rental for a group of pictures and say "take it or leave it".

The public has the right to have motion pictures shown in decent theatres and at reasonable admission prices, and an exhibitor who constantly pays exorbitant film rentals cannot give this service. It must be borne in mind that

the business of exhibiting motion pictures is, by its very nature, competitive with other forms of amusement,[3] and that it is to the selfish interest of the operator of a motion picture theatre to give the public a good value for its admission dollar so that theatre-goers will not turn to other forms of amusement. An exhibitor cannot give this value to the theatre-going public if the distributors are given greater advantage than they now have in their bargaining positions with exhibitors, such as these appellants, who are not affiliated with them. "Circuit buying power" is, we think, in the public interest rather than contrary to the public interest.

Assuming the existence of the facts sought to be established by the Government, can it be said that anything has been proved except the proposition that the defendant exhibitors have bargained and traded with the distributors to the best of their ability in the interest of their own business? A buying combination may be of such a character that it unreasonably restrains commerce among the states, but this would only be true in the case of great disparity between the economic positions of the sellers and of the buying monopoly. For example, it may be argued that if the larger tobacco companies were found to engage in concerted buying of tobacco from the many hundreds of individual tobacco growers in the tobacco growing sections of the country, a violation of Section 1 of the Sherman Act would be spelled out. In the Case at bar, the opposite situation exists. Here we have eight large producing and distributing companies. The position in the industry of each of these companies is far more powerful than that of the alleged combination of buyers attacked by the Government.

In any Sherman Act case the conditions in the particular industry constitute an important consideration in gauging the effect on the competitive conditions in the industry of the activities complained of. Thus, in *Appalachian Coals* v.

[3] R. 896, 1192-1193.

United States (1933), 288 U. S., 344, conditions in the coal industry were found to have been such that the public interest was not prejudiced by a combination of coal producers controlling about 73 percent of the commercial production of coal in the Appalachian territory. The Court said:

> "The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form, and, if there is not, it is not to be condemned because of the absence of corporation integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint.
>
> "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be a 'definite factual showing of illegality.' *Standard Oil Company v. United States*, 283 U. S. 179. . . ."

The paradoxical nature of the decree in this case may perhaps be demonstrated by a *reductio ad absurdum* argument. If the so-called circuit buying power of a group of exhibitors is injurious to their competitors, it is injurious because the group which exercises the circuit buying power gets more favorable terms from the distributors than indi-

vidual exhibitors are able to obtain.[4] Assuming that the exercise of circuit buying power is illegal, it seems obvious that the distributors suffer damage equally with the independent exhibitors. That being true, if this decree is affirmed they will have causes of action against defendant exhibitors for treble damages under Sections 5 and 6 of the Clayton Act. Surely this cannot be a proper application of the law.

VI. DIVESTITURE—PARAGRAPHS (13), (15), (16) AND (18) OF THE DECREE.

(Assignments of Error 22, 23, 24 and 25).

These Assignments of Error are by far the most important in the case from the standpoint of defendant exhibitors. The divestiture provisions of the decree are harsh and punitive. They not only go far beyond the criterion of "effective relief", but are confiscatory to an extent probably not realized by the District Court.

In discussing these provisions of the decree we first wish to emphasize the fallacies which we think are inherent in the conclusions of law which were urged by plaintiff's counsel and accepted by the District Court.

1. *The fallacious basis for the divestiture provisions:*

The divestiture provisions of the decree were undoubtedly based upon the District Court's Conclusion 9, which was as follows:

> "9. Each of the defendants, Crescent Amusement Company, Inc., Muscle Shoals Theatres, Rockwood

[4] On the trial of the case plaintiff undertook to prove that when an independent exhibitor became affiliated with one of the defendant exhibitors, he was able to procure pictures for lower film rentals. The Court commented as follows: (R. 879) "Well, I think that it is an important part of the Government's case if they can show that the Sudekum circuit was able to secure rebates or lower prices from the distributors than their competitors were able to secure and that theatres which became affiliated with the Sudekum circuit were able to secure concessions and lower prices on their films then they were able to secure before they became affiliated."

Amusements, Inc., Cumberland Amusement Company and Cherokee Amusements, Inc., has violated the Sherman Act in the following manner:

> A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.
>
> B. Combining its closed towns with its competitive situations in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.
>
> C. Coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practice."

The language in paragraph A, "creating and maintaining an unreasonable monopoly", suggests that the District Court construed Section 2 of the Sherman Act as a prohibition against the creation and maintenance of a monopoly even though there were no acts coming within the definition of "monopolize" or "attempt to monopolize".[1] Admittedly, the defendant exhibitors had numerous individual monopolies in the same sense that so-called independent exhibitors had monopolies in towns where there was no competition. In the article on "Monopoly" in the Encyclopedia Britannica, it is said:

> "Examples of monopolies are numerous. The village shop is a 'monopoly' when there is no rival shop in the neighborhood. . . . A monopoly may be due to the sheer excellence of the services rendered by particular concerns."

It is true that appellants operated theatres throughout the State of Tennessee and in the adjacent portions of neigh-

[1] See *Standard Oil Company v. United States* (1911) 221 U. S. 1; *William Goldman Theatres, Inc. v. Loew's, Inc. et al*, (D. C. E. D. Pa. 1944), 54 F. Supp. 1011.

boring states. Clearly this fact does not change the application of Section 2 of the Sherman Act. Geographical concentration of theatres is immaterial, because so-called "circuit buying power" depends on the number of theatres and the other resources of the exhibitor or group of exhibitors, and not on the location of the theatres. Nor does "circuit buying power" depend on the number of corporations in the "combination". One hundred individually-owned theatres in a cooperative association should have as much bargaining power,—other things being equal,—as ten affiliated corporations which own ten theatres each, or one corporation owning one hundred theatres.[2] We think the divestiture provisions of the decree may have resulted from a failure on the part of the District Court to consider the foregoing facts and principles.

Paragraph B of Conclusion 9 has already been discussed in connection with the assignments of error directed to paragraphs (8) and (12) of the decree. That discussion is equally applicable here.

With reference to Paragraph C, an examination of the Findings fails to disclose what the District Court intended by the language employed, but leads to the conclusion that the District Court regarded competition *per se* as "coercion" and as a "predatory practice" where an independent exhibitor had a theatre monopoly in a town and one of the defendant exhibitors thereafter erected a theatre or made plans to erect a theatre in that town.

The only predatory practice alleged in the complaint (after the elimination of a portion of paragraph 54 by order of the Court) was the allegation in paragraph 54 to the effect that independent exhibitors were induced to sell out by threats that they would be deprived of films. There was no allegation in the complaint that the threat of competition

[2] See *Mid-West Theatres Co. v. Co-Operative Theatres*, (D. C. E. D. Mich. 1941); 43 F. Supp. 216

per se, or that actual competition *per se*, amounted to a predatory practice. There is no Finding that any independent exhibitor sold out to any defendant exhibitor as the result of a threat to deprive the independent of films.

The Findings refer to a number of instances where a subordinate employee of Crescent, Mr. Castleberry, (who did not occupy a responsible position and had no knowledge of Crescent's film deals),[3] talked with independent exhibitors in several towns, asked them whether they wanted to sell to Crescent, and said or implied that, if they did not sell, Crescent would open a theatre in competition. None of the exhibitors referred to in these Findings did sell to Crescent and apparently they were not frightened by Castleberry's talk.[4] We regard these Findings as irrelevant, especially in view of the fact that there was no allegation in the complaint upon which the reception of this evidence could properly have been based. There was no allegation as to unsuccessful "threats".[5]

We are not attempting to justify Mr. Castleberry's conversations with independent exhibitors. There was no evidence that any responsible officer of any of appellants knew about these conversations until the trial of this case. We insist, however, that the Findings in that connection do not justify the divestiture provisions of the decree.

In the instances where a defendant exhibitor actually acquired the theatre of a competitor, it uniformly appeared that the competitor preferred to sell rather than attempt to compete with a competently managed theatre and that the seller was paid a fair price. We insist that no predatory practices, in the proper sense of the term, were involved in these instances. An analysis of the Findings will demonstrate that this is true. We think the District Court

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[3] R. 966-967.

[4] Findings 102, 104, 105, 107, 108, R. 1425-1427.

[5] See par. 54 of the complaint, R. 9-10.

failed to distinguish between fair competition and unfair competition.[6]

In *Brown Chemical Company* v. *Meyer*, (1891), 139 U. S. 540, 35 L. ed. 247, this Court said (139 U. S., p. 544):

> "The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by state, and to build up new enterprises from which the public is likely to derive a benefit. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by an open declaration of his intention to compete with the other in the market."

In *Sinclair Refining Company* v. *Federal Trade Commission*, (C. C. A. 7, 1921), 276 Fed. 686, (aff'd. 261 U. S. 463), Judge Page said:

> "Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition."

[6] An illustration is Finding 103, R. 1426, which should be compared with the evidence on which it was presumably based, R. 284-285, 296. The independent, Pittman, had enjoyed the privilege of competition with a poorly managed theatre. When this theatre was acquired by a competent operator, Pittman preferred to sell. The question of product or "buying power" had nothing to do with it.

In *Whitwell* v. *Continental Tobacco Co.* (C. C. A. 8, 1903) 125 Fed. 454, at page 462, the Court said:

> "It was not—it could not have been—the purpose or the effect of the second section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. The acts of the defendants were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act upon consideration, because such attempts are indispensable to the existence of any competition in commerce among the states."

In *Goldman* v. *Hartford Building Asso.* (1926), 150 Md. 677, 133 Atl. 843, a demurrer was sustained to a bill of complaint alleging that plaintiff had applied to the defendant building association for a loan on certain property and that the defendant thereafter bought the same property which plaintiff had intended to buy. The Court said:

> "'Iron sharpeneth iron' is ancient wisdom, and the law is in accord in favoring free competition, since ordinarily it is essential to the general welfare of society, notwithstanding competition is not altruistic but is fundamentally the play of interest against interest and so involves the interference of the successful competitor with the interest of his unsuccessful competitor in the matter of their common rivalry. Competition is the state in which men live and is not a tort,

unless the nature of the method employed is not justified by public policy, and so supplies the condition to constitute a legal wrong. Disparity in knowledge, experience, skill, credit, wealth, or foresight of the competitors does not of itself furnish this additional condition, and make the competition unequal in a legal sense, since each competitor must necessarily bring to every competition his attributes, which may be a benefit or a detriment, but which are not an extraneous advantage as they simply constitute his subsisting equipment for the business of life. The law accepts this inherent disparity as being the basic condition of the individual in society and a quality entering into every treaty; and, by reason of its universality, the law does not treat the presence of the disparity mentioned as destroying the legal quality of the competitors."

In *Bell* v. *Etna Oil Service* (1932), 242 Ky. 471, 46 S. W. (2d) 757, it was held that plaintiff, who was engaged in the oil business, had no cause of action against competitors who consolidated and lured away plaintiff's employees and customers, cut prices, etc., with the alleged object and result of putting plaintiff out of business.

Other decisions of state courts to the same effect may be found. We have referred to them because the Sherman Act merely applies the common law to interstate commerce. The facts in these state cases, including the two cases specifically referred to above, went far beyond the allegations and facts in this case as to the aggressive methods of competition which were pursued. Applying these principles to the case at bar it is clear that the defendant exhibitors are merely accused of competing, in a normal way, with other exhibitors, and as a necessary part of this competition, of trying to license and exhibit the best pictures in order to attract the patronage of the public.

We next propose to demonstrate, by analysis of the divestiture provisions of the decree, that they not only have no tendency to remedy the alleged evils found by the District Court to exist, but are wholly illogical and have no other effect than to mete out haphazard punishment for the fail-

ure of defendant exhibitors to anticipate the novel application of the Sherman Act evolved by plaintiff's counsel and accepted by the District Court in this case.

2. Analysis of the divestiture provisions:

Crescent was not required to divest itself of its half interest in Strand Enterprises, a defendant exhibitor which was found not guilty of violating the Sherman Act. In holding Strand Enterprises not guilty the District Court referred to the facts: (1) that it was not a party to any franchise; (2) that when it bought out competitors it did not take from them agreements not to compete; and (3) that it did not collaborate with Crescent in making film deals.[7]

All three of these reasons, however, were equally applicable to Cumberland. It was undisputed that Cumberland was not a party to any of the franchises held to be illegal. If it was ever a party to a franchise, it was prior to the period covered by this suit. There was no evidence that Cumberland ever bought out a competitor and took an agreement not to compete. It was undisputed that Cumberland did its own film buying. Cumberland was found guilty only for the reason that it erected a modern theatre in Rogersville, Tennessee, where Miller was already operating an independent theatre in an old warehouse, without toilet facilities or a modern heating system; and that after Cumberland erected this theatre, it made film deals with one or more distributors who had previously made deals from time to time with Miller.

Crescent also was required to divest itself of its half interest in Lyric. The only reason Lyric was found guilty was that it had been a party to the franchise agreements held to be illegal. Lyric had never been the beneficiary of an alleged discrimination by a distributor against an independent. It is true, however, that there was collabora-

[7] R. 941, 1472-1473.

tion between Lyric and Crescent in making film deals, in that Messrs. Sudekum and Stengel negotiated film deals for Lyric as well as for Crescent.

Collaboration in making film deals could not, however be the basis of the divestiture provisions of the decree because the District Court expressly held that there was no illegality in a United Artists deal covering 73 different towns in which theatres were operated by twelve different exhibitor corporations (See Finding 165[8] and Conclusion 18).[9] Such a deal obviously saves selling expense which, if passed on in part to the exhibitors, should result in lower film rentals than if deals were made separately for each town or corporation. It may also be assumed that a distributor will be more inclined to say "take it or leave it" to a film buyer who is negotiating for only one theatre than to one who is negotiating for a substantial number of theatres.[10]

Lyric was not the only defendant exhibitor which was never the beneficiary of any alleged discrimination by a distributor against an independent competitor: neither was Kentucky, an affiliate of Rockwood. Nevertheless, Rockwood was required to divest itself of its half interest in Kentucky. Furthermore, Rockwood was required to divest itself of its half interest in Ruffin Amusements, although the latter was not even a defendant in the case and hence could not have been found guilty of any illegal act. Cherokee was likewise required to divest itself of its half interest in Newport, although the latter was not even a defendant in the case.

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[8] R. 1464-1466.

[9] R. 1478.

[10] A cooperative of theatre owners has been held not to be illegal *per se*, but to be illegal when its power was used illegally, viz. by overbuying for the purpose of preventing competitors from obtaining films, and by threatening with boycotts distributors who proposed to deal with competitors. *Midwest Theatres Co. v. Cooperative Theatres* (D. C. E. D. Mich. 1941) 43 F. Supp. 216, 222. In the case at bar there was not a scintilla of competent evidence, and no Finding by the District Court, that defendant exhibitors had been guilty of either practice.

In this connection it should also be pointed out that Rockwood was operating theatres in thirteen towns having an aggregate population of 31,193, and Cherokee was operating theatres in ten towns having an aggregate population of 22,049. That is to say, these two corporations together operated theatres in only twenty-three towns having an aggregate population of 83,242. Nevertheless, Rockwood is required to divest itself of its half interest in Cherokee. It is apparent that size alone could not logically be the basis of the divestiture provisions.

The foregoing analysis excludes the theory that the divestiture provisions were either logical or remedial. The only alternative theory is that they are punitive. The extent of the punishment can be measured only by examining the present tax laws. If and when the stocks in the subsidiary corporations are sold, the parent corporations must distribute the proceeds (after payment of the capital gains taxes) to their stockholders in the form of dividends. The stockholders must in turn pay the greater part of these sums to the Government in the form of income and surtaxes. Theoretically the parent corporations might retain the net proceeds of sale for reinvestment; but it would be absurd to require them to dispose of the theatre interests which they now own but permit them to acquire other theatre interests to replace them. It would serve no purpose for the parent corporations to retain these sums in the form of cash and pay the penalty taxes imposed by Section 102 of the Internal Revenue Code.

As to the Rockwood chain, the divestiture provisions of the decree are even more confiscatory. Rockwood itself is too small an enterprise to justify the entire time and efforts of the defendant, Stengel, or of any other competent executive with substantial earning power. The same thing is true of Cherokee. Actually paragraph (16) of the decree gives Stengel no real choice at all. He must stay with Crescent.

The divestiture provisions bear no relation whatever to the allegedly illegal acts found by the District Court to have

been committed, unless to weaken the bargaining power of the defendant exhibitors in their film negotiations with distributors and thereby tend to equalize their bargaining power with that of independent competitors.[11] If this is true, what will be the effect and result? The advantage of superior resources already possessed by the distributors will be enhanced. They will get higher film rentals which will absorb the profits of the exhibitors. "Once a theatre, always a theatre" is a motto in the industry, meaning that if an exhibitor goes broke, someone else will take over the theatre and the distributor will continue to have an outlet for its pictures. Possibly there will be a more rapid turnover in theatre ownership and management as the result of this decree, but the disadvantages to the public will greatly outweigh the advantages.

3. *Failure of the District Court to grant a trial period:*

At the hearing before the District Court on the form of the decree,—and there had been no prior hearing or argument as to the nature of the relief to be granted plaintiff in the event of a decision in plaintiff's favor,—it was contended by defendant exhibitors that the relief should be equitable and not punitive.

In this connection, there was urged upon the District Court the decision in *United States* v. *Great Lakes Towing Co.*, (1914), 217 Fed. 656, where the Court said:

> "The controlling inquiry thus is: What remedy promises the most effective measure of relief against the evils which we have found to exist?
>
> "In the instant case, the evil to be remedied is not the ownership by the towing company of the corporate stocks of the Dunham and the Union Companies, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and the Great Lakes Towing Company, Limited. These companies were not sub-

[11] A comment by the District Judge during the course of the trial, R. 879, suggests that this thought influenced the decision. (See footnote, *supra*, p. 107). If so, a cooperative of theatre owners would be illegal *per se*.

stantial competitors. No good would result from distributing to the stockholders of the towing company the stocks of the five companies above enumerated; and the government does not so request. Nor does the evil reside in the mere ownership of the corporate stocks, or physical properties, or both, bought from the other corporations or individuals. It is concededly impossible to restore to the sellers the properties so bought. The combination represented by the towing company violates the Sherman Act because it is a monopoly created by abnormal and unfair means . . . Unless for such means, purposes, and practices, the size alone of the combination, or the mere unification of the towing interests thereby brought about, would surely not justify putting the towing company entirely out of business. . . .

". . . The towing company is before the court and subject to its injunctive processes, including punishment for disobedience thereto; and if we can impose upon that company prohibitions, susceptible of enforcement, which shall eliminate past abuses and remove obstacles to free competition, such course would provide the most effective relief available, and so would manifestly be for the public interest."

It was further urged that injunctive relief should at least be given a trial period before any order of divestiture, and there was urged upon the Court the decision in the case of *United States v. American Can Company* (1916), 234 Fed. 1019, where the Court said:

"In passing upon the government's contention, little will be added to that which has already been said. Jurisdiction of a court of equity is remedial, not punitive. A dissolution may not be decreed, unless there is reason to believe that more good than harm will come of it. . . . It is the duty of the courts to give effect to the legislative will, but it is equally their duty so to shape their decrees as to bring about the result desired by Congres with the least possible waste of anybody's time or of anybody's money . . .

"If, as has been suggested, jurisdiction over the case is retained, the assurance that the defendant will not

resort to unfair practices will be well-nigh absolute. Under such conditions it will not be likely to accept a competitor's offer to sell out to it, and thereby add to that size and power which, acquired as they were, in defiance of law, the court must necessarily view with suspicion and distrust. Under such circumstances the passing of a decree for dissolution seems both unnecessary and unwise. The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal. In this case it appears probable that all potential restraints upon free competition now imposed by the size and power of defendant will pass away as speedily without as with dissolution, and that dissolution will cause far more loss and business disturbance than will attend the gradual re-establishment of competitive conditions by the play of economic forces. If so, no dissolution should now be decreed . . ."

In response to these suggestions as to the form of the decree, the comment of the Court was as follows: "You can just forget about the trial period under the injunction. I am not going to consider that at all. I am not going to have that matter before me. I am going to get rid of this lawsuit."[12]

We think the District Court did not give proper consideration to the nature of the relief granted. While we recognize the rule that such matters are usually within the discretion of the Trial Court, we respectfully submit that, in the case at bar, the Trial Court's discretion was arbitrarily exercised and that appellants are entitled to relief in this Court, all other questions aside.

This Court has always been careful to examine the relief granted the Government in equity cases under the Sherman Act and to make sure that the relief is no broader than necessary to eliminate the illegal activities. The Court

[12]R. 91.

has been particularly reluctant to order the breaking up of an existing business organization except in cases of the most compelling necessity. It was only because "effective relief" could be granted in no other way that the Court ordered dissolution in *Standard Oil Company* v. *U. S.* (1911), 221 U. S. 1, and in *United States* v. *American Tobacco Co.* (1911), 221 U. S. 106. Dissolution was not ordered in *Sugar Institute* v. *U. S.*, 297 U. S. 553, because the District Court felt that the objectives of the Sherman Act would be amply protected by the specific prohibitions of the decree. Jurisdiction was retained by the District Court for the purpose of "enforcing, enlarging or modifying" the terms of the decree.

In *U. S.* v. *Bausch & Lomb Optical Co.*, *supra*, the trial court had determined that Soft-Lite Lens Company and certain of its officers had violated the Sherman Act. The decree directed the cancellation of Soft-Lite's license agreements with retailers and its resale price maintenance contracts and agreements with wholesalers and prohibited the company from entering into any other agreement similar in effect or purpose to those adjudged unlawful. An exception was made in the case of so-called Fair Trade contracts; the decree permitted the company to renegotiate them after a period of six months. Jurisdiction was retained by the court for the entry of further orders or directions. The Government appealed seeking, among other things, a broadening of the decree by the substitution of a permanent instead of a six months injunction against new Fair Trade agreements and also the addition to the decree of a requirement that Soft-Lite sell its product without discrimination to any person offering to pay cash therefor. Both of these requests were denied by this Court, for reasons which are directly pertinent to this case.

With respect to the second suggestion, i.e., that Soft-Lite be required to sell its product to any person offering to pay

cash therefor, this Court referred to the decree actually entered and said:

> "... We have no reason to doubt that Soft-Lite will conform meticulously to the requirements of the decree. When it is shown to the trial court that it has not done so will be an appropriate time for the Government to urge this addition to the decree."

And, in denying the request that the six months prohibition be made permanent, the Court said:

> "What we have just said as to the Government's request for a requirement of sales by Soft-Lite to all applicants for its commodities is relevant to the Government's other request for modification of the decree to make permanent the six months' prohibition against Soft-Lite's systematically suggesting resale prices on its lenses and the execution of resale price maintenance contracts under the Miller-Tydings Act. The path is narrow between the permissible selection of customers under the decision in Colgate & Co. and unlawful arrangements as to prices under this decree, but we think Soft-Lite is entitled to traverse it, after a reasonable interim to dissipate unlawful advantages, with such aid as Congress has given by the Miller-Tydings Act. The suggestion for a permanent injunction is unacceptable."

The observations of the Court in the *Bausch & Lomb* case are directly applicable to the case at bar. The final decree in this case specifically prohibits the defendants from following certain practices determined by the trial court to be violative of the Sherman Act. Jurisdiction is retained for the purpose of entering such further orders or decrees as may be necessary for the construction, modification, termination or enforcement of the decree. As in the *Bausch & Lomb* case, there is no reason to doubt that the defendants will conform meticulously to the requirements of the decree. It must be remembered that the divestiture provisions of the decree do not purport to require the defendants to dis-

pose of specific theatres acquired as a result of allegedly unlawful practices. The requirement is that each of the corporate defendants divest itself of the ownership of any stock or other interest in any other corporate defendant, irrespective of whether the stock was acquired legitimately or otherwise. If the injunctive paragraphs of the decree directed to the *future* are observed, we can see no reason for this harsh punishment for the *past*.

The consent decree in the Paramount case is itself evidence of the unfairness of the divestiture provisions of the present decree. Paramount was said by plaintiff in that case to own 63 first-run metropolitan theatres and 1210 other theatres in 41 states; its gross assets were said to be approximately $90,000,00.[13] Fox was said to own 30 first-run metropolitan theatres and 508 other theatres in 17 states; its gross assets were said to be approximately $60,000,000.[14] Warner was said to own 35 first-run metropolitan theatres and 522 other theatres in 19 states; its gross assets were said to be approximately $150,000,000.[15] Loew's was said to own 24 first-run metropolitan theatres and 98 other theatres in 14 states; its gross assets were said to be approximately $150,000,000.[16] RKO was said to own 29 first-run metropolitan theatres and 103 other theatres in 10 states; its gross assets were said to be approximately $70,000,000.[17] Each of the five companies named was a producer, distributor and exhibitor of motion pictures.

It was stipulated[18] that the Court might take judicial notice of the allegations of the amended complaint in the Paramount case; and while the entire complaint is not copied in this record, it can be stated that every charge made against defendant exhibitors in this case was made

[13] R. 178-181.
[14] R. 183-186.
[15] R. 186-188.
[16] R. 181-183.
[17] R. 188-191.
[18] R. 1344.

against the defendants in that case, as well as many additional charges. Although the amended complaint asked for dissolution of the circuits and divestiture of their theatre holdings, the consent decree does not require any of them to divest themselves of their theatre holdings or break up their circuits.[19] In fact, Paragraph XI of the decree permits the defendants in that case to acquire additional theatres under certain limitations.[20]

The consent decree contains prohibitions against certain unfair trade practices and provides a method whereby complaints of certain types of unfair conduct on the part of the Big Five can be disposed of by arbitration. It was evidently the theory of the Government at the time the decree was entered that the correction of the alleged unfair trade practices made unnecessary and improper the much more drastic remedy of divestiture. Both consistency and elementary fairness require that the same treatment be accorded the defendants in this case. That is to say, the divestiture provisions of the decree should be eliminated, or at least they should be postponed for a trial period with leave to the Government to apply thereafter for the additional relief of divestiture if regarded as necessary to protect the public interest.

4. *Hardship of divestiture provisions on parties who were not defendants:*

It must be borne in mind that the stock ownerships of the defendant exhibitors among themselves and with respect to other corporations result merely in partnerships in the corporate form. For example, Crescent owns exactly 50 per cent of the stock in Lyric, and the other 50 per cent is owned by the Crute family who are residents of Huntsville, Alabama, where Lyric operates several theatres. Neither stockholder has control except by agreement with

[19] R. 198-227.

[20] R. 211-212.

the other. So long as the parties are in agreement, such a business enterprise will function smoothly as in the case of an ordinary partnership. On the other hand, if a stranger should acquire either stock interest without the approval of the other stockholder, a disastrous situation could easily come about.

It is apparent that the Crute family is thus vitally interested in the purchaser of the half interest in Lyric owned by Crescent. Of course, the record in this case does not indicate the ability or nonability of the Crute family to purchase the stock itself. It may be assumed, however, that for one reason or another they are unable to do so or unwilling to put all their eggs in one basket. For what reason should the Crute family be punished because Crescent has violated the Sherman Act, not with respect to the Huntsville theatres but in connection with Brownsville, Tennessee, or some other remote spot? The same situation exists with respect to Cumberland,[21] in which half the stock is owned by Crescent; Kentucky,[22] in which half the stock is owned by Rockwood; and Cherokee,[23] in which half the stock is owned by Rockwood.

The impropriety of the divestiture provisions is further illustrated by the fact that the decree requires Rockwood to sell its stock not only in Cherokee and Kentucky, but also its half interest in Ruffin Amusements, Inc., which was not made a defendant, and requires Cherokee to sell its half interest in Newport Amusements, Inc., which was not made a defendant. The authorities hereinbefore cited as to necessary and indispensable parties are applicable here. The rights of each of these corporations and its other shareholder would be directly affected by any change in its ownership or management.

[21]Cumberland operates thirteen theatres in ten small towns in Tennessee. R. 1360.

[22]Kentucky operates only in one Kentucky town, population 3,667. R. 1362.

[23]Cherokee operates fourteen theatres in ten small towns in Tennessee and North Carolina. R. 1362.

A case we regard as directly in point is *Minnesota* v. *Northern Securities Company*, (1902), 184 U. S. 199. In that case the State of Minnesota brought a bill in equity in this Court (under Sec. 2, Article 3, of the Constitution, giving the Supreme Court original jurisdiction of cases between a State and citizens of another State) seeking to prevent by injunction a combination between two competing railroad companies, the Great Northern and Northern Pacific Railway Companies. It was alleged that a majority of the stockholders of these two Minnesota corporations had turned their stock over to the defendant, Northern Securities Company, a New Jersey corporations, for the purpose of effecting joint control and management of the two railroad companies. The Great Northern and Northern Pacific Railway Companies were not made parties defendant and it would have ousted the jurisdiction of the Court if they had been made parties defendant. This Court said at page 235:

> "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Pldg. sec. 72."

After discussing the nature of the case, this Court said:

> "Can such a controversy be determined with due regard to the interests of all concerned, by a suit solely between the State of Minnesota and the Northern

Securities Company? It is, indeed, alleged that all of the stockholders of the Northern Securities Company are stockholders in the two railroad companies, and, therefore, it may be said that the latter stockholders are sufficiently represented in the litigation by the Northern Securities Company; but it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company. It is obvious, therefore, that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company. They have a right to be represented, in the controversy, by the companies whose stock they hold, and their rights ought not to be affected without a hearing, even if it were conceded that a majority of the stock in such companies, held by a few persons, had assisted in forming some sort of an illegal arrangement."

This Court accordingly dismissed the case.

VII. FRANCHISES.

A. Assignment of Error 20.[1]

Paragraph (1) of the Final Decree is as follows:

"(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Co., Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each of the distributors, Paramount, Fox, and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar

[1] R. 1518.

combinations and conspiracies having similar purposes and objects."

Findings 114-133,[2] inclusive, suggest that the repeat-run clauses and the clearance provisions in the three franchises were the features which, in the view of plaintiff's counsel and of the District Court, rendered the franchises illegal. There was no averment in the complaint that the franchises were illegal, but paragraph (10) of the decree invalidated each of them.

Clause 8-e of the Paramount franchise was one of the main points of controversy in the case. This clause was as follows:

> "The Exhibitor may at its election exhibit for repeat run exhibition any of the feature photoplays licensed hereunder at any theatre covered by this agreement upon the same terms and conditions applicable to the Hopalong Cassidy feature photoplays in respect of such theatre, as set forth in the annexed Schedule A, and the Exhibitor agrees to pay as license fees for each feature photoplay during each such repeat exhibition the license fees payable hereunder for the said Hopalong Cassidy feature photoplays."

Where an exhibitor has licensed a season's product at specified film rentals, it will frequently develop that one or more feature pictures prove to be "hits", and the public demands a second exhibition of the picture. Sometimes because of bad weather, some other attraction in town, or for some other reason, there are many persons who fail to see a good picture. It is to the advantage of both the exhibitor and the theatre-going public that such pictures be repeated. If there is no repeat-run clause in the contract, it becomes necessary for the exhibitor and the distributor to negotiate for the film rentals to be paid when these pictures are re-

[2] R. 1430-1457.

peated.[3] A repeat-run clause precludes the necessity for such negotiations.[4] There is not the slightest evidence that the parties to the Paramount franchise had any other purpose in mind by including Clause 8(e) in the franchise.

The District Court regarded this repeat-run clause as amounting to a contractual obligation on the part of the distributor not to license second-run product to a competing exhibitor. This was a fundamental error in the District Court's treatment of the franchises. Even without such a clause it was not the usual policy of distributors to license pictures for second-run exhibition in small towns by a competitor of the first-run theatre (e.g. Fox at Gallatin, Tennessee).[5] Even in larger towns, it would not be to the advantage of a distributor to license pictures for second-run exhibition by a competitor of the first run house unless the exhibitor contracts for a full second-run deal.[6]

It is particularly to the disadvantage of the distributor to license second-run product to a competitor of the first-run house where the film rentals paid by the first-run house for the top feature pictures are based on a percentage of gross receipts. The Paramount franchise provided that the film rentals for the four top features for each season would be 40 per cent of the gross receipts. If the public knows in advance that particular pictures will be played in the second-run house at lower admission prices, the gross receipts of the first-run house will necessarily be impaired and there is a probability that the total revenue of the distributor in the town will likewise be impaired.

The trouble with Clause 8(e) as originally drafted was that it required Paramount to keep prints available for an indefinite length of time. When Smith's complaint to the Department of Justice was brought before the Paramount officials, the inadequacy of Clause 8(e) was brought to

[3] R. 1039.
[4] R. 1212-1213.
[5] R. 847.
[6] R. 1325-1326.

light and prompt steps were made to clarify the situation by requiring the parties to the franchise to decide within thirty days after playing a particular picture whether they wanted to repeat it.[7] The omission of such a provision in Clause 8(e) as originally drafted was simply the result of poor draftsmanship, however, and not for any unlawful purpose as insisted by plaintiff.

The repeat-run clause in the 1939 Fox franchise (see Finding 130) expressly provided that where Fox made a second-run deal with an independent exhibitor in a competitive situation, the repeat-run privilege in that town would be automatically eliminated. The Department of Justice attitude toward repeat-run clauses had evidently come to the attention of an exhibitor who had threatened Fox with a lawsuit, and the Fox lawyers had advised against repeat-run clauses similar to the one in the Paramount-Crescent franchise. The repeat-run clause in the Fox franchise was so worded as to avoid legal difficulties.[8] There can be no possible argument that the Fox repeat-run clause discriminated against independent exhibitors. Nevertheless, the Fox three-year franchise was invalidated along with the Paramount five-year franchise and the Warner three and one-half year franchise.

The repeat-run clause in the three franchises will be further discussed in connection with Assignments of Error 12 to 15 inclusive, relating to Findings of the District Court in which these franchises were referred to. A purely academic question is involved. The distributors had, over a period of years, developed their own policies in regard to second-run deals, and they simply followed these established policies.

As to the clearance provisions, it has been uniformly held, in the treble damage cases which have came before the lower courts since the Anti-Trust Division took an interest in the motion picture industry, that reasonable clear-

[7] R. 689, 697-698, 1035, Exhibit P-31.

[8] R. 1213-1216.

ance provisions in licensing agreements are not invalid.[9] On the contrary, such provisions are normal and indeed necessary, being for the benefit of both the distributors and the exhibitors. Of course a clearance provision may be unreasonable, under the circumstances of a particular case. In the case at bar, however, there was no issue as to the reasonableness or unreasonableness of any particular clearance provision. Apparently the Government's contention was that clearance should be renegotiated at short intervals because conditions may change and a clearance provision, reasonable when negotiated, may become unreasonable when conditions change. There was no contention, however, that any particular clearance provision had become unreasonable, and the argument is purely theoretical.

In the argument on the form of the decree, counsel for defendant exhibitors suggested that paragraph (1) of the decree be drafted in such a way as to indicate that defendant exhibitors might safely make franchises in which the repeat-run clause followed the repeat-run clause in the Fox franchise and in which clearance provisions were not frozen for the entire period of the franchise. On this point the Court said:

> "THE COURT: All I can say is that you can't make any more franchises like those you have made. I am not ruling in advance on what some other franchise might be or might not be."[10]

Counsel for defendant exhibitors also suggested that the decree make it plain that a film deal covering two seasons' product is not invalid. On this point the Court said:

> "THE COURT: I haven't decided in this case that a two years franchise is invalid."[11]

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[9] *Westway Theatre* v. *Twentieth Century Fox Film Corp.*, (D. Md. 1940) 30 F. Supp. 830; aff'd. (C. C. A. 4, 1940), 113 F. (2d) 932. *Gary Theatre Co.* v. *Columbia Pictures Corp.* (C. C. A. 7, 1941), 120 F. (2d) 891.

[10] R. 47.

[11] R. 52.

We think that if appellants are to be enjoined from making franchises "with the intent and purpose" of violating the Sherman Act, they are entitled to provisions in the injunctive portion of the decree which will furnish them some ascertainable standard of conduct.[12] In other words, if the repeat-run clauses in the Paramount and Warner franchises are in restraint of trade, or if the clearance provisions of any of the franchises are in restraint of trade, and if a franchise is otherwise illegal only if it covers more than two seasons' product, the injunction should be so worded as to make it clear that a two-year franchise without the objectionable features is valid.

Certainly these franchises would not have been considered contracts in restraint of trade at common law; and if that is true, they are not within the purview of the Sherman Act as interpreted by this Court in *Apex Hosiery Co. v. Leader, supra.* It should be borne in mind that this suit was instituted in 1939 prior to the *Apex Hosiery Company* decision in which the legislative history and meaning of the Sherman Act were fully expounded. Unfortunately, the Government has not been willing to accept the interpretation there announced.

As late as September 16, 1943, the District Court for the Southern District of New York was called upon to decide a contention of the Anti-Trust Division that certain contracts made by the Western Union Telegraph Company constituted unreasonable restraints of trade and commerce in telegraph communication, in violation of the Sherman Act. These contracts were entered into between the telegraph company and various railroad, transportation and terminal companies, hotels, public buildings, etc., granting rights of exclusive occupancy to the telegraph company for stated

[12] *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, decided April 10, 1944.

periods of time. District Judge Nevin (sitting by designation) said:[13]

> "The elements which make contracts, otherwise lawful, sometimes illegal as being in restraint of trade as set forth in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, are not present. The Court has not been unmindful of the distinction existing between enterprises inherently public in their character and those of a private nature, as pointed out in the *Trans-Missouri Freight* case, 166 U. S. 290, nor of the further fact that telegraph companies are to be deemed public service corporations, affected by a public interest. *Central N. Y. Telephone and Telegraph Co.* v. *Averill*, 199 N. Y. 128."

The contracts considered in the above case were exclusive contracts. The franchises in the case at bar were *not* exclusive contracts except in the sense that the distributors could not license the same picture for *first run* exhibition to more than one exhibitor in the same town. In the case above mentioned the telegraph company conducted a business affected by a public interest. The motion picture industry, on the other hand, is not of that character.

We think any injunction against the making of franchises is outside the scope of the pleadings in the case at bar.[14] If incorrect in this position, however, it is respectfully submitted that a licensing agreement covering a copyrighted product or patented product is not in violation of the Sherman Act merely because it runs for two, three or five years or for a longer period. (The plaintiff did not so contend during the trial).[15] There are ups and downs in the business world,—"buyers' markets" are followed by "sellers' mar-

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[13] *United States* v. *Western Union Telegraph Co. et al*, Equity No. 86-129, reported in Commerce Clearing House Trade Regulation Service, Par. 52, 980, p. 53, 611.

[14] See R. 10-12 as to relief prayed in the complaint. While paragraph 2 is couched in broad language, attention is called to the fact that the body of the complaint makes no distinction between franchises and short term-deals.

[15] R. 782.

kets",—and both exhibitors and distributors should have the privilege of making long-term arrangements to afford them some measure of protection from the changes in the business cycle.[16] A long-term lease of real estate is in the same category. How can it possibly be said to be illegal for an exhibitor to make franchise agreements with only three of the eight distributors mentioned in the complaint,—the product of the remaining five distributors, as well as independents, being available for its competitors?[17]

B. Assignments of Error 12 to 15 Inclusive.

These assignments of error relate to the Findings in connection with the three franchises. The principal purpose of these assignments is to illustrate and high-light the prejudicial effect, with respect to this issue, of the consideration by the District Court of incompetent evidence and of the adoption from the Government's brief of the Findings on which the Government now relies in defending paragraph (1) of the decree. The quotations made from the

[16] In a rising market, the distributors are likely to discourage the making of franchises as not to their advantage. See R. 1333, 1339. They can protect themselves, however, by provisions stepping up the film rentals each year, as in the case of the five year Paramount franchise.

[17] In paragraphs 40-42, of the complaint, R. 7, the position is taken that it is necessary for an exhibitor to have the first-run product of three or more of the eight distributors in order successfully to opeate a first-run theatre and that it is necessary to have the second-run product of three or more of the eight distributors in order successfully to operate a second-run theatre, etc. We have heretofore pointed out that in the case at bar there was no evidence that any independent exhibitor did not have sufficient product according to the test announced by plaintiff. In *William Goldman Theatres, Inc.* v. *Loew's, Inc. et al* (D. C. E. D. Pa. 1944), 54 F. Supp. 1011, the District Court dismissed a civil action for injunctive relief and damages, based upon an alleged conspiracy to monopolize the motion picture business in Philadelphia, where the evidence showed that none of the eight distributors would license pictures to plaintiff for first-run exhibition.

Findings are, in each instance, the language of plaintiff's counsel as found in plaintiff's brief.

Finding 118—Paramount Franchise. (Assignment of Error 12).[1]

In this Finding, after referring to the clearance provision in the franchise, it is said:

> "The effect of the franchise (Ex. P. 21, P. 29 and P. 30), on the independent competition at Dresden, Earlington, Gallatin, McKenzie, Spruce Pine, Union City, Hopkinsville, Gadsden, Morristown, Harriman, Newport and Mt. Pleasant has already been recounted. Morgan, in negotiating it, knew precisely what its effect on these independent accounts would be."[2]

This language is a mere argument. When the Findings[3] in reference to the situations referred to are examined in connection with the comments hereinbefore made in this brief in regard to some of them, the impropriety of this language in Finding 118 will be apparent. As to Spruce Pine, attention is called to the fact that original Finding 61 was later modified.[4] As to Dresden and Newport, attention is called to the fact that the "circuit" competition was by corporations which were not made defendants in the case.[5] As to Gallatin and Mt. Pleasant, attention is called to the fact that although plaintiff was required by the Court to specify in bills of particulars the competitors of defendants

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[1] R. 1511.

[2] R. 1435.

[3] Findings not made the subject of assignments of error are as to Dresden, R. 1418-1419; Gallatin, R. 1412-1413; Spruce Pine, R. 1391, 1490; Harriman and Newport, R. 1395-1397; and Mt. Pleasant, R. 1419.

[4] R. 1490.

[5] Ruffin Amusements, Inc. operated the theatres at Martin and Greenfield (R. 1362) referred to in Findings 90 and 91 (R. 1418-1419); and Newport Amusements, Inc. operated the theatre at Newport referred to in Findings 69 and 70 (R. 1396-1397).

whose competition was "restrained", etc., as alleged in paragraph 49 of the complaint, neither Gallatin nor Mt. Pleasant was specified in item 6 of any of the four bills of particulars.[6]

Finding 119—Paramount Franchise.

(Assignment of Error 13):[7]

The following language appears in Finding 119:[8]

> "The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to an opposition theatre, as shown by the experience of Smith, Anderson and Henry when they tried to buy a second-run. As Morgan described its effect in a letter to Unger, his immediate superior, on November 14, 1939 (Ex. 152):
>
> > 'In any event, the only way we could sell second-run, even if we wanted to in these particular towns (Harriman, Morristown and Newport) would be after Sudekum had taken the refusal, because Paragraph E of Article 8 of the Crescent Amusement Company franchise provides he can repeat any feature at a given price.' "

Smith (Morristown) and Anderson (Hopkinsville) have heretofore been discussed.[9] Finding 81 as to Henry (Union City) made no reference to the repeat run clause; and pursuant to its general policy, Paramount would not have made a second-run deal with Henry instead of Crescent, its first-run account in that town, even in the absence of a repeat-run clause in the franchise.

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[6] R. 144, 152, 153-173.

[7] R. 1512.

[8] R. 1435.

[9] Assignments of Error 9 and 8 respectively, *supra*, pp. 89-92.

[10] R. 1040, 1326.

Finding 119 then proceeds:

> "The repeat-run clause was apparently never brought to the attention of Agnew, the general sales manager, until this trial, and even after Unger suggested a modification, the only thing that was done was to make Crescent and Rockwood exercise the option within a fixed period of time. The clause, as modified, still prevents the sale of a second run to the opposition."

We think the last sentence is misleading. Certainly Paramount did not relinquish its legal right to make a second-run deal with the opposition. It may be said that pictures actually repeated by Crescent or Rockwood might then be played third-run, rather than second run, by the competing theatre, if Paramount decided to give Crescent or Rockwood the earlier play-date. Assuming that to be true, we fail to see any impropriety in such an arrangement. *The situation never actually arose, however, and hence there is no basis for a contention that there was any restraint of trade of trade or commerce.*

Finding 122—Warner Franchise. (Assignment of Error 14).[1]

The repeat-run clause in the Warner franchise permitted the exhibitor to repeat a picture, at the lowest allocated rentals, *in lieu of* a picture which would otherwise have been played pursuant to the contract. The public thus benefitted. This clause was applicable only to towns where there was no second run commitment or where there was originally a second-run commitment but the defendant exhibitor closed the second-run theatre. The Warner franchise provided for the playing by Crescent of 24 pictures on percentage, so there was very little liklihood that Warner would desire to license its product for second-run exhibition by a competitor of the defendant exhibitor.

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[1] R. 1512.

Finding 122[2] includes the following:

"But even with one theatre closed and its second-run commitment out of the way, the exhibitors obviously wished to still be in a position to prevent a competitor from getting a second run. The last paragraph, giving a repeat-run option where one theatre is closed, was plainly an addition to the rider insisted upon by exhibitors, as it confers no rights or advantages on the distributor. Unlike the Paramount repeat-run clause, this option was so worded as to make the repeat-run subject to such other runs in the same town as the distributor might license. The only purpose that this clause could serve was to make it difficult for Warner to license a second-run theatre in opposition to Crescent after Crescent shut one theatre and got rid of its second-run commitment.

"The purpose of the repeat-run option was plainly to replace the second-run commitment as a means of tying up second run in the situations where that commitment was subject to elimination upon closing a theatre, as in the situations where no second-run commitment was made, a straight repeat-run privilege was inserted which does not depend on the closing of a theatre to take effect. Thus is Harriman and Morristown, where Crescent was also operating two theatres, but no second-run commitment was made, the repeat-run clause reads as follows:

> 'KCS. Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee, and in such event the exhibitors commitment to exhibit such features in the lowest rental classification shall be reduced accordingly.'

"The only difference between this and the repeat-run clause previously quoted is in the stricken opening phrase: 'In the event one theatre closes'. In all of the one-theatre situations in which no second run was

[2] R. 1440-1443.

bought, the same unqualified repeat-run clause as that stated above was used."

The statement as to the "purpose" of the repeat-run clause is a wholly unwarranted argument of plaintiff's counsel, adopted by the District Court as a finding of fact. The repeat-run clause permitted the exhibitor to repeat a picture which turned out to be a better attraction than previously expected, but without the necessity of negotiating all over again as to the film rentals. It was to the advantage of the public for good pictures to be repeated in lieu of inferior pictures which would otherwise have been played. There is no Finding, and there was no contention by plaintiff, that the repeat-run clause in the Warner franchise ever prevented any independent exhibitor from getting pictures or that Warner was contractually obligated not to license its product for second-run exhibition by an independent exhibitor.[3] The provision making the privilege of repeating a picture "subject to such other runs in the same town as the distributor might license" eliminated the principal ground of the objection made by plaintiff to the repeat-run in the Paramount franchise.

Finding 127—Fox Franchise.

(Assignment of Error 15).[1]

Plaintiff introduced in evidence as Exhibit 205[2] a letter dated March 13, 1936 from the Atlanta District Manager of Fox to the New York Sales Manager of that Company which included the following:

> "As you know we have had a great deal of difficulty with the Sudekum Circuit and the procedure in the past has been such that we almost had to take anything that Sudekum wanted to give us. I have been on the verge of splitting with him a time or two, but could not see

[3] R. 1091.
[1] R. 1513.
[2] R. 826-828.

that I was gaining anything, so always late in the season would take rather unsatisfactory deals.

"However, this year, after repeated efforts to get together with him on any kind of a deal that would show an improvement over anything we received in the past, I closed up and called it a day and attempted to salvage what money I could from a few opposition points, thinking that maybe with Fox out some opposition would open up. He has opposition in the towns of Gadsden and Maryville in the Atlanta territory and in the Memphis territory he has opposition in Paris, Tennessee. In the Indiana territory, they sell a little bit of a town outside of Madisonville, called Earlington, which George Landis advised me he received a very satisfactory contract from for the K-3 product. In Decatur he has opposition in a town called Hartselle, which we have sold, but this is all we could salvage; I imagine the whole thing amounted to about seven or eight thousand dollars.

"Since I have sold away from Tony, he has evidenced some desire to get together with us in the future and while it is too late to sell him in some of his spots this year, we have worked out a deal that I think is excellent. I am sending you a recap of the money that we have received, which includes all of the towns in his circuit, for which he buys direct, (he still owns half interest in the Hill Circuit, but this is a separate corporation). This shows the gross total of $24,745.50.

"Briefly, the deal is this:—he is to give us $20,000.00 for half of the K-3 product, but deducting from this the money that he would normally allocate against the towns where we have already sold. In other words, we only sell him half of the K-3 product, but in view of the fact that we receive more from these towns than we have received from Tony, the deal will probably run up to considerably more than $20,000.00 for the K-3 product.

* * *

"I would appreciate your giving me your thoughts in the matter, or anything else you might want to add to this, but I would like to get it operating as quickly as possible. These are all very small towns, no opposi-

> tion and some of them are pretty bad looking propositions insofar as gross returns are concerned, although a few of them are pretty good. I do not think I could ever do any better and I am quite sure that I could not go up there 'cold' and sell him next year's product at $40,000.00."

Mr. Ballance, the author of this letter, was introduced as a witness and testified that he wrote it.[3] He was not asked to explain it in any way or to verify any statements or facts contained in the letter. Clearly the letter is not a proper basis for a Finding that any independent exhibitor paid higher film rentals than Crescent in any individual situation. Nevertheless the letter is made the basis of the following language in Finding 127:[4]

> "Even though the independents in the towns where there was then opposition, Earlington, Gadsden, Maryville, Paris and Hartselle, paid Fox more than it received from Sudekum, the total revenue from them added up to only 'about seven or eight thousand dollars'. The Sudekum franchise offered a total rental of better than $120,000.00 for all situations for the three years' product and that being the case, this product was sold away from the independent exhibitors at the 'opposition points', who had bought the 1935-36 product, without giving them any opportunity to negotiate for the next season. Everyone of these independents, who paid more than Sudekum in their individual situations but could not collectively match his total Circuit purchase, was eventually taken over by Crescent or Rockwood before the expiration of the francise in August, 1939."

This is another illustration of the way in which incompetent evidence is made the basis of the Findings of the District Court.

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[3] R. 824.

[4] R. 1450.

Finding 127 also contains the following statement:

> "Hendren's letter of February 7, 1936 (Ex. 258), indicates that if he could have gotten the Fox 1936-37 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greeneville. For the 1935-36 feature product in Maryville, he paid $2,456.61 as against $570.00 paid by Crescent for the 1934-35 feature product and $1,080.00 paid by Crescent for the 1936-37 feature product (Ex. 327) in the same town. For the 1935-36 feature product in Greeneville he paid $2,589.00 against $1,095.00 paid by Crescent for 1937-38 (Ex. 328)."

In order to avoid repetition, reference is made to the discussion in an earlier portion of this brief as to the foregoing language in the Court's Finding.[5] Hendren's actual testimony, on direct examination by plaintiff's counsel, was that the question of product had nothing to do with the deal between Parrott & Hendren and Crescent.[6] As previously demonstrated, Parrott & Hendren had Fox product continuously in Greeneville.[7] There was no evidence to the contrary.

Finding 133—Fox, Warner and Paramount Franchises. (Assignment of Error 15).[1]

Finding 133[2] contains the following language:

> "One obvious purpose of all three franchises was to give Fox, Warner, and Paramount an ostensibly valid legal excuse for discriminating in favor of the Sudekum circuit in licensing its films during the period covered in the same manner that they had discriminated in the past. The Sudekum circuit, by virtue of having built up a preponderance of closed situations, through the

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[5] *Supra*, pp. 60-61.
[6] R. 240.
[7] R. 847.
[1] R. 1514.
[2] R. 1456.

persistent elimination of competition, was in a position to deal effectively with such competition as remained or might arise in the future, in making one-year film deals, but franchises offered protection against future changes in those discriminatory practices."

The statement as to "one obvious purpose" of the three franchises is another wholly unwarranted argument of counsel, adopted by the District Court as a finding of fact. Executives of the three distributors testified that the initiative for making these franchise came from the distributors themselves and not from the defendant exhibitors.[3] Their reasons were to insure a continuous outlet for their pictures. There is not the slightest evidence in the record of any unlawful purpose on the part of either the defendant exhibitors or the distributors in the making of these franchises.[4]

CONCLUSION.

In conclusion, it is respectfully submitted that all of the assignments of error made by the defendant exhibitors should be sustained and that this case should be reversed and dismissed. At the very least, it should be remanded to the District Court with directions to eliminate paragraphs (1), (8), (12), (13), (15), (16) and (18) of the decree and to revise paragraph (21) of the decree relating to costs, so as to relieve appellants of that burden.

Respectfully submitted,

GEORGE H. ARMISTEAD, JR.,
WILLIAM WALLER,
Attorneys for Crescent Amusement Company et al.

ARMISTEAD, WALLER, DAVIS & LANSDEN,
Of Counsel

Nashville, Tennessee.

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[3] R. 1083, 1121, 1323, 1339.

[4] See R. 1216 as to reasons defendant exhibitors wanted franchises.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action 54

UNITED STATES OF AMERICA, *Plaintiff*

vs.

CRESCENT AMUSEMENT COMPANY, INCORPORATED, ET AL., *Defendant.*

FINAL DECREE.

This cause having come on for hearing before this Court upon the pleadings and upon the testimony, both oral and documentary, introduced at the trial of this cause, and the same having been argued by counsel both orally and upon briefs submitted, and the Court having made and filed its findings of fact and conclusions of law herein on the 3rd day of March, 1943:

It is hereby ordered, adjudged and decreed as follows:

(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Company, Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each other of the distributors, Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(2) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, en-

joined and restrained from continuing in combination with each other for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(3) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they are hereby enjoined and restrained from continuing in combination with each other for the purpose and with the effect of eliminating, suppressing and preventing independent competition in the territory in which each operates; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(4) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel and Louis Rosenbaum be, and they hereby are, enjoined and restrained from continuing in combination with each other, and with Paramount, Fox, Warner, Loew's, RKO, and United Artists in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(5) That the defendant United Artists Corporation, be, and it hereby is, enjoined and restrained from continuing in combination with Cumberland, Rockwood, and Stengel to eliminate its independent theatre competition at Rogersville, Tennessee; and is further enjoined and restrained from entering into any similar combinations having similar purposes and objects.

(6) That the defendant United Artists Corporation be, and it hereby is, enjoined and restrained from continuing in combination with Rosenbaum, Sudekum, Rockwood and

Steagel to eliminate independent theatre competition of Muscle Shoals at Athens, Alabama; and is further enjoined and restrained from entering into any similar combinations having similar purposes and objects.

(7) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be and it hereby is, enjoined and restrained from creating or maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

(8) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company and Cherokee Amusements, Inc., be and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

(9) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., its officers, agents or servants, be and it hereby is enjoined and restrained from coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

(10) That all existing franchises to which the Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, Cherokee Amusements, Inc., Lyric Amusement Company, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, or Louis Rosenbaum, hereinafter referred to as the exhibitor defendants, is a party be, and they hereby are, declared invalid, except insofar as any such franchise may relate to theatres operated by any of said defendants in Nashville, Tennessee, the validity of which the Court does not expressly adjudicate in this cause.

(11) That all existing agreements not to compete in the future to which any exhibitor defendant is a party, be, and they hereby are, declared invalid:

(12) That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation.

(13) That each of the corporate exhibitor defendants, be, and it hereby is, required to divest itself of the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and each such defendant is hereby enjoined and restrained from acquiring the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc.

(14) That the defendant, Louis Rosenbaum, be, and he hereby is, required to divest himself of any interest which he may have in any of the corporate defendants, and said defendant Rosenbaum is hereby enjoined and restrained from acquiring any interest in said corporate defendants.

(15) That the defendant, Anthony Sudekum, be and he hereby is, required to resign as an officer of any corporation except the Crescent Amusement Company, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except the Crescent Amusement Company, by acting as an officer thereof, or otherwise.

(16) That the defendant, Kermit C. Stengel, be, and he hereby is, required to resign as an officer of any corporation, except one defendant corporation of his choice, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except the corporation of his choice, by acting as an officer thereof, or otherwise.

(17) Wherever reference is made in this decree to affiliated corporations such reference shall not include the following corporations: Bijou-Louisiana Corporation, Shreveport Theatre Corporation, Bijou-Pensacola Cor-

poration, Bijou-Ft. Worth Corporation, Ace Theatre Corporation, Lincoln Amusement Company, Lewisburg Theatre Company, the Auditorium Company, Hippodrome Attractions, Stock Yards, Ricks Hosiery Mills, Springfield Woolen Mills, Mid-State, Chickasaw, Dickson and Nu-Strand Corporation.

(18) That the acts of dissolution described in paragraphs (13), (14), (15), and (16) hereof, shall be performed within one year from date of entry of this decree.

(19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

(20) That the jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and decrees as may be necessary or appropriate for the construction or carrying out of this decree, for modification or termination of any of the provisions thereof, for the enforcement or compliance therewith and for the punishment of violations thereof.

(21) That the costs of this action shall be taxed against the exhibitor defendants.

(22) That the Bill of Complaint be, and it hereby is, dismissed as to the defendants, Strand Enterprises, Inc., Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Columbia Pictures Corporation, and R. E. Baulch, upon the merits.

Enter May 17, 1943.

ELMER D. DAVIES,
United States District Judge.

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Nos. 17, 18 and 19

IN THE

Supreme Court of the United States

October Term, 1944

THE UNITED STATES OF AMERICA, *Appellant,*

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., *et al.,*

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., *et al.,* *Appellants,*

v.

THE UNITED STATES OF AMERICA.

MOTION OF THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

MORRIS L. ERNST,
Attorney for The Society of Independent Motion Picture Producers, Amicus Curiae,
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Borough of Manhattan,
New York 17, New York.

Of Counsel:
HAROLD H. STERN,
HARRIET F. PILPEL.

Lloyd Wright

Nos. 17, 18 and 19

IN THE

Supreme Court of the United States

October Term, 1944

THE UNITED STATES OF AMERICA,

Appellant,

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., *et al.*,

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA.

Motion for Leave to File Brief on Behalf of *Amicus Curiae*

MAY IT PLEASE THE COURT:

The undersigned, as counsel for The Society of Independent Motion Picture Producers, respectfully moves this Honorable Court for leave to file a brief *amicus curiae* in these cases.

1. The Government filed a petition for appeal in No. 17, which was allowed on July 16, 1943 and a petition for appeal in No. 18, which was allowed on October 27, 1943.

The defendants' petition for appeal in No. 19 was filed and allowed on October 29, 1943.

2. The association above named has requested the consent of both parties to the submission of a brief *amicus*. Consent has been granted by the Government. Counsel for the defendants has indicated his disinclination to consent in advance of seeing the brief in final form. Page proofs of the brief, subject only to final polishing, were sent to him on Tuesday, October 10, and final printed briefs together with a copy of this motion were sent to him prior to the filing hereof. Defendants' counsel had previously been notified of our intention to file the brief and accepted by wire such notice of intention.

3. Although by reason of the foregoing circumstances consent of both parties to the litigation has not been obtained as provided in Rule 27, subd. 9 of the Rules of this Court, it is respectfully submitted that the present case affords an appropriate occasion for the exercise of this Court's discretion and undoubted power to receive the *amicus* brief.

4. The United States brought this suit against nine affiliated companies operating motion picture theatres in five southern states, four individual officers of these companies and the eight major distributors of films, charging them with conspiracy to restrict interstate commerce in motion picture films and to monopolize the exhibition of films in violation of Sections 1 and 2 of the Sherman Act. The District Court rendered no opinion but filed findings of fact and conclusions of law. Final judgment was entered in accordance with these findings on May 17, 1943, prohibiting seven of the nine exhibitors, three of the four individual defendants and one major distributor from engaging in certain practices which the Court found to be illegal.

5. The members of The Society of Independent Motion Picture Producers are:

Cagney Productions, Inc.
Charles Chaplin
Edward Small Productions
Edward A. Golden
Samuel Goldwyn
Sol Lesser
Mary Pickford
Hunt Stromberg
Vanguard Films, Inc. (David O. Selznick)
Walt Disney Productions
Walter F. Wanger
Orson Welles

6. The emphasis of the Government at the trial was on the effect of the defendants' practices on independent exhibitor competition. But The Society of Independent Motion Picture Producers believes that the defendants' practices are equally fraught with peril to independent producers such as those who comprise the membership of the Society. Furthermore, the Society believes that the defendants' activities represent a grave menace to the motion picture industry as a whole, and that they impinge upon rights of the movie-going public which are protected by the First Amendment. These three impacts of the defendants' activities—upon the independent producers, upon the industry as a whole, and upon the movie-going public—are fully discussed in the attached *amicus* brief. Although they are implicit in the Record, neither the Government nor the defendants have touched upon them more than incidentally. Accordingly, we believe that the attached brief will be of assistance to the Court to the extent that it illuminates aspects of the litigation which are not developed in the briefs of the parties.

We, therefore, respectfully urge that the Court grant leave to file the attached brief on behalf of The Society of Independent Motion Picture Producers as *amicus curiae*; such brief to be filed not later than the 18th day of October, 1944.

MORRIS L. ERNST,
Attorney for The Society of Independent Motion Picture Producers, Amicus Curiae,
Office & P. O. Address
285 Madison Avenue,
Borough of Manhattan,
New York 17, New York.

Of Counsel:
HAROLD H. STERN,
HARRIET F. PILPEL.

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Nos. 17, 18 and 19

IN THE

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October Term, 1944

THE UNITED STATES OF AMERICA,

Appellant,

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., *et al,*

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., *et al.,*

Appellants,

v.

THE UNITED STATES OF AMERICA.

Petition for Reconsideration of Motion for Leave to File Brief on Behalf of The Society of Independent Motion Picture Producers as *Amicus Curiae*

MORRIS L. ERNST,
Attorney for The Society of Independent Motion Picture Producers, Amicus Curiae,
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285 Madison Avenue,
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New York 17, New York.

LOYD WRIGHT,
HAROLD H. STERN,
HARRIET F. PILPEL,
Of Counsel.

Nos. 17, 18 and 19

IN THE

Supreme Court of the United States

October Term, 1944

THE UNITED STATES OF AMERICA,

Appellant,

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., *et al.*,

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA.

Petition for Reconsideration of Motion for Leave to File Brief on Behalf of The Society of Independent Motion Picture Producers as *Amicus Curiae*

MAY IT PLEASE THE COURT:

The undersigned, as counsel for The Society of Independent Motion Picture Producers, respectfully petitions this Honorable Court to reconsider the petitioner's motion for leave to file a brief *amicus curiae* in these cases.

1. Pursuant to subdivision 9 of Rule 27 of the Rules of this Court, petitioner sought the consent of both parties to the filing of its brief *amicus curiae*. Consent was granted by the Government and denied by counsel for the defendants. This Court denied petitioner's motion on October 23, 1944.

2. Subsequent to the denial of petitioner's motion, petitioner received from the Solicitor General the following letter in which the Government has not only renewed its consent but has gone so far as to state that the *amicus* brief would be of interest and value to the Court:

Office of the Solicitor General
Washington, D. C.

October 27, 1944

[shield of DEPARTMENT OF JUSTICE]

Morris Ernst, Esquire
285 Madison Avenue
New York, N. Y.

Re: United States v. Crescent Amusement Company, et al., Nos. 17-19, October Term 1944

Dear Mr. Ernst:

I have your letter of yesterday in which you state that in behalf of the independent producers, whom you represent, you have decided to file papers requesting reconsideration of your motion for leave to file an amicus brief. You ask that I let you know the feeling of the Department as to whether the brief which you submitted would be in aid of the Government's position and to the Court. As you know, I consented to the filing of the brief and this consent still stands. I am glad to add that I believe the brief would be of interest and value to the Court.

Yours sincerely,

(signed) CHARLES FAHY
Solicitor General

3. We respectfully submit that the foregoing letter taken together with the policy behind subdivision 9 of Rule 27 of this Court calls for a reconsideration of petitioner's original motion for leave to file.

4. Subdivision 9 of Rule 27 dispenses with the necessity of obtaining the consent of the parties to the filing of an *amicus* brief when the brief is presented by the United States and sponsored by the Solicitor General. In promulgating this Rule, the Court has in effect delegated to the private parties to litigation the right to decide who may file *amicus* briefs, except in cases where the Government as the proponent of the public interest is acting as *amicus*. In such cases the paramount interest of the Government is recognized and it is permitted to file without first obtaining consent. It would seem to be a necessary corollary of this policy that where the Government is a party litigant and seeks to have this Court accept an *amicus* brief from an outside party, its desire should be equally conclusive. Any other rule gives extraordinary power to the private litigant to withhold consent at will, and perhaps just because of the vitality of the *amicus* position, to the admission of a brief which illuminates issues of public interest.

5. This Court has in the past exercised its discretion to permit the filing of an *amicus* brief, despite one party's refusal to consent, where, as here, the litigation impinged on First Amendment guarantees. See, *e. g.*, *Sweeney* v. *Schenectady Union Publishing Company*, 316 U. S. 642 (1942). The emphasis of the *amicus* brief is to a great extent on the relation of the First Amendment to the anti-trust laws in cases involving media of communication.

6. The Court has often made exceptions from general rules in cases involving such guarantees of individual freedom as are affected here. *Cf.* footnote 4 on p. 152 of

United States v. *Carolene Products Company*, 304 U. S. 144 (1938). If the special importance attached to free speech and press warrants deviation from established rules of substantive law, we respectfully submit that it should likewise induce relaxation of less crucial procedural rules such as that dealing with obtaining consent to the filing of *amicus* briefs.

7. We respectfully refer the Court to our original motion and to our brief for a summary of the case, a description of petitioner, and an exposition of the effect of the defendants' practices on independent producers and on the movie going public in the area affected.

We, therefore, respectfully urge that the Court reconsider the motion for leave to file the attached brief on behalf of The Society of Independent Motion Picture Producers as *amicus curiae*.

Morris L. Ernst,
Attorney for The Society of Independent Motion Picture Producers, Amicus Curiae,
Office & P. O. Address,
285 Madison Avenue,
Borough of Manhattan,
New York 17, New York.

Loyd Wright,
Harold H. Stern,
Harriet F. Pilpel,
Of Counsel.

Dated: October 30, 1944.

In The

Supreme Court of the United States

October Term, 1944

UNITED STATES OF AMERICA,
Appellant,

vs.

THE CRESCENT AMUSEMENT COMPANY, ET AL.,
Appellees.

No. 18.

THE CRESCENT AMUSEMENT COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 19.

PETITION FOR REHEARING ON BEHALF OF THE CRESCENT AMUSEMENT COMPANY, ET AL.

GEORGE H. ARMISTEAD, JR.,
WILLIAM WAIZER,
Counsel for Petitioners,
The Crescent Amusement Company, et al.
Address: American Trust Bldg.
Nashville, Tenn.

Dated January 2, 1945.

In The

Supreme Court of the United States

October Term, 1944.

UNITED STATES OF AMERICA,
Appellant,

v.

THE CRESCENT AMUSEMENT COMPANY, ET AL.,
Appellees.

No. 18.

THE CRESCENT AMUSEMENT COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 19.

PETITION FOR REHEARING.

To the Honorable, the Supreme Court of the United States:

The Crescent Amusement Company, et al., appellees in No. 18 and appellants in No. 19, hereinafter referred to as defendants, respectfully request a reconsideration or rehearing of these causes upon the grounds and for the reasons hereinafter stated.

Point 1:

In the first paragraph of Section III of the opinion, the Court states that there was no assignment of error that "the

United States failed to prove the allegations of the complaint as amplified by the bill of particulars," and hence that the Court would not consider this contention but would consider only the assignments of error specifically made as to parts of sixteen findings of fact.

Unless the Court has given a new interpretation to the Court's own rules, the Court has undoubtedly misinterpreted the contention actually made by defendants.

Rule 13, paragraph 9, 275 U. S. 606, requires an appellant to file with the Clerk "a definite statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof." The adverse party then is given time to designate portions of the record which he thinks material to the consideration of those points. Assignments of error Nos. 20-25, inclusive, were to the effect that the District Court erred with respect to specified paragraphs of the decree against defendants. Defendants' statement of points then specifically made the contention "that there was a fatal variance between the allegations and the Findings (as well as the proof) and that the decree cannot stand for that reason" (R. 1533). The Government thus had full notice of this contention, which was repeated *verbatim* in the summary of the argument contained in the brief (p. 18) and was elaborated in the argument proper.

This contention was not predicated upon lack of evidence to support the findings of fact (as the Court erroneously assumes) but rather on the theory that, assuming the findings of fact to be unimpeachable, a decree predi-

cated on these findings was nevertheless outside the scope of the complaint as amplified by the bills of particulars.

Other grounds or reasons for sustaining assignments of error Nos. 20-25, inclusive, were also given in the statement of points. The Court considered and disposed of these other reasons, and thus impliedly recognized that an assignment of error specifically pointing out the error relied upon is sufficient. It has never heretofore been held by this Court that an assignment of error is insufficient because it does not go further and point out the reasons or grounds relied upon. Such a construction of Rule 9 would render superfluous paragraph 9 of Rule 13.

The Court's opinion affirmatively states that the Court *did not consider* this question of variance. If the findings were insufficient to support the decree because at variance with the allegations of the complaint as amplified by the bills of particulars, assignments of error Nos. 20-25, inclusive, should be sustained and the Government's assignment of error overruled even though it be assumed that each finding of fact was supported by evidence. We think the defendants are entitled to a consideration by the Court of this important and material issue which was discussed in detail in the briefs.

Point 2:

In the second paragraph of Section III of the opinion the Court states that there was "ample evidence" of the use of defendants' buying power

> "for the purpose either of restricting the ability of its competitors to license films or of eliminating competi-

tion by acquiring the competitor's property or otherwise."

The example then given by the Court of such a use of buying power is that

> "the defendants would insist that a distributor give them monopoly rights in towns where they had competition or else defendants would not give the distributor any business in closed towns where they had no competition."

There is *no* finding of fact that defendants so insisted or acted. All that the Government even *contended* in this connection (Gov. brief, p. 68) was that "actual discrimination" by distributors against independents was proved by "other evidence" and

> "*warranted the inference* that discrimination was induced by defendant exhibitors for the purpose of restraining competition."
>
> (Italics ours)

We believe that this Court would not consciously and deliberately hold an inference of this character warranted in the face of the direct evidence in the record as to the actual reasons for the so-called discriminations.

Film rentals received by distributors must necessarily depend, in the final analysis, upon the box office receipts of exhibitors. Box office receipts will normally be greater in a large, well-equipped, competently managed theatre than in a small, poorly-equipped or incompetently managed theatre; and a distributor will naturally prefer to make a deal with the exhibitor who will not only agree to pay, but

can be depended upon to pay, the greater film rentals over a period of time. (See Findings 111 and 112, R. 1428-1429). The so-called discriminations by the distributors were induced by these business reasons and the inference relied upon by the Government is not valid.

Moreover, the quoted language from the opinion must be considered in connection with the next succeeding sentence reading as follows:

> "The competitor, not being able to renew his contract for films, would frequently go out of business or come to terms and sell out to the combination with an agreement not to compete for a term of years."

Assuming that the Court had in mind in this sentence an actual causal connection rather than a mere *post hoc ergo propter hoc* connection, there was *no* finding of fact and no evidence that any such thing ever happened. The Government in its brief was unable to point to any situation where an independent actually sold his theatre because of his failure to renew a contract for films.

Unless suspicion and accusation are the equivalent of evidence, the second paragraph in Section III of the opinion cannot be sustained under the facts of this case. We make no point on the Court's legal conclusions. We respectfully submit, however, that elementary fairness to the defendants requires a reconsideration as to the facts. In this connection we emphasize that we are content to rely upon the findings of the District Court after elimination of the portions thereof predicated upon the documen-

tary evidence taken from the distributors' files and the portions as to which specific error was assigned.

Point 3:

In the fourth paragraph of Section III of the opinion mention is made of defendants' contention "that the independents were eliminated by the normal processes of competition." There is nothing in the findings of the District Court to compel a contrary inference, especially after the elimination of such portions of these findings as are based on incompetent evidence and the portions as to which specific error was assigned. Although this was a crucial contention of defendant, we find nothing in the Court's opinion which answers it. Indeed the Court seems to assume the factual validity of the contention, but holds the fact immaterial on the ground that

> "action by a combination of exhibitors to obtain an *agreement* with a distributor whereby commerce with a competing exhibitor is suppressed or restrained is . . . prohibited by the Sherman Act."
>
> (Italics ours)

We think this statement may have been induced by a similar statement in the Government's brief (p. 56). We take no exception to it as an abstract statement of law. What actually happened, however, was that defendants made normal contracts with distributors for pictures for normal exhibition in their own theatres. That competing exhibitors could not license the same pictures, or could not license them for exhibition on the same run, was an effect which could not be avoided. The distinction between such

a situation and the situation involved in *Interstate Circuit v. United States*, 306 U. S. 208, has heretofore been analyzed by defendants. (Reply brief, pp. 28-29). There was absolutely *no* evidence that defendants ever obtained or attempted to obtain from any distributor any agreement, express or implied, that it should not furnish pictures to a competing exhibitor or should impose restrictions on any other exhibitor.*

*The only exception was with respect to clearance over neighboring towns and there was no issue as to the reasonableness of such clearance. Contrary to the statement to that effect in the Court's opinion (third paragraph of Section III), defendants never obtained clearance over competing theatres in the same town.

CONCLUSION.

Defendants understand that the function of this Court is mainly that of passing upon legal questions and evolving legal philosophy as distinguished from factual analysis. In this type of case, however, there is no intermediate Court. We feel that the *facts* in this case have not been sufficiently analyzed and that false premises have been inadvertently assumed as the premise for the Court's opinion.

Defendants respectfully pray for a reconsideration or rehearing as to assignments of error Nos. 20-25, inclusive, as well as the Government's assignment of error, upon the grounds and for the reasons stated.

Respectfully submitted,

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Address: American Trust Bldg.,
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I certify that the foregoing petition is presented in good faith and not for delay.

This January 2, 1945.

WILLIAM WALLER

SUPREME COURT OF THE UNITED STATES.

Nos. 17, 18 and 19.—October Term, 1944.

The United States of America, Appellant, 17 *vs.* Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., et al.	
The United States of America, Appellant, 18 *vs.* Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., et al.	Appeals from the District Court of the United States for the Middle District of Tennessee.
Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., et al., Appellants, 19 *vs.* The United States of America.	

[December 11, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

The United States brought this civil suit against nine affiliated companies (whom we will call the exhibitors) operating motion picture theaters in some 70 small towns in Alabama, Arkansas, Kentucky, Mississippi, and Tennessee; against certain officers of these companies; and against eight major distributors of motion picture films, charging them with a conspiracy unreasonably to restrain interstate trade and commerce in motion-picture films and to monopolize the exhibition of films in this area in violation of § 1 and § 2 of the Sherman Act. 26 Stat. 209, 15 U. S. C. §§ 1, 2. The suit was dismissed against five of the distributors on motion of the United States.[1] Of the other three the Court found that only one had violated the Sherman Act. The court

[1] This was done after a consent decree had been entered against five of the major distributors in United States v. Paramount Pictures, Inc. This dismissal did not eliminate the charge that these distributors had conspired with the defendant exhibitors to restrain and monopolize trade. And some of the distributors, though dismissed from the case, were found to be co-conspirators with the exhibitors in making franchise agreements and in licensing films for the purpose of maintaining the exhibitors' theatre monopolies and of preventing the independents from competing.

also found that seven of the exhibitors and three of the individual defendants had violated the Sherman Act substantially as charged. It entered a decree against them. From the judgment entered the United States, six of the exhibitors, and three individual defendants appeal directly to this Court under § 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29 and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

I. Before we come to the merits there is a preliminary question as to whether the appeal of the United States in No. 17 is premature. The District Court entered a final judgment in this case on May 17, 1943. On the sixtieth day after judgment there were motions pending to amend the findings. On that day the appeal was applied for and allowed. On August 30, 1943, the court ruled on the motions to amend its findings. Within sixty days thereafter the United States applied for the appeal in No. 18 and it was allowed. The appeal in No. 17 was filed here at the same time as that in No. 18. The appellees move to dismiss No. 17 on the ground that it was premature and to dismiss No. 18 on the ground that the District Court by allowing the first appeal lost jurisdiction of the cause and was without power to allow a further appeal. We think the motion to dismiss the appeal in No. 17 must be granted and the motion to dismiss the appeal in No. 18 denied.

The motion to amend the findings tolled the time to appeal if it was not addressed to "mere matters of form but raised questions of substance" e. g., if it sought a "reconsideration of certain basic findings of fact and the alteration of the conclusions of the court." *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205. An examination of the motion makes plain that matters of substance were raised. The appeal in No. 17 was accordingly premature. *Zimmern* v. *United States*, 298 U. S. 167. But it does not follow that the District Court had no jurisdiction to allow the appeal in No. 18. An appeal can hardly be premature (and therefore a nullity) here and yet not premature (and therefore binding) below. Under these circumstances an appellant may rely upon the later appeal (*Ohio Public Service Co.* v. *Fritz*, 274 U. S. 12) and not run the risk of losing an appellate review on the appeal first allowed. Cf. *Wilentz* v. *Sovereign Camp*, 306 U. S. 573.

II. We turn to the merits. Crescent, the principal exhibitor,[2] owns 50% of the stock of Cumberland and Lyric. The majority of Crescent's stock is owned by defendant Sudekum, by certain of his relatives; and by defendants Stengel and Baulch. Prior to 1937 Crescent owned almost two-thirds of the stock of Muscle Shoals; since that time Muscle Shoals was run as a partnership in which Sudekum's wife had a half-interest. Defendant Stengel, Sudekum's son-in-law, is the record holder of all of Rockwood's stock. Rockwood owns 50% of the stock of Cherokee and Kentucky and of five other theatre corporations. Rockwood was operated as a "virtual branch" of the Crescent business under the immediate supervision of Stengel. Sudekum is president of Crescent, Cumberland, and Lyric; Stengel is an officer and director of Kentucky and Cherokee. Sudekum was paid $200 a week by Cherokee "for his advice and assistance in running the business." Each of these companies was an exhibitor operating motion picture theatres.

In the five year period ended in August 1939, when this bill was filed, the exhibitors experienced a rather rapid growth—in the number of towns where their theatres were operated; in the number of towns where they operated without competition; in their earnings and surplus. The United States claims that that growth was the product of restraints of trade in violation of § 1 of the Sherman Act and of monopolistic practices in violation of § 2.

The District Court found that each of the seven exhibitors had violated the Sherman Act by

"A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

"B. Combining its closed towns with its competitive situations in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

"C. Coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices."

The court found that these violations were effected (a) by combining with each other and with certain major distributors in

[2] Crescent is used for Crescent Amusement Co.; Cumberland for Cumberland Amusement Co.; Lyric for Lyric Amusement Co., Inc.; Cherokee for Cherokee Amusements, Inc.; Kentucky for Kentucky Amusement Co., Inc.; Muscle Shoals for Muscle Shoals Theatres; and Rockwood for Rockwood Amusement Co.

making franchises, i.e. term contracts for the licensing of films, with the purpose and effect of maintaining their theatre monopolies and preventing independents from competing with them; (b) by combining with each other for the purpose of dividing the territory in which theatres might be operated by any of them; (c) by combining with each other for the purpose and with the effect of eliminating, suppressing, and preventing independents from competing in the territory in which each operated; and (d) by combining with each other and with certain major distributors in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independents from competing with them. Three of the individual defendants were found to have participated actively in these violations.

Interstate commerce was found to have been employed in consummating the conspiracy. In the selling season each year the distributor's salesmen solicit contracts from the exhibitors for the distributor's approval by the home office. As the films are released for exhibition prints are sent to the numerous exchanges located in various states and delivered by them to the exhibitors in their respective areas.[3] The exhibitor ordinarily returns the print to the distributor's exchange from which it is supplied to other theatres. The findings are wholly adequate to establish that the business of the exhibitors involves a regular interchange of films in interstate commerce. As we shall see, that course of business may be sufficient to make the Sherman Act applicable to the business of exhibiting motion pictures. *Interstate Circuit* v. *United States*, 306 U. S. 208. Cf. *Binderup* v. *Pathe Exchange*, 263 U. S. 291. The crucial issues in the present case relate to the evidence and the appropriateness of the decree.

III. The defendants assert that the United States failed to prove the allegations of the complaint as amplified by the bill of particulars. But no such error was assigned. The only assignments on this phase of the case relate to subsidiary findings which are parts of sixteen of the one hundred and eighty-seven findings of fact contained in one hundred and twenty printed pages. Hence they are the only ones we will consider. *Seaboard Air Line Ry. Co.* v. *Watson*, 287 U. S. 86, 91; *E. R. Squibb & Sons* v. *Mallinckrodt Chemical Works*, 293 U. S. 190; Rule 9, 275 U. S. 600. We have examined them and conclude that they do not constitute

[3] The defendant exhibitors during the five year period preceding the filing of this suit paid about 90% of their total film rental to the eight major distributors.

reversible error. If any modifications were made in these subsidiary findings they would not be basic or essential ones.

The crux of the government's case was the use of the buying power of the combination for the purpose of eliminating competition with the exhibitors and acquiring a monopoly in the areas in question. There was ample evidence that the combination used its buying power for the purpose either of restricting the ability of its competitors to license films or of eliminating competition by acquiring the competitor's property or otherwise. For example, the defendants would insist that a distributor give them monopoly rights in towns where they had competition or else defendants would not give the distributor any business in the closed towns where they had no competition. The competitor not being able to renew his contract for films would frequently go out of business or come to terms and sell out to the combination with an agreement not to compete for a term of years. The mere threat would at times be sufficient and cause the competitor to sell out to the combination "because his mule was scared." In that way some of the affiliates were born. In summarizing various deals of this character the District Court said, "Each of these agreements not to compete with Crescent or its affiliates in other towns extended far beyond the protection of the business being sold, and demonstrated a clear intention to monopolize theatre operation wherever they or their affiliates secured a foothold."[4]

[4] The expansion of the combination during this period was summarized by the District Court as follows:

"On August 11, 1934, the defendant exhibitors and their affiliates operated in thirty-two towns in Tennessee, (excluding Nashville) Kentucky, and Alabama, in six of which they had competition. On August 11, 1939, the defendant exhibitors and their affiliates, with the exception of Strand, heretofore dismissed as a defendant, operated in seventy-eight towns in Tennessee (excluding Nashville) Kentucky, Alabama, and North Carolina, in five of which they had competition, and the only towns in which they have competition today outside of Nashville, are Gadsden, Alabama, Harriman, Gallatin and McMinville, Tennessee, and Franklin, Kentucky. In two of these towns—Gadsden, Alabama, and Harriman, Tennessee, the independent theatres have opened since the filing of this suit and two more—Franklin, Kentucky and Gallatin, Tennessee—are towns which Crescent entered less than two years before the filing of this suit.

"Of the forty-five towns in Tennessee listed in the 1940 census as having populations between 2,500 and 10,000, Crescent and its affiliates now operate theatres in all but nine. The independents operating in three of those nine towns have already been approached by Sudekum emissaries with the suggestion that they sell to one of the defendant exhibitors."

Their financial growth was found to be "out of all proportion" to their physical expansion:

"During the five-year period immediately preceding the suit, the Crescent and Rockwood companies each experienced a phenomenal growth in earnings

The same type of war-fare was waged with franchise contracts with certain major distributors covering a term of years. These gave the defendants important exclusive film-licensing agreements. Their details varied. But generally they gave the defendant exhibitors the right to first-run exhibition of all feature pictures which they chose to select in their designated towns. Clearances over the same or nearby towns were provided, i. e. a time lag was established between the showing by the defendant exhibitors and a subsequent showing by others. The opportunity of competitors to obtain feature pictures for subsequent runs was further curtailed by repeat provisions which gave the defendant exhibitors the option of showing the pictures in their theatres a second time. In reviewing one of these franchise agreements the District Court concluded, "The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to any opposition theatre."

We are now told, however, that the independents were eliminated by the normal processes of competition; that their theatres were less attractive; that their service was inferior; that they were not as efficient businessmen as the defendants. We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act.[5] But the vice of this undertaking was the combination of several exhibitors in a plan of concerted action. They had unity of purpose and unity of action. They pooled their buying power for a common end. It will not do to analogize this to a case where purchasing power is pooled so that the buyers may obtain more favorable terms. The plan here was to crush competition and to build a circuit for the exhibitors. The District Court found that some of the distributors were co-conspirators on certain phases of the program. But we can put that circumstance to one side and not stop to inquire whether the findings are adequate on that phase

and surplus which was out of all proportion to the increase in gross receipts and gross assets resulting from physical expansion of the business and improving general economic conditions. During the five-year fiscal period from June 30, 1934 to June 30, 1939, Crescent's total assets were less than doubled, but its surplus was increased thirty times. During the last fiscal year of said period its gross receipts were less than twice the amount of its gross receipts for the first fiscal year of said period, but its net profits (exclusive of dividends received) were more than five times those of the first year. During the five-year period, its net earnings (exclusive of dividends received) averaged about 35 per cent per annum, on its capitalization."

[5] A union of the exhibitor with a distributor in such a program would of course constitute a conspiracy under the Sherman Act as held in Interstate Circuit v. United States, 306 U. S. 208.

of the case. For it is immaterial whether the distributors technically were or were not members of the conspiracy. The showing of motion pictures is of course a local affair. But action by a combination of exhibitors to obtain an agreement with a distributor whereby commerce with a competing exhibitor is suppressed or restrained is a conspiracy in restraint of trade and a conspiracy to monopolize a part of the trade or commerce among the States, each of which is prohibited by the Sherman Act. And as we have said, the course of business which involves a regular exchange of films in interstate commerce is adequate to bring the exhibitors within the reach of the Sherman Act. *Interstate Circuit* v. *United States, supra.*

The exhibitors, however, claim that the findings against them on the facts must fall because of improper evidence. The evidence to which this objection is directed consists of letters or reports written by employees of certain of the major distributors to other employees or officers in the same company stating reasons why the distributor was discriminating against an independent in favor of the defendants. The United States asserts that these letters or reports were declarations of one conspirator in furtherance of the common objective and therefore admissible as evidence against all under the rule of *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249. And it is argued that it makes no difference that these distributors were dismissed out of the case (*Delaney* v. *United States*, 263 U. S. 586, 590) since they were charged with being co-conspirators and since the findings are with certain exceptions adequate to support the charge. We do not come to that question. The other evidence established the position of the distributors and their relations to the theatres involved, what the distributors in fact did, the combination of the defendants, the character and extent of their buying power, and how it was in fact used. This other evidence was sufficient to establish the restraints of trade and monopolistic practices; the purpose, character, and extent of the combination are inferable from it alone. Thus even if error be assumed in the introduction of the letters and reports, the burden of showing prejudice has not been sustained.

The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. See *United States* v. *Forness*, 125 F. 2d

928, 942-943. But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are.

IV. The major controversy here has turned on the provisions of the decree.

A. *Objections of the United States.* The United States objects to the provision of the decree that no defendant exhibitor shall acquire a financial interest in any additional theatre outside Nashville in any town where there already is a theatre "unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof." Paragraph 9 referred to enjoins the defendants "from coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices." It asks that there be substituted for that provision one which the District Court had earlier approved restraining such acquisitions "except after an affirmative showing that such acquisition will not unreasonably restrain competition."

The Court at times has rather freely modified decrees in Sherman Act cases where it approved the conclusions of the District Court as to the nature and character of the violations. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78-82. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 184-188. We recognize however that there is a wide range of discretion in the District Court to mould the decree to the exigencies of the particular case; and where the findings of violations are sustained, we will not direct a recasting of the decree except on a showing of abuse of discretion. See *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 725, 728. We think this is a case where we should act lest the public interest not be adequately protected by the decree as cast.

The generality of this provision of the decree bids fair to call for a retrial of a Sherman Act case any time a citation for contempt is issued. The crucial facts in each case would be subtle ones as is usually true where purpose and motive are at issue. This type of provision is often the only practical remedy against continuation of illegal trade practices. But we are dealing here with a situation which permits of a more select treatment. The growth of this combine has been the result of predatory practices condemned by the Sherman Act. The object of the conspiracy

was the destruction or absorption of competitors. It was successful in that endeavor. The pattern of past conduct is not easily forsaken. Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis. The acquisition of a competing theatre terminates at once its competition. Punishment for contempt does not restore the competition which has been eliminated. And where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock. Moreover if the District Court were to supervise future acquisitions in this case, it would not be undertaking an onerous and absorbing administrative burden. The burden would not seem more onerous than under the alternative provision where in substance the issue would be violation of the Sherman Act *vel non*.

These considerations impel us to conclude that the decree should be revised so as to prohibit future acquisitions of a financial interest in additional theatres outside of Nashville "except after an affirmative showing that such acquisition will not unreasonably restrain competition."

B. *Objections of the Defendants.* (1) The decree enjoins the defendant exhibitors from making franchises with certain distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them" and from entering into "any similar combinations and conspiracies having similar purposes and objects". The decree also enjoins them from combining, in licensing films, their closed towns with their competitive situations "for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate" against the independents. The decree also enjoins each defendant exhibitor "from conditioning the licensing of films in any competitive situation (outside Nashville) upon the licensing of films in any other theatre situation."

It is argued that these provisions will aggrandize the distributors at the expense of the exhibitors, that if such measures are taken they should be taken against the distributors, that they deprive the exhibitors of group purchasing power, that the franchise agreements are normal and necessary both for distributors and ex-

hibitors, and that these provisions of the decree are so vague and general as to greatly burden the conduct of these businesses.

It is not for us, however, to pick and choose between competing business and economic theories in applying this law. Congress has made that choice. It has declared that the rule of trade and commerce should be competition not combination. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397; *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465. Since Congress has made that choice, we cannot refuse to sustain a decree because by some other measure of the public good the result may not seem desirable. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221-222. The duty of the Court in these cases is "to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp.* v. *United States, supra*; p. 461. The chief weapons used by this combination in its unlawful warfare were the franchise agreements and the licensing system. The fact that those instruments could be lawfully used does not mean that the defendants may leave the court unfettered. Civil suits under the Sherman Act would indeed be idle gestures if the injunction did not run against the continuance or resumption of the unlawful practice. And it is hard to see how the decree could be made less general and more specific. If it is a burden which cannot be lightened by application to the court for exercise of the power which it has reserved over the decree, it is a burden which those who have violated the Act must carry. And the fact that there may be somewhere in the background a greater conspiracy from which flow consequences more serious than we have here is no warrant for a refusal to deal with the lesser one which is before us.

(2) Serious complaint is made of the divestiture provisions of the decree. It requires each corporate exhibitor to divest itself of the ownership of any stock or other interest in any other corporate defendant or affiliated corporation,[6] and enjoins it from acquiring any interest in those companies. Sudekum is required to resign as an officer of any corporation (except Crescent) which is affiliated with any defendant exhibitor and he is enjoined from acquiring control over any such affiliate (except Crescent) by acting as officer or otherwise. Stengel is required to resign as officer of the affiliates (except one corporation of his choice) and is enjoined from acquiring any control over the others by

[6] Defined in the decree to exclude certain companies.

acting as an officer or otherwise. A year from the date of entry of the decree is allowed for completing this divestiture.

It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive.

The Court has quite consistently recognized in this type of Sherman Act case that the government should not be confined to an injunction against further violations. Dissolution of the combination will be ordered where the creation of the combination is itself the violation. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 354-360; *Standard Oil Co.* v. *United States*, *supra*; *United States* v. *American Tobacco Co.*, *supra*, pp. 186-188; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 97; *United States* v. *Reading Co.*, 253 U. S. 26, 63; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214; *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 1018. Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy. But the relief need not, and under these facts, should not be so restricted. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. Hence we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available.

The fact that minority stockholders of the affiliated companies are not parties to the suit is no legal barrier to a separation of the companies. *United States* v. *American Tobacco Co.*, *supra*. No legal right of one stockholder is normally affected if another stockholder is required to sell his stock. And no exception to that

rule has been shown to exist here. Only business inconvenience and hardship are asserted. It is said, however, that the decree requires Rockwood and Cherokee (two defendant exhibitors) to sell their respective half-interests in two companies which were not made parties to the proceedings. The argument is that the latter companies are indispensable parties if such divestiture is required. Reliance is placed on *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199. In that case Minnesota brought an original action in this Court alleging that the acquisition by Northern Securities Co. of the majority stock of two railroad companies effected a consolidation of the railroads in violation of Minnesota law. Minnesota asked, among other things, for an injunction against Northern Securities Co. voting the stock of those companies. The Court held that the two railroad companies were indispensable parties; and since the jurisdiction of the Court would have been defeated if they were joined, leave to file the bill was denied. Denial of the right of a majority stockholder to vote his stock would deprive the corporation of a board of directors elected in accordance with state law. If such a step were taken, the corporation should be a party so that all corporate interests might be represented. *Minnesota* v. *Northern Securities Co.* goes no farther than that. Here there is no showing of any complication of that order. If such a complication appeared, the District Court could bring in the two affiliates as parties in order to effectuate the decree. *United States* v. *Southern Pacific Co.*, *supra*, p. 241. But on this record it does not appear that if Rockwood and Cherokee are required to sell their half-interests in those companies any legal right of any other stockholder would be affected. Cf. *Morgan* v. *Struthers*, 131 U. S. 246.

We have considered the other contentions and find them without merit.

The appeal in No. 17 is dismissed.

The judgment in No. 18 is reversed.

The judgment in No. 19 is affirmed.

It is so ordered.

Mr. Justice FRANKFURTER, Mr. Justice MURPHY, and Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice ROBERTS dissents.